

The Titles of This Code Are Arranged and Numbered as Follows

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| 2. Agency | 7. Building and Loan Associations |
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REVISED CODES OF MONTANA

1947

ANNOTATED

NINE VOLUMES

COMPILED, REVISED AND ANNOTATED
UNDER CHAPTER 184, LAWS OF 1945 AND CHAPTER 266, LAWS OF 1947
AND PUBLISHED UNDER CHAPTER 43, LAWS OF 1947

I. W. Choate
Wesley W. Wertz
CODE COMMISSIONERS

REPLACEMENT

VOLUME 3

Forests and Forestry to Negotiable Instruments

Containing the Permanent Laws of the State in
Force at the Close of the Thirty-third
Legislative Assembly of 1953

Publishers
THE ALLEN SMITH COMPANY
Indianapolis, Indiana



REVISED CODES OF MONTANA

1937

ANNOTATED

NINE VOLUMES

Copyright, 1954
The Allen Smith Company

Indianapolis

J. W. Calkins

Wesley W. Wells

Wesley W. Wells

REPLACEMENT

VOLUME 2

Forest and Forests in Montana

Containing the Foremost Laws of the State in
Force at the Close of the Year 1937
Legislative Assembly of 1938

THE ALLEN SMITH COMPANY
Indianapolis, Indiana

PREFACE

AN EXPLANATORY STATEMENT

In order to prolong the life of REVISED CODES OF MONTANA, 1947, and to provide for the substantial and constant increase in new legislation, a program to replace volumes that have become too cumbersome was inaugurated with the approval of the Montana Bar Association. By eliminating obsolete material and inserting the new laws and decisions as found in the current pocket supplements of the volumes to be reissued, the 1947 Codes may be continued and used to full advantage for years to come.

The primary purpose in reissuing volume three was to bring the material therein to date in all respects, remove laws that have become obsolete through actions of the Montana legislatures since 1947, insert new laws and amendments adopted since 1947 and add the decisions of the Montana and United States courts handed down since publication of the 1947 Codes.

In short the material as contained in the 1953 pocket supplement to volume three has been inserted in the proper places and obsolete laws have been deleted. Notes indicating repeals have been inserted for ready reference.

The General Index in volume nine and in the pocket supplement for that volume may be used as readily for locating statutes in this replacement volume as in the original volume.

The numbering, arrangement, legislative history references, abbreviations and other fine features of the original volume have been retained in this replacement and no changes in the general style have been made. For further explanation of numbering and arrangement, we recommend a thorough reading of the preface in volume one of the 1947 Codes.

This volume is a compilation of existing legislation in Title 28, Forests and Forestry to and including Title 55, Negotiable Instruments, through the thirty-third legislative assembly of 1953 and excluding local and special laws, appropriation acts, resolutions, titles and enacting and repealing clauses.

The annotations to the decisions of the Supreme Court of Montana and to the Supreme Court of the United States and other Federal courts have been brought up to and including volume 126 Montana Reports and subsequent Montana decisions to and including volume 270 Pacific 2d, volume 345 United States Reports, volume 97 Lawyers' Edition, volume 73 Supreme Court Reporter, volume 208 Federal Reporter 2d, volume 116 Federal Supplement, volume 14 Federal Rules Decisions and 34 American Law Reports 2d.

This volume may be cited as Repl. Vol. 3, Revised Codes of Montana, 1947. When referring to sections, we recommend citing "Sec. —, Repl. Vol. 3, Revised Codes of Montana, 1947."

Keen appreciation is extended to Wesley W. Wertz, code commissioner of the 1947 Codes, for his splendid editing and assistance in the preparation of this Replacement.

The Publishers

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28-101. State board of forestry created—membership. For the purposes of protection and conservation of forest resources, forest range and water, of regulation of stream flow, and of prevention of soil erosion, and

for the further purpose of more adequately promoting and facilitating the cooperation, financial and otherwise, between the state of Montana and all of the public and private agencies with which it is now or later may be associated in such work, there is hereby created the Montana state board of forestry, hereinafter designated as the board. The board shall consist of the governor of the state of Montana, who shall be ex officio chairman of the board, and seven additional members who shall be appointed by the governor as follows:

(1) One member of the state water conservation board of Montana, upon the recommendation of this board.

(2) One elector of the state of Montana upon the joint recommendation of the Blackfoot forest protective association and the northern Montana forestry association or their successors.

(3) One elector of the state of Montana upon the joint recommendation of the Montana stock growers' association and the Montana wool-growers' association or their successors.

(4) One elector of the state of Montana who shall be a representative farm woodland owner, owning not less than forty (40) acres and not more than four hundred (400) acres of forest land classified as such by the board. This member shall be appointed by the governor from individual recommendations to be submitted by the three farmers' organizations—the Montana state grange, the Montana farm bureau federation and the Montana farmers' union or their successors.

(5) One elector of the state of Montana upon the recommendation of the Montana lumber manufacturers' association or its successors.

(6) One elector of the state of Montana who shall be a member of the faculty of the Montana school of forestry upon the recommendation of the president of the Montana state university.

(7) One elector of the state of Montana on the recommendation of the regional forester, region one, U. S. forest service.

The members appointed shall serve for a term of four (4) years, or during their continuance in office, as the case may be. In the event of death, resignation or disqualification of any member of the board, his successor shall be appointed in the same manner that he was appointed, and shall serve for the remainder of his term. The board shall hold two (2) regular meetings each year at the times and places designated by it. The dates of such regular meetings shall be shown in the permanent minute book of the board and notice of the date, time and place of each meeting shall be given in the manner prescribed by the board. The governor as ex officio chairman shall designate a member of the board to serve as acting-chairman of the board for such meetings as he personally is unable to attend. The state forester of Montana shall serve as secretary of the said board without compensation for such services or for any work done for the board, other than his regular compensation as state forester of Montana. No compensation shall be paid to any member of the said board by the state of Montana for any services rendered or work done, except that members of the board attending authorized regular or special meetings for transacting official business will be allowed actual expenses

in attendance at such meetings. Special meetings may be called in the manner prescribed by the board.

History: En. Sec. 1, Ch. 128, L. 1939;
amd. Sec. 1, Ch. 141, L. 1941.

71 C.J. Woods and Forests § 40.
See generally, 22 Am. Jur. 593, Fires.

Cross-Reference

State forests, secs. 81-1401 to 81-1416.

Constitutionality of reforestation or forest conservation legislation. 13 ALR 2d 1095.

Collateral References

Woods and Forests 7.

28-102. Functions of board. It shall be the function of the board to cooperate in an advisory capacity with the state water conservation board and all public and other agencies in the development, protection and conservation of the forest, range and water resources in the state of Montana, and to carry out the specific authorities and duties hereinafter imposed upon it.

History: En. Sec. 2, Ch. 128, L. 1939.

28-103. Definitions. The follow words and phrases used in this act are hereby defined:

Organized forest protection district is defined as a definite forest land area, the boundaries of which are fixed, and wherein, through the medium of an agency recognized by the board, the forest land owners, whether state, county, municipal or private, pay the actual cost of fire protection and fire suppression on a pro rata basis for acreage owned within the district.

Fire district is defined as a subdivision of an organized forest protection district, or a forest area outside the boundaries of an organized forest protection district, but adjacent thereto and which can be made a part thereof.

Recognized agency is defined as an association of owners of forest lands in an organized forest protection district, organized for the purpose of providing forest protection and fire suppression in such district and financed by the owners in said district, and recognized by the board as giving adequate fire protection to such forest lands in accordance with rules and regulations prescribed by the board. Any public agency administering and protecting forest lands may also be recognized by the board as such an agency.

Forest fire season is defined as the period of each year beginning on May first and ending on September thirtieth, inclusive; provided, however, that in the event of excessive or great fire danger, the board may expand the said season within any district, or in any part thereof, for not more than thirty extra days, and when so expanded the board shall give such public notice thereof as it may deem necessary.

Forest protection is defined as the work of prevention, detection and suppression of fire in forest material or on forest land.

Owner is defined as the person, firm, association or corporation having the actual, beneficial ownership of forest land, or timber, other than an easement, right of way, or mineral reservation.

History: En. Sec. 3, Ch. 128, L. 1939.

28-104. Responsibility of actual owner of land or timber—scope of act.

(a) In any instance where the owner as herein defined does not appear upon the public records as the holder of the legal title to such land or timber, he is nevertheless primarily responsible for the performance of the acts and duties imposed upon him by this act. In addition thereto, the holder of the legal title to such land or timber as it may appear upon the public records is hereby made secondarily responsible for the performance of the acts and duties imposed upon the owner by this act and is subject to the same liabilities and penalties as such owner. Where the owner of the timber is not the owner of the land, the primary responsibility for the performance of the acts and duties imposed by this act shall be upon the owner of the timber.

(b) Sections 28-108 to 28-113 shall only apply to forest lands within the state of Montana growing commercial or merchantable timber or having a young growth of timber which, in the ordinary course of time, would or will become commercial and merchantable timber, and then only when officially so classified by the board as being such forest lands for which conservation and fire protection measures are reasonably required, but all of the other sections and parts of this act (sections 28-101 to 28-129) shall apply to all forest lands within the state of Montana which shall be officially classified by the board as forest lands for which conservation and fire protection measures are reasonably required; provided, that nothing herein contained shall be deemed to prevent or discourage any owner of forest land, classified as such by the board, from paying fire control cost to organized forest protection agencies recognized as such by the board.

History: En. Sec. 4, Ch. 128, L. 1939;
amd. Sec. 3, Ch. 141, L. 1941.

Collateral References
Woods and Forests 5.
71 C.J. Woods and Forests § 9.

28-105. Powers of board. To effectuate, accomplish and maintain the purposes of this act, the board is hereby authorized and empowered:

(a) To classify the forest land areas of the state as to forest lands for which conservation and fire protection measures are reasonably required, and to change or modify such classification from time to time as in its judgment shall be proper.

(b) To create fire districts in any organized forest protection district upon recommendation thereof by the recognized agency in such district, the creation of such fire districts to be based upon differences in classification as to timber types, fire hazards, and cost of forest protection between such fire districts and other parts of the forest protection district in which the same are situated. When such fire districts are created by the board the assessment upon owners therein for the cost of forest protection as provided for by this act shall be fixed and determined in accordance with such classification.

(c) To provide for the protection of any forest lands by its own organization, or by contract or any other feasible means, independently or in cooperation with any federal, state or other recognized agency or agencies.

(d) To make and enforce reasonable rules and regulations for the purpose of enforcing and accomplishing the provisions and purposes of this

act; provided, however, that such rules and regulations shall not conflict with the powers of the state board of land commissioners.

(e) To cooperate with the government of the United States and any of its bureaus, services and agencies in accordance with federal statutes and regulations thereunder.

History: En. Sec. 5, Ch. 128, L. 1939.

28-106. Board to give technical advice. The board is hereby authorized and empowered to give technical and practical advice to the farmers of the state concerning soil and forest conservation and the establishment and maintenance of woodlots, windbreaks and shelters.

History: En. Sec. 6, Ch. 128, L. 1939.

28-107. Board to assist land commissioners. The board is hereby directed to assist the state board of land commissioners in the protection, economic development, and use of the state forests and forest land held by the state for the purposes and benefit of the common schools and state institutions.

History: En. Sec. 7, Ch. 128, L. 1939.

28-108. State considered "owner" when. Where the state has title to forest lands within any organized forest protection district, it shall be considered as an owner and it shall list its lands and pay the assessments to the recognized agencies responsible for lands in such organized forest protection districts.

History: En. Sec. 8, Ch. 128, L. 1939.

28-109. Duty of owner of classified forest land. Every owner of forest land classified as such by the board is hereby required to furnish protection against the starting or existence, and to suppress the spread, of fire on such land during the full period of each forest fire season defined by this act. Such protection and suppression shall be in conformity with reasonable rules and standards for adequate fire protection to be prescribed by the board. If such owner does not provide for such protection and suppression, said board may provide the same, at a cost of not less than one cent (1c) or more than five cents (5c) per acre per annum, and in the event thereof, the owner of such land shall pay to the county treasurer of the county in which such land is situated, the charge for the same approved by the board, in accordance with the provisions of this act; provided, that for the purposes of this section, any legal subdivision of not more than one hundred sixty (160) acres of forest land classified as such by the board, to be designated by the owner, shall be deemed by the board to be protected by the owner if more than one-half thereof is within the radius of one mile of a permanent habitation occupied throughout the fire season either by the owner or by someone under the owner's direction, and provided further that the starting, existence and spread of fire on said designated legal subdivision, without immediate and reasonable measures for suppression being taken by said owner or under his direction, shall be prima facie evidence that protection is not being furnished by said owner, and the

board shall thereupon provide protection and suppression in accordance with the provisions of this section.

History: En. Sec. 9, Ch. 128, L. 1939;
amd. Sec. 2, Ch. 141, L. 1941.

28-110. What constitutes compliance. Every owner of forest lands within an organized forest protection district, while a member of, or while participating in a recognized agency for forest protection shall be deemed to have fully complied with the requirements of section 28-109.

History: En. Sec. 10, Ch. 128, L. 1939.

28-111. Determination of cost of fire protection—certification—tax levy. On or before the first Tuesday in September of each year, the secretary shall determine the actual cost per acre of forest protection furnished and provided by the board in each organized forest protection district, fire district and in all other forest land areas, said cost to be calculated to the end of the preceding fiscal year, June 30. The secretary shall further determine the names of all owners who shall have failed to provide the forest protection for their lands required by this act, together with the description of such lands and the acreage thereof, and calculate the total amount due to the board from each such owner for such forest protection which shall not exceed the maximum hereinbefore specified.

The secretary shall submit a statement of the foregoing to the board and upon approval thereof by the board, the secretary shall certify in writing to the county clerk and recorder of each county, the names of such owners of forest lands in his county, together with a description of such lands and a statement of the amount so found to be due and owing by each of such owners to the board for forest protection which shall not exceed the maximum hereinbefore specified.

Upon receiving such certificate from the secretary showing the amounts due, the clerk and recorder shall extend the amounts so certified upon the county tax rolls covering such lands, and such sums shall become obligations of the owner to be paid and collected in the same manner and at the same time and with like penalties as general state and county taxes upon the same property are collected. All sums so collected shall be promptly transmitted to the state treasurer, who is hereby required to deposit the same in a special fund designated the foresters' cooperative work fund, as hereinafter provided for.

History: En. Sec. 11, Ch. 128, L. 1939.

28-112. Payment under protest. Any owner who is required to pay to the county treasurer any sum for forest protection as required by this act and who contends that he is not legally obligated to pay such sum or some part thereof, shall pay the same to the county treasurer under written protest stating the reasons for such protest. Such payment under protest, and all proceedings subsequent thereto, shall be in conformity with the provisions of the law of the state of Montana, providing for the payment of taxes under protest and action to recover the same. In the hearing and determination of any such action to recover such payment under protest, all questions of the legality and reasonableness of the proceedings of the board may be reviewed and decided.

History: En. Sec. 12, Ch. 128, L. 1939.

28-113. Amount due for protection—lien on land—remedies. Whenever the said board provides forest protection during a forest fire season for any forest land or timber not protected by the owner thereof as required by this act, the amount due for such forest protection shall be and become a lien upon such land or timber which shall continue until such time as the amount due shall have been paid. Such lien shall have the same force, effect and priority as general tax liens under the laws of the state of Montana, and shall be subject and inferior only to tax liens on such lands. The county attorney of the county in which such land is situated shall on request of the said board foreclose the said lien in the name of the state of Montana and in the manner provided by law, or said county attorney upon the request of the said board, shall institute an action against the forest landowner, in the name of the state, in any district or justice court having jurisdiction, to recover the debt, and the state in such action shall not be required to pay any fees or costs to the clerk of the court or justice of the peace. The complaint and all subsequent proceedings in such action shall conform as nearly as practicable to that provided by section 84-4302. The remedies provided by this section shall be deemed cumulative and shall not affect the other provisions of this act for the payment and collection of amounts due to the board.

History: En. Sec. 13, Ch. 128, L. 1939.

28-114. Permit for burning required. During the forest fire season or any expansion thereof, defined by this act, no person shall ignite or set any forest fire, or slash burning fire, or land clearing fire, or debris burning fire, or any open fire, within any forest lands, without having obtained an official written permit to ignite or set such fire from a fire warden or peace officer authorized by the board to issue such permits for such lands; provided, that no permit shall be required to build, set or ignite a campfire within and upon a designated improved camping ground, or upon a plot of land from which all vegetable and inflammable matter and debris shall have been removed to a point where it may not become ignited by the said campfire or by sparks therefrom.

History: En. Sec. 14, Ch. 128, L. 1939.

28-115. Failure to extinguish campfire—penalty. Any person who shall fail to extinguish any campfire set or ignited by him within any forest lands before leaving the same, or shall fail to extinguish any campfire used by him or left in his charge, before leaving the same, or who shall negligently allow such fire to spread from the plot described in section 28-114, shall be guilty of a misdemeanor.

History: En. Sec. 15, Ch. 128, L. 1939.

28-116. Penalty for failure to comply with permit. Every person to whom a written permit shall have been issued to set or ignite a fire within forest lands during the forest protection season defined by this act, shall comply strictly with the provisions of such permit. If such person shall fail to comply with such provisions, or shall leave such fire unattended, or shall leave such fire before it shall have been totally extinguished, or shall negligently allow such fire to spread from or beyond the burning area defined by the said permit, he shall be guilty of a misdemeanor. The board,

with the assistance of the state forester, shall prescribe the form and substance of such permit.

History: En. Sec. 16, Ch. 128, L. 1939.

28-117. Throwing lighted cigarettes, etc.—penalty. During the forest fire season, as defined by this act, any person who shall throw or place any lighted cigarette, cigar, ashes or other flaming or glowing substance or any substance or thing that may cause a fire, in any place where such lighted cigarette, cigar, match, ashes, or other flaming or glowing substance, or other substance or things, may directly or indirectly start a fire in or near any forest material, or throw from a vehicle any lighted cigarette, cigar, ashes or other flaming or glowing substance, or any substance or thing that may cause a fire, shall be guilty of a misdemeanor.

History: En. Sec. 17, Ch. 128, L. 1939.

28-118. Spark arresters to be provided for engines, etc. During the forest fire season, as defined by this act, no person shall use, drive or operate within any forest lands, any wood or coal burning locomotive, logging engine, portable engine, traction engine, or stationary engine, or any coal or wood burning jammer or loader, or internal combustion engine, which is not equipped with a modern, efficient and adequate spark arrester and with modern, efficient devices to prevent the escape of sparks, coals, cinders and other burning material from the smoke stack, fire box, ash pan or exhaust of any such engine, jammer or loader. And it shall be unlawful for any person to operate any such engine, jammer or loader, within any forest lands during any forest protection season, except when such spark arrester and other devices herein defined are efficient, complete and properly installed for the purpose intended.

History: En. Sec. 18, Ch. 128, L. 1939.

28-119. Sawdust piles—restrictions. No sawmill located within or contiguous to forest lands shall accumulate in one pile, sawdust in excess of an amount resulting from the sawing of 500,000 feet log scale of saw logs, provided, however, that a larger sawdust pile may be accumulated when there is no reasonable danger of fire therefrom and a permit for the additional accumulation is granted by the state forester. Each sawdust pile so accumulated shall be prepared for burning by cribbing the base of each pile with slabs in accordance with regulations issued by the board of forestry.

History: En. Sec. 19, Ch. 128, L. 1939.

28-120. Destruction of signs—penalty. Any person who shall destroy, deface, remove, injure, or disfigure any sign, placard, proclamation, order, warning or notice issued by any federal, state, or forest protection agency under the provisions of this act and erected or posted at any point in the state, shall be guilty of a misdemeanor.

History: En. Sec. 20, Ch. 128, L. 1939.

28-121. Disposition of fines collected. All fines collected in any court of the state under the provisions of this act shall be transferred to the state treasurer for deposit, in, and for the credit of, the foresters' cooperative work fund as hereinafter provided. Whenever a person is convicted in

any court of a violation of this act, the court shall have power to levy and collect as costs in such case the amount necessary to compensate the county for the expenditures made in and for the prosecution of such offender against the provisions of this act. Such costs when collected shall be deposited by the court, with the proper county treasurer for the benefit of such county.

History: En. Sec. 21, Ch. 128, L. 1939.

28-122. Land commissioners and county commissioners to cooperate.

The state board of land commissioners and boards of county commissioners may cooperate with the board to the extent legally permissible, in providing means and methods of safeguarding the forest land lying within the state and in preventing fire nuisance thereon. The state board of land commissioners and the boards of county commissioners may list any forest lands under their jurisdiction with any recognized agency or the board for forest protection. Such moneys as the state and counties shall become liable for under the provisions of this section shall be paid from any funds provided by law for the protection of the forest lands owned by the state and counties.

History: En. Sec. 22, Ch. 128, L. 1939.

28-123. Disposal of moneys—foresters' cooperative work fund. In compliance with section 81-1410, all moneys received from all public agencies, private agencies and individuals cooperating with the state forester or the board of forestry, shall be deposited with the state treasurer and placed to the credit of the foresters' cooperative work fund. The following funds may be expended as directed by the board for fire prevention, detection and suppression: All moneys collected by county treasurers as assessments on forest lands for forest protection; moneys collected for the abatement of public nuisances; all fines collected for the violations of this act; the state's share of the cooperative fire protection funds allocated by the federal government and any other funds provided for the purposes herein indicated. All other cooperative funds collected, appropriated or allocated for the use of the state forester, including funds for the removal of slash hazards resulting from logging or other wood operations on state and private forest lands, those provided for the purpose of helping to maintain the maximum productivity of the forests of the state, those provided for purposes designed to assist the farmers of the state in the establishment of windbreaks and woodlots in localities where such forest plantings are helpful, and funds for other cooperative work, shall not be expended except for the specific purposes for which the same were collected, appropriated or allocated.

History: En. Sec. 23, Ch. 128, L. 1939.

28-124. Disbursement of moneys. All cooperative moneys collected, appropriated, or allocated for the use of the state forester and deposited with the state treasurer in the foresters' cooperative work fund, shall be paid out after approval and request of the said board and all vouchers or claims shall be signed on behalf of the said board by the secretary thereof. The state board of examiners is hereby authorized to approve for payment (out of any moneys available for purposes designated) all claims properly

executed and submitted in the manner provided by law to the person, firm, corporation or public or private agency entitled thereto in compliance with the provisions of this act.

History: En. Sec. 24, Ch. 128, L. 1939.

28-125. Ex officio fire wardens—powers. The officers, employees and persons hereinafter designated are hereby declared ex officio fire wardens to serve without compensation for the purpose of enforcing the penal provisions of this act: Members of the Montana state board of forestry, the state forester and all regular employees of his office, officers of organized forest protection districts, members of the Montana highway patrol, all field officers, in the United States forest service residing in Montana, game and deputy game wardens, officers of the national park service and the Indian service situated in Montana. Such ex officio fire wardens shall have all the powers vested by section 81-1413.

History: En. Sec. 25, Ch. 128, L. 1939.

28-126. Powers and duties of state forester. The state forester shall be the agent of the said board and he shall have power to enforce any and all provisions of this act and the rules and regulations of the board made thereunder. He shall be the representative of the board in organizing forest protection districts to be approved by the said board. He shall be the co-ordinating officer of the board in the co-ordination of the work and efforts of all agencies cooperating with the said board, in the protection of forest land, and in the prevention and abatement of any forest fire nuisances thereon, under the provisions of this act. He shall be the expert adviser of the board and of agencies cooperating with the board and existing under this act, in all matters relating to the creation of forest protection districts, and disposal of slash and slash hazards, the prevention and suppression of forest fires and forest fire nuisances, within forest protection districts. His office shall be the principal place of business of the board and all orders, rules, regulations, maps, documents, publications, minutes of regular and special meetings of the board, notices, forms, correspondence, petitions and all and every paper connected with any part of the official business of the board shall be filed in his office. Such records shall be open to public inspection during business hours subject to such reasonable rules as the board may prescribe in writing for the protection of such records and the convenience of the public and the employees of the state forester.

History: En. Sec. 26, Ch. 128, L. 1939.

28-127. Penalty for violation of act. Any person who violates any term or provisions of this act, or any rule or regulation promulgated by the board pursuant to this act, is hereby declared to be guilty of a misdemeanor unless otherwise provided by this act, and shall be punished by a fine of not more than five hundred dollars (\$500.00) or imprisonment in a county jail for not more than six (6) months, or both such fine and imprisonment.

History: En. Sec. 27, Ch. 128, L. 1939.

28-128. Purpose of act. It is the intent and purpose of this act not to impose or levy, or cause to be imposed or levied, any tax upon the property of any persons. This act is passed and adopted in the exercise of the police

power of the state of Montana to conserve and protect the forests and resources of the state as herein provided. All payments required by the act by owners of forest lands are hereby declared to be compensation for benefits actually received by such owners in the protection of their lands as herein provided for.

History: En. Sec. 28, Ch. 128, L. 1939.

28-129. Owners of forest lands may have hearing before board—conditions. Any owner, or the accredited representative of any owner, of forest land classified as such by the board, within any organized forest protection district, subject to the provisions of this chapter, shall upon request, be granted a hearing before the board or the executive committee thereof, on any subject pertaining to the activities of the board, or of the state forester as secretary or agent of the board, or any recognized agency as agent of the board, affecting such owner's property; provided, that no request for a hearing before the board shall have the effect of suspending the operations of the board, or any such agent of the board, undertaken pursuant to the provisions of this chapter, but, upon such hearing, the board may terminate such operations if found unreasonable; and, provided further, that any hearing pertaining to costs charged against the forest land of any owner for protection thereof, as provided in section 28-109, must be requested on or before the fifteenth day of August of each year.

History: En. Sec. 4, Ch. 141, L. 1941.

28-130. Policy for control of forest diseases. It is declared to be the public policy of the state of Montana, in order to protect and preserve forest resources from destruction by forest insect pests and tree diseases, to protect the forests and watersheds of Montana, to enhance the production of forests, to promote the stability of forest industry, to protect the recreational values of the forest, to independently and through cooperation with the federal government and private forest land owners adopt measures to control, suppress and eradicate outbreaks of forest insect pests and tree diseases.

History: En. Sec. 1, Ch. 25, L. 1953.

NOTE.—Section 2, Ch. 25, Laws 1953 read: "This act is declared to be a measure

necessary for the protection and preservation of the forest resources of the state of Montana."

28-131. Construction of words "forest land." For the purposes of this act any land shall be considered forest land which has enough forest growth, standing or down, to constitute, in the judgment of the state forester and the state board of forestry, an insect or disease infestation breeding ground of a nature to constitute a menace, injurious and dangerous to the forest resources in the district or zone of infestation.

History: En. Sec. 3, Ch. 25, L. 1953.

28-132. Forest land owner defined. "Forest land owner" is defined as the person, firm, association or corporation having the actual, beneficial ownership of forest land or timber, other than an easement, right of way or mineral reservation.

History: En. Sec. 4, Ch. 25, L. 1953.

28-133. Forest infestation—zoning—suppression or eradication. Whenever the state forester determines that there exists an infestation of forest insect pests or forest tree diseases injurious to the timber of forest growth on forest lands within the state of Montana, and that said infestation is of such a character as to be a menace to the timber or forest growth of this state, the state forester shall, with the written approval of the state board of forestry, declare the existence of a zone of infestation, and shall declare and fix the boundaries so as to definitely describe and identify the said zone of infestation.

Thereupon, the state forester or his agent shall have the power to go upon the land within said zone of infestation and cause the forest insect pest infestation or forest tree disease to be suppressed, eradicated and destroyed in the manner approved by the state board of forestry, and in order to accomplish the suppression, eradication and destruction of such infestation, the state forester may enter into cooperative agreement with the federal government and other public or private agencies, and with forest land owners using such funds as have been or may hereafter be made available for such purposes.

History: En. Sec. 5, Ch. 25, L. 1953.

28-134. Abolition of zone of infestation. Whenever the state forester determines that forest insect or disease control work within the designated zone of infestation is no longer necessary or feasible, then the state forester on advice and written consent of the state board of forestry, shall abolish the zone of infestation.

History: En. Sec. 6, Ch. 25, L. 1953.

CHAPTER 2

FOREST LANDS ADVISORY COMMISSION

(Repealed—Section 1, Chapter 79, Laws of 1953)

28-201 to 28-203. Repealed.

Repeal

These sections (Secs. 1-3, Ch. 176, L. 1943), relating to the forest lands advisory

commission, were repealed as Chapter 2 of Title 28 by Sec. 1, Ch. 79, Laws 1953.

CHAPTER 3

ESTABLISHMENT OF STATE FOREST AND CONSERVATION EXPERIMENT STATION

- Section 28-301. Montana forest and conservation experiment station established.
 28-302. Director.
 28-303. Purposes of station.
 28-304. Reports.
 28-305. Oaths of office.

28-301. Montana forest and conservation experiment station established. There is hereby established in the Montana state university, forestry school, a station to be known as the Montana forest and conserva-

tion experiment station, which shall be under the direction of the state board of education.

History: En. Sec. 1, Ch. 141, L. 1937.

Collateral References

Woods and Forests 8.

71 C.J. Woods and Forests § 23.

Constitutionality of reforestation or forest conservation legislation. 13 ALR 2d 1095.

28-302. Director. The dean of the forestry school, whoever shall hold that office from time to time, shall be the director of said Montana forest and conservation experiment station. The state board of education shall have the power and it shall be its duty to appoint or designate such assistants and employees as may be necessary, and to fix the compensation of all persons connected with said station.

History: En. Sec. 2, Ch. 141, L. 1937.

28-303. Purposes of station. It shall be the purpose of this station:

1st. To study the forest and forest land resources of the state to the end that the state and its citizens may attain the highest economic and social benefits from the forest soils within the state and the influences and products flowing therefrom.

2nd. To study the growth and the utilization of timber with special reference to their improvement and the widening of the markets available to the state.

3rd. To determine the relationship between the forest and water conservation and waterflow regulation; the forest and pasturage for domestic livestock and wild life; the forest and recreation and those other direct and indirect benefits that may be secured by the maintenance of or the establishment of forests or woodlands.

4th. To study and develop the establishment of windbreaks, shelter belts and woodlots on the farms of the state that moisture may be conserved thereby for the best production of agricultural crops and forage; for the prevention of soil wastage and erosion; to make the farm home more comfortable and to produce forest material for the use of the farmer and the stockman.

5th. To study the findings of other agencies that the information thus obtained may be used to improve the growth, management and utilization of the timber within the state and to protect it against damage by fire, insects, disease and other harmful agencies.

6th. To collect, to compile and to publish statistics relative to Montana forests and forestry and the influences flowing therefrom; to prepare and publish bulletins and reports, with the necessary illustrations and maps that the information collected by said station in forestry and in conservation may be made available for use and to distribute said information or material in such other ways as the state board of education may direct.

7th. To collect a library and bibliography of literature pertaining to or useful for the purpose of this act.

8th. To study logging, lumbering and milling operations and other operations dealing with the products of forest soils with special reference to their improvement; to investigate, and make tests of forest products produced or that may be produced within the state that markets may be improved thereby.

9th. To consider such other scientific and economic problems as, in the judgment of the state board of education, are of value to the people of the state.

10th. To cooperate with the other departments of the University of Montana, the state forester and the state board of land commissioners, the state fish and game commission, the state livestock commission and with other departments and branches of the state government when mutually beneficial, with private individuals and agencies; and to cooperate with the United States government and its branches as a land grant institution, or otherwise, in accordance with their regulations.

11th. To establish such field experiment stations as in the judgment of the state board of education may be necessary. The state board of education is hereby authorized to accept, for and in behalf of the state of Montana, such gifts of land or other donations as may be made to the state for the purposes of this act.

History: En. Sec. 3, Ch. 141, L. 1937.

28-304. Reports. The state board of education may require such regular and special reports to be prepared as it deems necessary. Such regular reports and the special reports and bulletins, with proper illustrations and maps, shall be printed and distributed as the state board of education may direct, and as the interests of the state and of science and industry may demand.

History: En. Sec. 4, Ch. 141, L. 1937.

28-305. Oaths of office. The dean of the forestry school, the officers and employees of said station, appointed or assigned, and their assistants shall take an oath to perform all the services required of them under this act and to guard carefully all confidential information accumulated in the progress of their work; and to turn into the station as state property all correspondence, notes, illustrations, and data of any kind accumulated by them in performing the work of the station.

History: En. Sec. 5, Ch. 141, L. 1937.

CHAPTER 4

DISPOSAL OF SLASHINGS AND FOREST DEBRIS

- Section 28-401. Piling and burning of brush and forest debris.
28-402. Disposal of slashings.
28-403. Slashings lien.

28-401. (2778.5) Piling and burning of brush and forest debris. Everyone clearing right of way for any railroad, public highway, public trail, private highway, private road, trail, ditch, dike, pipe line or wire line, or any other transmission or transportation utility right of way, except temporary roads, chutes or trails used in actual logging operations, shall pile and burn all refuse timber, brush, slash or debris cut for such clearing or resulting from the cutting of material for the construction of said public or private utility unless exempted by the state forester.

The piling shall be done as rapidly as cutting or clearing progresses, and burning shall be completed within one (1) year from time of cutting.

If burning be done during the closed season it must be done in compliance with all the provisions of this act relative to burning permits during the closed season.

The provisions of this section shall apply to all clearing of rights of way on behalf of the state, county, highway districts and road districts, whether the work be done by day labor, or by contract, and less unavoidable emergency prevents, provisions shall be made by the proper officials conducting, directing, or letting said work for withholding until it is complete, a sufficient portion of the payment therefor to assure compliance with this act.

Violations of any of the provisions of this section shall be deemed a misdemeanor and be punishable by a fine of not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00).

In addition to the penalty herein provided, the offender may be enjoined, at the instance of the state forester, or of the fire warden of the district, from proceeding with such work until the provisions of this section shall have been complied with; and, upon application of the state forester, or of the fire warden of the district, to any court of competent jurisdiction, a writ of mandate shall issue compelling the offender to fully comply with the provisions hereof.

History: En. Sec. 5, Ch. 95, L. 1927.

est conservation legislation. 13 ALR 2d 1095.

Collateral References

Constitutionality of reforestation or for-

28-402. (2778.6) Disposal of slashings. Every person, firm or corporation, hereinafter called the operator, who shall hereafter, for commercial purposes, cut any timber, logs, trees, posts, ties, poles, cordwood, pulpwood or any other forest product upon any lands within the state of Montana, shall remove any forest fire hazard to the property of others that may be created by the slashings, or other forest debris incident to such cutting operations. Provided, however, that an expenditure in excess of seventy-five cents (75c) for each one thousand (1000) feet log scale, or the equivalent thereof if products other than logs are cut, shall not be required. Slash and debris will be disposed of during the cutting operations or as soon thereafter as is practical. Provided, however, that any fire hazard to the property of others created by said slash and debris shall under no condition be allowed to remain for more than eighteen months in any portion of the cutting area except with written permission of the state forester. If and when the operator has satisfactorily disposed of said slash or debris in accordance with the law and the rules and regulations of the state board of forestry he will be so notified, in writing, by the state forester.

Any operator, as defined herein, may elect to have said slash and debris, incident to his cutting operations treated, protected or disposed of by the state forester under the rules and regulations of the state board of forestry. Said operator will deposit with the state forester the estimated costs of such disposal at such times and in such amounts as the state forester may direct, but in no event shall such deposit or payment exceed, in the aggregate, an amount equal to seventy-five cents (75c), multiplied by the number of thousand of feet log scale cut from the forest area involved. The state

forester will refund to said operator all sums deposited over and above costs of slash and debris treatment, protection or disposal.

Each person, firm or corporation, hereinafter called the purchaser, who shall hereafter purchase or contract to purchase any timber, logs, trees, ties, posts, poles or other forest products cut from any forest lands within the state of Montana, shall within five (5) days after making said purchase or contract to purchase, notify the state forester of such purchase or contract together with the name of the person furnishing said forest products and the name of the owner of the land from which said products are cut. Each purchaser shall withhold, before making payment for such products a sum equal to seventy-five cents (75c) for each thousand (1000) feet log scale or the equivalent thereof if forest products other than logs are to be cut under such contract, unless the state forester has notified said purchaser that slash and debris from the cutting operator furnishing the forest products has been disposed of, or that the cutting operator has complied with the law. When the state forester is satisfied that said slash and debris, creating a fire hazard to the property of others, has been or will be legally treated, protected or disposed of by the cutting operator in accordance with the requirements of law and of the rules and regulations of the state board of forestry, he will release said money withheld by purchaser to insure compliance with the law. If, on or before the conclusion of said purchase or contract to purchase, the state forester has not released said withheld moneys the purchaser shall, upon demand, immediately remit the moneys withheld to the state forester. The state forester will issue receipt, therefore, to the purchaser. Said receipt shall discharge the purchaser from any and all liability for moneys withheld from cutting operator in the amounts shown by said receipt. The state forester shall retain such moneys as a surety covering treatment, protection or removal of said slash and debris or may, at his discretion procure the treatment, protection or disposal of said slash and debris by applying said money, or so much thereof as may be necessary in payment of the costs of such abatement.

History: En. Sec. 6, Ch. 95, L. 1927; amd. Sec. 1, Ch. 81, L. 1931; amd. Sec. 1, Ch. 34, L. 1941; amd. Sec. 1, Ch. 83, L. 1949; amd. Sec. 1, Ch. 18, L. 1953.

Collateral References

Woods and Forests 6.
71 C.J. Woods and Forests § 11.

28-403. (2778.7) Slashings lien. If any operator shall fail, refuse or neglect to remove, treat or protect slash hazards hereafter created in accordance with the requirements of law and of the rules and regulations of the state board of forestry within a period of thirty (30) days after the date of a written order to remove, treat or protect such slash hazards, the state forester may procure the removal of the slashings, or such part thereof as he shall deem necessary and he shall immediately afterwards notify the operator that had failed to remove the slash hazards, of the cost of their removal and demand payment of the cost thereof, which shall not be in excess of seventy-five cents (75c) per thousand (1000) feet log scale or the equivalent thereof, if forest products other than logs have been cut, plus ten per cent (10%) to cover additional costs incurred by the state. If payment of the sum demanded be not made to the state forester within (30) days after the date of such demand, the state forester must

transfer all papers relative to the unsatisfied demand for payment to the attorney general of the state, who shall bring legal action on behalf of the state to recover the debt. If the amount expended by the state forester for the removal, treatment or protection of the slashings be not paid within the time herein required, a lien as security for the amount of the debt shall attach to the land on which the slashings were created and/or the timber or other forest products cut or produced from such land from and after the date that notice of such lien shall be filed by the state forester in the office of the clerk and recorder of each county in which said land is situated.

Violation of any of the provisions of section 28-402 or this section shall be a misdemeanor and be punishable by a fine of not more than five hundred dollars (\$500.00). Such offender may be enjoined at the instance of the state board of forestry from proceeding with any cutting in violation of the provisions of any law enacted for the protection of property from fire hazard, or of the rules and regulations of the state board of forestry.

History: En. Sec. 7, Ch. 95, L. 1927;
amd. Sec. 2, Ch. 34, L. 1941; amd. Sec. 2,
Ch. 83, L. 1949.

CHAPTER 5

COUNTY FORESTS—CREATION AND MANAGEMENT BY

BOARD OF COUNTY COMMISSIONERS

- Section 28-501. Creation of "county forests" by county commissioners authorized.
28-502. County owned tax deed lands may be exchanged.
28-503. Sale of timber and other crops of county forests, procedure for.
28-504. Breach of timber sale agreement, recourse.
28-505. Dead and down timber—permits for domestic use.
28-506. Proceeds of sales or permits, apportionment and distribution of.
28-507. Construction of act.

28-501. Creation of "county forests" by county commissioners authorized. The board of county commissioners of any county in the state of Montana is hereby authorized to create "county forests" from any lands in such county principally valuable for the timber thereon or for the growing of timber, which lands have been acquired by such county by tax deed and have been offered for sale at public auction and not sold, or have been acquired by such county by exchange for lands acquired by tax deed. Such county forests shall be established by resolution of the board of county commissioners of such county and may be discontinued by resolution of said board.

History: En. Sec. 1, Ch. 70, L. 1945.

71 C.J. Woods and Forests § 23.

Cross-Reference

County commissioners may provide money for fire protection, sec. 16-1104.

Constitutionality of reforestation or forest conservation legislation. 13 ALR 2d 1095.

Collateral References

Woods and Forests ⇨ 8.

28-502. County owned tax deed lands may be exchanged. After any lands acquired by the county by tax deed have been offered for sale at public auction and not sold, the board of county commissioners may ex-

change such lands for other lands which are principally valuable for the timber thereon or for the growing of timber, if, in the opinion of such board of county commissioners, it is in the best interests of such county to acquire such other lands for the purpose of creating county forests or for the purpose of consolidating such lands with then existing county forests.

History: En. Sec. 2, Ch. 70, L. 1945.

28-503. Sale of timber and other crops of county forests, procedure for.

The board of county commissioners may sell the timber crop and other crops of county forests, under such rules and regulations as it may establish; provided, however, that a notice of any proposed sale of timber in excess of one hundred thousand feet (100,000) board measure shall be advertised at least once in a newspaper published in the county at least thirty (30) days prior to the closing of bids as specified in said notice, and the board of county commissioners shall receive sealed bids up to the hour of the closing of bids. The board of county commissioners may reject any or all bids, or it may award the sale to the highest responsible bidder. Upon award of sale, the purchaser shall execute a formal agreement, which shall describe the area on which the timber is to be cut, the approximate amount to be cut by species, the rate for each product of each species, stipulate that all timber shall be paid for in advance of cutting, fix a date for termination of the agreement, define rules of silviculture, cutting, utilization, sealing, and slash disposal, and incorporate such other rules as in the discretion of the board of county commissioners are essential to the perpetuation of the county forests. As a guarantee for the faithful performance of the agreement, the purchaser shall be required to furnish a bond, with sufficient securities, to the county, in an amount equal to at least twenty per cent (20%) of the estimated value of the timber sold.

History: En. Sec. 3, Ch. 70, L. 1945.

28-504. Breach of timber sale agreement, recourse. Upon breach of any timber sale agreement, the board of county commissioners is authorized to suspend cutting or removal of the timber, and, upon advice and counsel of the county attorney, to take such steps as are deemed by it necessary to adjust the breach or to liquidate the county's claim for damages, or to submit the case to the county attorney for collection on the bond.

History: En. Sec. 4, Ch. 70, L. 1945.

28-505. Dead and down timber—permits for domestic use. Permits may be issued free of charge for dead, down, or inferior timber in such quantities and under such restrictions and regulations as the board of county commissioners may approve for fuel and domestic purposes to residents and settlers of the county.

Permits may be issued to citizens of the state of Montana for commercial purposes at commercial rates without advertising, under such restrictions and rules as the board of county commissioners may approve, for timber in quantities of one hundred thousand feet (100,000) board measure, or

less. Repeated permits of this kind shall not be issued to avoid advertising and the consequent competition secured thereby.

History: En. Sec. 5, Ch. 70, L. 1945.

28-506. Proceeds of sales or permits, apportionment and distribution of. The proceeds of every such sale or of the issuance of any such permit shall be paid over to the county treasurer who shall apportion and distribute the same in the following manner:

(a) The proceeds of each sale up to the amount of ten (\$10.00) dollars shall be credited to the county general fund to reimburse such for expenditures made therefrom in connection with the holding of such sale or the issuance of such permit.

(b) If there shall be any amount remaining of such proceeds and such remainder is in excess of the aggregate amount of all taxes and assessments accrued against such property for all funds and purposes, without penalty and interest, then so much of such remaining proceeds shall be credited to each fund or purpose, as the same would have received had such taxes been paid before becoming delinquent and all excess shall be credited to the general fund of the county.

(c) If there shall be any amount remaining of such proceeds and such remainder is less in amount than the aggregate amount of all taxes and assessments accrued against such property for all funds and purposes, without penalty or interest, such proceeds shall be pro-rated between such funds and purposes in the proportion that the amount of taxes and assessments accrued against such property for each such fund or purpose bears to the aggregate amount of taxes and assessments accrued against such property for all funds and purposes.

History: En. Sec. 6, Ch. 70, L. 1945.

28-507. Construction of act. Nothing in this act shall be construed as repealing sections 84-4190 to 84-4197 or sections 28-101 to 28-128.

History: En. Sec. 7, Ch. 70, L. 1945.

CHAPTER 6

PROTECTION AND CONSERVATION OF FOREST AND FARM RESOURCES BY COUNTY COMMISSIONERS

Section 28-601. Authority of county commissioners to protect range, farm and forest resources.

28-602. Functions of the board.

28-603. Powers of board.

28-604. Lands to which applicable.

28-601. Authority of county commissioners to protect range, farm and forest resources. For the purpose of protection and conservation of range, farm and forest resources, and of the prevention of soil erosion, the respective boards of county commissioners are hereby authorized to perform the functions hereinafter provided.

History: En. Sec. 1, Ch. 173, L. 1945.

Collateral References

Woods and Forests \S 7.

71 C.J. Woods and Forests \S 40.

Constitutionality of reforestation or forest conservation legislation. 13 ALR 2d 1095.

28-602. Functions of the board. The functions of the respective boards of county commissioners with respect to rural fire control shall be to carry out the specific authorities and duties hereinafter imposed.

(1) To provide for the organization of volunteer rural fire control crews;

(2) To appoint a county rural fire chief and such district rural fire chiefs, subject to the direction and supervision of the county rural fire chief, as they may deem necessary. The county rural fire chief shall be a regular county officer, who in the opinion of the board is the best qualified to perform the duties of this office and who shall serve without additional compensation for the duties hereby imposed. All district fire chiefs shall serve without compensation;

(3) Boards of county commissioners, acting pursuant to this act, may cooperate with federal, state and other fire protection agencies, including boards of county commissioners of adjoining counties in providing means and methods of safeguarding the range, farm and forest lands within the state and in preventing fire nuisance thereon.

History: En. Sec. 2, Ch. 173, L. 1945.

28-603. Powers of board. (1) Boards of county commissioners may in their discretion establish fire seasons annually during which no person shall ignite or set any forest fire, or slash burning fire, or land clearing fire, or debris burning fire, or any open fire, within any forest, range or crop lands, subject to the provisions of this act, without having obtained an official written permit to ignite or set such fire from a county rural fire chief or from a district rural fire chief authorized by the board to issue such permits for such lands;

(2) Any person who shall ignite or set any forest fire, or slash burning fire, or land clearing fire, or debris burning fire, or any open fire, within any forest, range or crop land subject to the provisions of this act without first having obtained a written permit to ignite or set such fire shall be guilty of a misdemeanor;

(3) To augment rural crews in case of serious emergency the boards may provide for the organization and training of voluntary urban fire crews to be used in rural areas;

(4) Any county rural fire chief and/or district rural fire chief may enter private property either with or without fire control crews for the purpose of suppressing fires, and are exempt from any damage resulting from such activity;

(5) The board is authorized to appropriate from the general fund of the county not to exceed twenty-five hundred dollars (\$2500) per year for the purchase, care and maintenance of fire fighting equipment, or for the payment of wages to skilled operators of heavy mechanized equipment in the suppression of fires when deemed necessary; or if the general fund is budgeted to the full limit, the board may at any time fixed by law for levy and assessment of taxes levy a tax at such rate as in their judgment will be necessary to raise such needed sum not to exceed twenty-five hundred dollars (\$2500).

History: En. Sec. 3, Ch. 173, L. 1945.

28-604. Lands to which applicable. The provisions of this act are not applicable to any organized forest protection district or fire district defined in sections 28-101 to 28-129, or any organized fire protection district organized and operating under other legal authority. This act shall apply to all lands not protected by federal, state, municipal or private protective agencies organized under the laws of the state of Montana.

History: En. Sec. 4, Ch. 173, L. 1945.

TITLE 29

FRAUDULENT CONVEYANCES

- Chapter 1. Uniform fraudulent conveyance act, 29-101 to 29-113.
2. Certain instruments and transfers, when void, 29-201 to 29-210.

CHAPTER 1

UNIFORM FRAUDULENT CONVEYANCE ACT

Section	29-101.	Definition of terms.
	29-102.	Insolvency.
	29-103.	Fair consideration.
	29-104.	Conveyances by insolvent.
	29-105.	Conveyances by persons in business.
	29-106.	Conveyances by a person about to incur debts.
	29-107.	Conveyance made with intent to defraud.
	29-108.	Conveyance of partnership property.
	29-109.	Rights of creditors whose claims have matured.
	29-110.	Rights of creditors whose claims have not matured.
	29-111.	Cases not provided for in act.
	29-112.	Construction of act.
	29-113.	Name of act.

29-101. Definition of terms. In this act "assets" of a debtor means property not exempt from liability for his debts. To the extent that any property is liable for any debts of the debtor, such property shall be included in his assets.

"Conveyance" includes every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or incumbrance.

"Creditor" is a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.

"Debt" includes any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.

History: En. Sec. 1, Ch. 126, L. 1945.

NOTE.—Uniform State Law. Sections 29-101 through 29-113 constitute the "Uniform Fraudulent Conveyance Act" approved by the National Conference of Commissioners on Uniform State Laws in 1918 and adopted in the states of Arizona, California, Delaware, Maryland, Massa-

chusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, South Dakota, Tennessee, Utah, Washington, Wisconsin and Wyoming.

Cross-Reference

Fraudulent conveyances, criminal liability, secs. 94-2101 to 94-2104.

29-102. Insolvency. (1) A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured.

(2) Indetermining whether a partnership is insolvent there shall be added to the partnership property the present fair salable value of the separate assets of each general partner in excess of the amount probably sufficient to meet the claims of his separate creditors, and also the amount

of any unpaid subscription to the partnership of each limited partner, provided the present fair salable value of the assets of such limited partner is probably sufficient to pay his debts, including such unpaid subscription.

History: En. Sec. 2, Ch. 126, L. 1945.

29-103. Fair consideration. Fair consideration is given for property, or obligation,

(a) When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or

(b) When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained.

History: En. Sec. 3, Ch. 126, L. 1945.

Collateral References

Assumption of mortgage as consideration for conveyance attached as in fraud of creditors. 6 ALR 2d 270.

Use of debtor's individual funds or property for acquisition, improvement of, or discharge of liens on property held in estate by entireties as fraud upon creditors. 7 ALR 2d 1104.

29-104. Conveyances by insolvent. Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

History: En. Sec. 4, Ch. 126, L. 1945.

29-105. Conveyances by persons in business. Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent.

History: En. Sec. 5, Ch. 126, L. 1945.

Collateral References

Validity of corporation's assignment for

benefit of creditors as affected by president's lack of authority from directors to make the same. 10 ALR 2d 713.

29-106. Conveyances by a person about to incur debts. Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.

History: En. Sec. 6, Ch. 126, L. 1945.

29-107. Conveyance made with intent to defraud. Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

History: En. Sec. 7, Ch. 126, L. 1945.

29-108. Conveyance of partnership property. Every conveyance of partnership property and every partnership obligation incurred when the

partnership is or will be thereby rendered insolvent, is fraudulent as to partnership creditors, if the conveyance is made or obligation is incurred,

(a) To a partner, whether with or without a promise by him to pay partnership debts, or

(b) To a person not a partner without fair consideration to the partnership as distinguished from consideration to the individual partners.

History: En. Sec. 8, Ch. 126, L. 1945.

29-109. Rights of creditors whose claims have matured. (1) Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser,

(a) Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, or

(b) Disregard the conveyance and attach or levy execution upon the property conveyed.

(2) A purchaser who without actual fraudulent intent has given less than a fair consideration for the conveyance or obligation, may retain the property or obligation as security for repayment.

History: En. Sec. 9, Ch. 126, L. 1945.

Collateral References

Right of creditor to set aside transfer of

property as fraudulent as affected by the fact that his claim is barred by the statute of limitations. 14 ALR 2d 598.

29-110. Rights of creditors whose claims have not matured. Where a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured he may proceed in a court of competent jurisdiction against any person against whom he could have proceeded had his claim matured, and the court may,

(a) Restrain the defendant from disposing of his property,

(b) Appoint a receiver to take charge of the property,

(c) Set aside the conveyance or annul the obligation, or

(d) Make any order which the circumstances of the case may require.

History: En. Sec. 10, Ch. 126, L. 1945.

29-111. Cases not provided for in act. In any case not provided for in this act the rules of law and equity including the law merchant, and in particular the rules relating to the law of principal and agent, and the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy or other invalidating cause shall govern.

History: En. Sec. 11, Ch. 126, L. 1945.

29-112. Construction of act. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

History: En. Sec. 12, Ch. 126, L. 1945.

29-113. Name of act. This act may be cited as the uniform fraudulent conveyance act.

History: En. Sec. 13, Ch. 126, L. 1945.

CHAPTER 2

CERTAIN INSTRUMENTS AND TRANSFERS, WHEN VOID

- Section 29-201. Certain instruments void against purchasers, etc.
 29-202. Not void against purchaser having notice, unless fraud is mutual.
 29-203. Power to revoke—when deemed executed.
 29-204. Same—deemed executed when entitled to execute.
 29-205. Purchaser in good faith not affected.
 29-206. Other provisions.
 29-207. Transfers, etc., with intent to defraud creditors.
 29-208. Certain transfers presumed fraudulent.
 29-209. Creditor's right must be judicially ascertained.
 29-210. Question of fraud—how determined.

29-201. (6939) Certain instruments void against purchasers, etc.

Every instrument, other than a will, affecting an estate in real property, including every charge upon real property, or upon its rents or profits, made with intent to defraud prior or subsequent purchasers thereof, or encumbrancers thereon, is void as against every purchaser or encumbrancer, for value, of the same property, or the rents or profits thereof.

History: Ap. p. Sec. 1, p. 492, Bannack Stat.; re-en. Sec. 1, p. 392, Cod. Stat. 1871; re-en. Sec. 155, 5th Div. Rev. Stat. 1879; re-en. Sec. 212, 5th Div. Comp. Stat. 1887; amd. Sec. 1650, Civ. C. 1895; re-en. Sec. 4688, Rev. C. 1907; re-en. Sec. 6939, R. C. M. 1921. Cal. Civ. C. Sec. 1227. Field Civ. C. Sec. 535.

Cross-Reference

Bulk sales, secs. 18-201 to 18-205.

Collateral References

Fraudulent Conveyances \S 2-6.
 37 C.J.S. Fraudulent Conveyances $\S\S$ 4-6.
 Generally, see 24 Am. Jur. 155, Fraudulent Conveyances.

Right of creditor to set aside transfer of property as fraudulent as affected by the fact that his claim is barred by the statute of limitations. 14 ALR 2d 598.

29-202. (6940) Not void against purchaser having notice, unless fraud is mutual. No instrument is to be avoided under the last section, in favor of a subsequent purchaser or encumbrancer having notice thereof at the time his purchase was made, or his lien acquired, unless the person in whose favor the instrument was made was a privy to the fraud intended.

History: Ap. p. Sec. 2, p. 492, Bannack Stat.; re-en. Sec. 2, p. 392, Cod. Stat. 1871; re-en. Sec. 156, 5th Div. Rev. Stat. 1879; re-en. Sec. 213, 5th Div. Comp. Stat. 1887; amd. Sec. 1651, Civ. C. 1895; re-en. Sec. 4689, Rev. C. 1907; re-en. Sec. 6940, R. C.

M. 1921. Cal. Civ. C. Sec. 1228. Field Civ. C. Sec. 536.

Collateral References

Fraudulent Conveyances \S 224.
 37 C.J.S. Fraudulent Conveyances \S 291.

29-203. (6941) Power to revoke—when deemed executed. Where a power to revoke or modify an instrument affecting the title to, or enjoyment of, an estate in real property, is reserved to the grantor, or given to any other person, a subsequent grant of, or charge upon, the estate, by the person having the power of revocation, in favor of a purchaser or encumbrancer for value, operates as a revocation of the original instrument, to the extent of the power, in favor of such purchaser or encumbrancer.

History: Ap. p. Sec. 3, p. 492, Bannack Stat.; re-en. Sec. 3, p. 392, Cod. Stat. 1871; re-en. Sec. 157, 5th Div. Rev. Stat. 1879; re-en. Sec. 214, 5th Div. Comp. Stat. 1887; amd. Sec. 1652, Civ. C. 1895; re-en. Sec. 4690, Rev. C. 1907; re-en. Sec. 6941, R. C. M. 1921. Cal. Civ. C. Sec. 1229. Field Civ. C. Sec. 537.

Collateral References

Fraudulent Conveyances \S 112.
 37 C.J.S. Fraudulent Conveyances $\S\S$ 223, 288.

29-204. (6942) Same—deemed executed when entitled to execute. Where a person having a power of revocation, within the provisions of the last section, is not entitled to execute it until after the time at which he makes such a grant or charge as described in that section, the power is deemed to be executed as soon as he is entitled to execute it.

History: En. Sec. 1653, Civ. C. 1895; 6942, R. C. M. 1921. Cal. Civ. C. Sec. 1230. re-en. Sec. 4691, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 538.

29-205. (6943) Purchaser in good faith not affected. The rights of a purchaser or encumbrancer in good faith and for value are not to be impaired by any of the foregoing provisions of this chapter.

History: En. Sec. 1654, Civ. C. 1895; re-en. Sec. 4692, Rev. C. 1907; re-en. Sec. 6943, R. C. M. 1921. Field Civ. C. Sec. 539.

Collateral References

Fraudulent Conveyances § 186, 187.
37 C.J.S. Fraudulent Conveyances § 282.

29-206. (6944) Other provisions. Other provisions concerning unlawful transfers are contained in sections 29-207 to 29-210 and 18-201 to 18-205, concerning the special relations of debtor and creditor.

History: En. Sec. 1655, Civ. C. 1895; 6944, R. C. M. 1921. Cal. Civ. C. Sec. 1231. re-en. Sec. 4693, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 541.

29-207. (8603) Transfers, etc., with intent to defraud creditors. Every transfer of property or charge thereon made, every obligation incurred, every judicial proceeding taken, and every act performed, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their representatives or successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor.

History: En. Sec. 4490, Civ. C. 1895; re-en. Sec. 6127, Rev. C. 1907; re-en. Sec. 8603, R. C. M. 1921. Cal. Civ. C. Sec. 3439. Field Civ. C. Sec. 1918.

evidence, may be considered as reflecting the intention with which the transfer was made. *First National Bank v. Conner*, 85 M 229, 239, 278 P 143.

Badges of Fraud

Since a fraudulent intent in the transfer of property to defeat claims of creditors is the result of mental process, generally the only means by which to ascertain whether such intent existed at the time of the complained-of transfer is by considering the acts of the party which experience has demonstrated to have fraudulent aspects, denominated "badges of fraud," such as insolvency, inadequacy of consideration, etc. *Security State Bank v. McIntyre*, 71 M 186, 196, 228 P 618.

While a person may do with his property as he sees fit, sell it for less than it is worth or give it away even though he is indebted or even insolvent, where fraud enters into the transaction and the rights of creditors are affected who attack the transfer as fraudulent, insolvency of the grantor and gross inadequacy of consideration are badges of fraud, and though the relationship of husband and wife is not a badge of fraud, transactions between them, because of the opportunity for fraud, are subject to the most rigid scrutiny, and the fact of such relationship, with other

"Creditors"

The fact that a creditor seeking to have an alleged fraudulent transfer set aside did not extend credit to the maker of a promissory note reduced to judgment because of the apparent ownership of the particular property does not defeat the creditor's right to question the good faith of the transfer, the term "creditor" as used in this section embracing all creditors without limitation other than that prescribed by section 29-209, i. e., the creditor must be one who by the transfer is obstructed from enforcement of his right to take the property by legal process. *Ferrell v. Elling*, 84 M 384, 391, 392, 276 P 432.

Declaratory of Common Law

This section is but declaratory of the common law. The transfer therein denounced as void is so only as to, and at the instance of, creditors having liens or charges upon, or special interest in, the property transferred. *Westheimer v. Goodkind*, 24 M 90, 103, 60 P 813.

Effect of Mortgage Given Four Months Prior to Bankruptcy

Mortgages and leases executed by a corporation to secure past indebtedness and future advances more than four months prior to the filing of a petition in bankruptcy were not voidable under the federal Bankruptcy Act, as having been given for the purpose of hindering, delaying and defrauding its creditors, under this section. *Godfrey L. Cabot, Inc. v. Gas Products Co.*, 93 M 497, 509, 19 P 2d 878.

Liberally Construed in Favor of Creditors

Courts look with disfavor upon conveyances between relatives when they are a fraud upon creditors, and therefore construe statutes of the character of this section, declaring void transfers made with intent to defraud creditors, liberally so as to include within their protection all persons who have interests of which they may be defrauded. *Ferrell v. Elling*, 84 M 384, 391, 392, 276 P 432.

What Creditor Must Show

Under this section and sections 29-209 and 29-210, a creditor seeking to set aside a transfer as fraudulent must allege and prove that the debtor was insolvent at the time he made the conveyance and that he had no other property out of which his claim could be satisfied or enforced by legal process. *Hale et al. v. Belgrade Co., Ltd.*, et al., 75 M 99, 109, 242 P 425.

When Intent is Presumed

Where one makes a voluntary conveyance of his property without retaining sufficient to satisfy the legal demands of his creditors, plaintiff in his action to set it aside as fraudulent is not required to show the existence of an actual fraudulent intent, the law presuming that by her voluntary act she intended the natural and inevitable consequences to flow therefrom, to-wit, to hinder, delay or defraud the plaintiff in the collection of his judgment secured after the conveyance, the result being fraud in fact. *National Bank of Anaconda v. Yegen*, 83 M 265, 280, 271 P 612.

Who May Claim Benefit of Statute

This section authorizing the setting aside of fraudulent conveyances, does not inure to the benefit of creditors alone, but also includes transfers and obligations incurred with intent to defraud "other persons" of their demands; the section includes with-

in its provisions all persons who have interests in the property of which they may be defrauded. *Humbird et al. v. Arnet et al.*, 99 M 499, 511, 44 P 2d 756.

References

Cited or applied as section 4490, Civil Code, in *Babcock v. Maxwell*, 29 M 31, 35, 74 P 64; *Williams v. Gray*, 61 M 1, 12, 203 P 524; *Newman v. Association of Credit Men*, 63 M 545, 208 P 914; *Wray v. Great Falls Paper Co.*, 72 M 461, 470, 234 P 486; *Edenfield v. C. V. Seal Co., Inc.*, et al., 83 M 49, 58, 270 P 642.

Collateral References

Fraudulent Conveyances—64.
37 C.J.S. Fraudulent Conveyances § 110.
24 Am. Jur. 165-295, Fraudulent Conveyances, §§ 5-161.

Remedy of general creditor or judgment creditor as affected by Uniform Fraudulent Conveyance Act. 65 ALR 251 and 119 ALR 949.

Absolute conveyance or transfer with secret reservation as fraudulent per se as against creditors. 68 ALR 306.

Principle which denies relief to party who has conveyed or transferred property in fraud of his creditors, as affected by execution, as part of, or as contemplated at time of, the fraudulent transaction, of reconveyance or retransfer of the property to him. 89 ALR 1166.

Uniform Fraudulent Conveyance Act as applied to conveyance between third persons, upon consideration furnished by debtor. 91 ALR 741.

Right to set aside, for benefit of heirs and distributees, a conveyance or transfer by deceased in fraud of his creditors. 148 ALR 230.

Rights as between creditors of grantor or transferrer and those of grantee or transferee in respect of property conveyed or transferred in fraud of creditors. 148 ALR 520.

Resumption of marital relations as consideration. 149 ALR 1012.

Purchase of homestead as fraud on creditors. 161 ALR 1287.

Use of debtor's individual funds or property for acquisition, improvement of, or discharge of liens on, property held in estate by entireties as fraud upon creditors. 7 ALR 2d 1104.

Rule denying relief to one who conveyed his property to defraud his creditors as applicable where the threatened claim which occasioned the conveyance was paid or was never established. 21 ALR 2d 589.

29-208. (8604) Certain transfers presumed fraudulent. Every transfer of personal property, other than a thing in action, or a ship or cargo at sea, or in a foreign port, and every lien thereon, other than a mortgage,

when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or encumbrancers in good faith subsequent to the transfer.

History: En. Sec. 4491, Civ. C. 1895; re-en. Sec. 6128, Rev. C. 1907; re-en. Sec. 8604, R. C. M. 1921. Cal. Civ. C. Sec. 3440. Field Civ. C. Sec. 1919.

Creditor's Right

In a creditor's suit to set aside a sale of sheep as fraudulent because there was no continued change of possession, where only a part of them remained in the possession of the purchaser at the time the creditors secured their lien, a judgment that the purchaser should deliver to the sheriff, for the benefit of the creditors, all the sheep purchased, or account for their proceeds, was erroneous, since the purchaser was liable only for the identical chattels, remaining in his possession at the time the creditor's lien attached. *Finch v. Kent*, 24 M 268, 275, 61 P 653.

By this section the legislature did not intend to go further than to declare that, during the time the vendor of personal property remains in possession after sale, his creditors may seize the property in satisfaction of their claims, notwithstanding such sale. *Western Mining Supply Co. v. Quinn*, 40 M 156, 166, 105 P 732.

Where there has been a sale of personal property not accompanied by an immediate delivery, and followed by an actual and continued change of possession, the vendee takes title subject to the claim of the vendor's creditor, who may subject the property to execution. *Tetrault v. Ingraham*, 54 M 524, 528, 171 P 1148.

In an action in claim and delivery by the purchaser of a band of horses ranging on public lands and seized by a trustee in bankruptcy at the instance of the principal creditor of the bankrupt vendor in whose possession they apparently remained until seizure, it was immaterial that it was not shown that vendor was in debt at the time of the alleged sale; as against his creditors or the trustee in bankruptcy, the sale was void under this section. *Anderson v. Hoffman*, 99 M 146, 149, 43 P 2d 644.

Effect as to Assignee for Benefit for Creditors

A transfer by a debtor of property not accompanied by change of possession is not void as against the assignee for the

benefit of the debtor's creditors under this section, as the estate does not "devolve" by such assignment, but is granted by it. *Babcock v. Maxwell*, 29 M 31, 35, 74 P 64.

Effect of Delivery and Nondelivery of Possession

While title to personal property may pass by bargain and sale without delivery of possession as between the parties to the transaction, as against every one but the seller, there must be a delivery of the possession. As a general rule, where the same personalty is sold to two different persons by transfer equally valid as between the seller and buyer, he who first lawfully acquires the possession will hold it against the other. Where plaintiff in a claim and delivery action, in good faith bought and paid for a band of horses and accepted delivery, he acquired title notwithstanding another had dealt and paid part of the price. *Jackson v. McDonald*, 115 M 269, 274, 143 P 2d 898.

Effect on Mortgages

A mortgage of personal property and transfer thereunder are void against a trustee in bankruptcy where the mortgage was made more than fourteen months prior to the transfer. *Stewart v. Hoffman*, 31 M 184, 189, 77 P 689.

In this state all personal property may be mortgaged; therefore, the words "when allowed by law," as appearing in this section, are superfluous. Disregarding the phrase "when allowed by law," all mortgages of personal property are exempted from the operation of the section. *Stewart v. Hoffman*, 31 M 190, 191, 81 P 3.

Where alleged transfer of mares to plaintiff in exchange for other animals was not accompanied by immediate delivery and was not followed by actual and continued change of possession, transfer was conclusively presumed to be fraudulent and void as against holders in good faith of subsequently executed notes and chattel mortgage and against sheriff acting at direction of holders and pursuant to terms of mortgage when he seized mares after transferor's default so as to preclude plaintiff from recovery against sheriff for conversion because of the seizure. *Reagan v.*

Armstrong, 118 M 273, 165 P 2d 1004, 1006.

Evidence Not Admissible to Disprove Fraud in Law

In an action in claim and delivery based upon constructive fraud in a sale of personal property under this section, testimony offered by the buyer that the bill of sale evidencing the transaction had been filed with the county clerk, and that he had made application for insurance on the property in his own name, was properly refused, since such evidence could only reflect upon the good faith of the parties to the sale, and this is an immaterial matter in an action in which fraud in law is relied upon. *Taylor v. Malta Mercantile Co.*, 47 M 342, 346, 132 P 549.

Not Applicable to Judicial Sales

This section does not apply to judicial sales. *Kerr v. Blaine*, 49 M 602, 605, 144 P 566.

A sale of personal property by a sheriff under a provision in a chattel mortgage authorizing him, among other things, to sell the property, in case default should be made in the payment of the principal or interest, is not a judicial sale, but falls within the letter and spirit of this section. *Kerr v. Blaine*, 49 M 602, 606, 144 P 566. See *Banking Corp. of Montana v. Hein*, 52 M 238, 241, 156 P 1085.

Purpose of Statute

The object of the statute of frauds (this section) is to require notice to the world of the transfer of personal property in order that creditors and purchasers or encumbrancers, in good faith, may be protected, and to prevent fraud; it requires surrender of control over the property by the vendor and the assumption of possession by the vendee, mere words being insufficient to constitute delivery. *O. W. Perry Co. v. Mullen*, 81 M 482, 263 P 976; *Brown v. Federal Surety Co.*, 91 M 389, 399, 8 P 2d 647.

Transfer Between Husband and Wife

It is a serious question as to whether this section is applicable to a transfer of personal property between husband and wife. *Webster v. Sherman*, 33 M 448, 457, 84 P 878.

What Constitutes a Delivery and Change of Possession

The fact that property was sold on one day, and not delivered until the next, does not render the sale void, if delivery was impossible on the day of sale; and it is properly a question for the jury to answer, whether the property was so situated, and the parties were so located at the time of sale, that instant delivery could not be made, and whether it was made as soon

thereafter as practicable. *O'Gara v. Lowry*, 5 M 427, 432, 5 P 583.

Id. The fact that the vendee of a horse and wagon employed the brother of the vendor to drive it, and, subsequently, for a short time, employed the vendor, does not show such a want of continued possession in the vendee as to render the sale void.

Where the vendors drove all their horses, which were branded alike, into a corral, and after said horses, to the number of twenty, which plaintiff had purchased, had been selected, branded with a bar under the previous brand, and turned loose with other horses "on the range," and the vendors executed a bill of sale for the twenty, it was held that there was an immediate delivery. *Dodge v. Jones*, 7 M 121, 126, 14 P 707. See *Taylor v. Malta Mercantile Co.*, 47 M 342, 350, 132 P 549; *Dover Lumber Co. v. Whitcomb*, 54 M 141, 149, 168 P 947.

Where a joint owner of personal property, in the possession of another joint owner, sells his interest, the failure of the purchaser to take possession does not, as against execution creditors of the seller, avoid the sale. The presumption referred to in this section is to be indulged only where the person making the transfer has at the time the possession or control of the property. *Yank v. Bordeaux*, 23 M 205, 209, 58 P 42.

In an action, where the question of fact to which instructions complained of were applicable was whether or not a sale of personal property was accompanied by immediate delivery, and followed by an actual and continued change of possession of the chattels, instructions reviewed and held, in view of the charge taken as a whole, not to be erroneous. *Morris v. McLaughlin*, 25 M 151, 153, 64 P 219.

Where one purchases a herd of range cattle with the brand, but delivery of only a portion thereof is actually made, the vendee may not recover those not delivered from a subsequent purchaser in good faith, under an alleged custom among cattlemen that one buying an entire herd of such cattle with their brand, some of which are not actually delivered, becomes the owner of those not delivered. *Ettien v. Drum*, 32 M 311, 317, 80 P 369.

The delivery of the key to a warehouse, standing on leased ground, which, together with its contents, consisting of heavy machinery, lumber, etc., had been sold to plaintiff in an action in conversion, constituted a sufficient delivery of the property sold, so as to prevent the presumption that the sale was fraudulent, the vendor not having exercised any act of ownership or control over any of the property thereafter. *Western Mining Supply Co. v. Quinn*, 40 M 156, 160, 105 P 732.

A continued change of possession of livestock for a period of five months was sufficient to satisfy the requirements of this section in that respect relative to transfers of personal property; a change of possession for a reasonable length of time, that is, such a period of time as will preclude the idea that the sale was a colorable one, being sufficient. *Chestnut v. Sales*, 44 M 534, 543, 121 P 481.

Id. Evidence sufficient to show that a sale was followed by an immediate delivery and actual change of possession.

Evidence insufficient to prove such an immediate delivery, either manual or symbolical, of property consisting of sheep-shearing machinery, frame buildings, etc., or an actual and continued change of possession as to meet the requirements of this section. *Taylor v. Malta Mercantile Co.*, 47 M 342, 349, 132 P 549.

A transfer of logs to a lumber company is valid as against an attaching creditor of the seller where there was a constructive delivery of the logs to the company, followed by an actual and continued change of possession. *Dover Lumber Co. v. Whitcomb*, 54 M 141, 151, 168 P 947.

Id. This section does not speak of actual possession, but of actual change of possession. Legal possession may be either actual or constructive.

The requirements of this section are satisfied in a transaction involving the sale of a large number of logs, where it appears that there was an actual change of dominion by marking the logs in such a manner as to indicate that the property was in the hands of the new owner, judging from the situation of the parties. *Dover Lumber Co. v. Whitcomb*, 54 M 141, 148, 168 P 947.

While a mere temporary change of possession of personal property will not avail against the claim of a creditor of the vendor, the change need not necessarily continue until the property is seized by the creditor, but if the change was open and so long continued as to indicate to the world at large that there has been a transfer of title, it is sufficient. *Puckett v. Hopkins et al.*, 63 M 137, 140, 206 P 422.

The mere statement, "It is yours," made with reference to a quantity of grain by the transferor to the transferee in an attorney's office miles away from where the grain was stored, the transferee doing nothing whatever to take possession, which remained in the transferor, was not such a delivery as is contemplated by this section, and therefore insufficient as against an attaching creditor of the transferor. *Wells et al. v. Esgar*, 72 M 333, 336, 233 P 123.

Whether in a given case of transfer of personal property there has been an im-

mediate delivery and actual possession in the vendee of the thing sold depends, in a measure, upon the character of the article sold, the nature of the transaction, the position of the parties and the intended use of the property, each case being dependent upon its own facts. *O. W. Perry Co. v. Mullen*, 81 M 482, 263 P 976.

In an action for the conversion of grain stored in an elevator and levied upon and sold, in which defendant claimed that plaintiff failed to prove ownership, in that having been sold before harvested, there was no immediate delivery within the meaning of the fraudulent transfer statute (this section), and hence the sale was void, held, that having been delivered to the elevator for plaintiff as soon after harvesting as practicable, title passed to plaintiff upon delivery to the warehouseman. *Claypool v. Malta Standard Garage*, 96 M 285, 287 et seq., 30 P 2d 89.

When a Jury Question

In a case where the evidence is conflicting, it is for the jury to say whether there was any such immediate delivery and actual and continued change of possession as to satisfy the statute of frauds. *Western Mining Supply Co. v. Melzner*, 48 M 174, 177, 136 P 44.

Where the evidence, in an action in conversion to recover on a sheriff's bond in which the defense was that the property seized by the officer had been sold by the judgment debtor with the intent to defraud the creditor, as to whether there was such an immediate delivery and continued change of possession as to satisfy the requirements of this section, was conflicting, the question was one for the jury to determine. *Tomcheck v. Maryland Casualty Co.*, 75 M 557, 565, 244 P 506.

Whether at the time of sale of grain instant delivery could not be made, whether it was made as soon thereafter as practicable and whether there was a sufficient change of possession to constitute a delivery passing title within the meaning of this section, are ordinarily questions for the jury's determination. *Claypool v. Malta Standard Garage*, 96 M 285, 287 et seq., 30 P 2d 89.

Who is a "Creditor"

In an action by an alleged vendee of the tools and equipment of a road construction subcontractor against the latter's surety to recover rental for the use of the equipment by the surety in completing the work on default of the subcontractor, evidence held to show that the transfer was fraudulent in law under the provisions of this section, and void as against the surety, a "creditor" within the meaning of this section. *Brown v. Federal Surety Co.*, 91 M 389, 399, 8 P 2d 647.

References

Cited or applied as section 169, Fifth Division, Revised Statutes of 1879, in *Botcher v. Berry*, 6 M 448, 13 P 45; as section 4491, Civil Code, in *Ettien v. Drum*, 35 M 81, 86, 88 P 659; as section 6128, Revised Codes, in *Olcott v. Gebo*, 54 M 35, 38, 166 P 300; *First Nat. Bk. v.*

Montana Emporium Co., 59 M 584, 593, 197 P 994; *Security State Bank v. McIntyre*, 71 M 186, 196, 228 P 618.

Collateral References

Fraudulent Conveyances ⇨ 132.
37 C.J.S. *Fraudulent Conveyances* § 187.

29-209. (8605) Creditor's right must be judicially ascertained. A creditor can avoid the act or obligation of his debtor for fraud only where the fraud obstructs the enforcement, by legal process, of his right to take the property affected by the transfer or obligation.

History: En. Sec. 4492, Civ. C. 1895; re-en. Sec. 6129, Rev. C. 1907; re-en. Sec. 8605, R. C. M. 1921. Cal. Civ. C. Sec. 3441. Field Civ. C. Sec. 1922.

Operation and Effect

Under this section and sections 29-207 and 29-210, a creditor seeking to set aside a transfer as fraudulent must allege and prove that the debtor was insolvent at the time he made the conveyance and that he had no other property out of which his claim could be satisfied or enforced by legal process. *Hale et al. v. Belgrade Co.*,

Ltd., et al., 75 M 99, 109, 242 P 425; *Ferrell v. Elling*, 84 M 384, 276 P 432.

References

Edenfield v. C. V. Seal Co., Inc., et al., 83 M 49, 61, 270 P 642; *First National Bank v. Conner*, 85 M 229, 239, 278 P 143.

Collateral References

Fraudulent Conveyances ⇨ 205.
37 C.J.S. *Fraudulent Conveyances* § 61.

Necessary parties defendant to action to set aside conveyance in fraud of creditors. 24 ALR 2d 395.

29-210. (8606) Question of fraud—how determined. In all cases arising under the provisions of this chapter, except as otherwise provided in section 29-208, the question of fraudulent intent is one of fact and not of law; nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration.

History: En. Sec. 4493, Civ. C. 1895; re-en. Sec. 6130, Rev. C. 1907; re-en. Sec. 8606, R. C. M. 1921. Cal. Civ. C. Sec. 3442. Field Civ. C. Sec. 1923.

References

Cited or applied as section 6130, Revised Codes, in *Taylor v. Malta Mercantile Co.*, 47 M 342, 346, 132 P 549; *Security State Bank v. McIntyre*, 71 M 186, 196, 228 P

618; *Hale et al. v. Belgrade Co., Ltd., et al.*, 75 M 99, 109, 242 P 425; *National Bank of Anaconda v. Yegen*, 83 M 265, 280, 271 P 612; *Ferrell v. Elling*, 84 M 384, 388, 276 P 432.

Collateral References

Fraudulent Conveyances ⇨ 74(1).
37 C.J.S. *Fraudulent Conveyances* § 163.

TITLE 30

GUARANTY, INDEMNITY AND SURETYSHIP

- Chapter 1. Guaranty—definition, creation and interpretation, 30-101 to 30-110.
2. Guarantors—liability and exoneration, 30-201 to 30-214.
3. Indemnity, 30-301 to 30-308.
4. Suretyship—sureties and their liability, 30-401 to 30-407.
5. Rights of sureties and creditors, 30-501 to 30-508.
6. Letters of credit, 30-601 to 30-609.

CHAPTER 1

GUARANTY—DEFINITION, CREATION AND INTERPRETATION

- Section 30-101. Guaranty defined.
30-102. Knowledge of principal not necessary to creation of guaranty.
30-103. Necessity of a consideration.
30-104. Guaranty to be in writing, etc.
30-105. Engagement to answer for obligation of another—when deemed original.
30-106. Acceptance of guaranty.
30-107. Guaranty of incomplete contract.
30-108. Guaranty that an obligation is good or collectible.
30-109. Recovery upon such guaranty.
30-110. Guarantor's liability upon such guaranty.

30-101. (8171) Guaranty defined. A guaranty is a promise to answer for the debt, default, or miscarriage of another person.

History: En. Sec. 3600, Civ. C 1895; re-en. Sec. 5656, Rev. C. 1907; re-en. Sec. 8171, R. C. M. 1921. Cal. Civ. C. Sec. 2787. Field Civ. C. Sec. 1534.

Distinction Between Accommodation Maker and Guarantor

Where defendant signed a renewal note taking the place of a note signed by her husband and another, at the request of the husband for the purpose of lending her name to him as comaker, she was an accommodation maker within the meaning of section 55-306, and not a guarantor, and liable as such to a holder for value though the latter knew her to be only an accommodation maker and that no consideration moved to her for signing it, the consideration moving to one or both of her comakers having been sufficient to uphold the note. *Mulany v. Murray*, 68 M 245, 251, 216 P 1105.

Distinction Between Indemnity and Guaranty

Where, for the purpose of inducing the purchase of corporate stock, the seller gave the buyer a promissory note payable in three years, the back of which bore the indorsement that when the stock had paid dividends to the amount of the purchase

price, the note should be void, the agreement, evidenced by the note and indorsement, was one of indemnity within the meaning of section 52-202, and not of guaranty. *Peterson v. Nelson*, 77 M 539, 549, 252 P 368.

Distinction Between "Special" and "General" Guaranty

A special guaranty is one addressed to a particular person who alone can take advantage of it and to whom only the guarantor can be held responsible; a general guaranty being one for acceptance by the public generally, i. e., a promise to anyone accepting it to be answerable for a debt or duty in case of the failure or default or another who is liable in the first instance. In the instant case the insolvency and direct suit clause under an oral insurance contract for public liability held to be neither, its primary intent being to protect the insured rather than the third person—indemnity, not guaranty. *Austin v. New Brunswick Fire Insurance Co.*, 111 M 192, 197, 108 P 2d 1036.

Distinction Between Surety and Guarantor

A surety is bound with the principal as an original promisor on the same contract,

while a guarantor makes his own separate contract; a surety makes his contract primarily for the principal, while a guarantor makes his contract mainly for his own benefit. *Cole Mfg. Co. v. Morton*, 24 M 58, 62, 60 P 587.

A bond in which the sureties unconditionally agreed to indemnify a county treasurer for default of a bank to pay over to him on demand any funds he might have on deposit therein was a contract of surety and not of guaranty, by which they bound themselves to pay a fixed and definite sum not exceeding that named in the bond, to-wit, the amount on deposit—a contract for the direct payment of money, warranting the issuance of an attachment against the property of the sureties in an action on the bond. *State ex rel. Barnett v. Reynolds et al.*, 68 M 572, 576, 220 P 525.

Under a contract of guaranty the promisor is bound independently of the person for whose benefit it is made, his engagement being a collateral undertaking; hence there being neither privity of contract, mutuality nor joint liability between the principal debtor and the guarantor, they cannot be joined as defendants; under that of suretyship the surety is bound as an original promisor and the creditor may bring his action jointly against him and the debtor. *Butte Mach. Co. v. Carbonate Hill Mill. Co.*, 75 M 167, 169, 242 P 956.

A contract of guaranty "is a promise to answer for the debt, default or miscarriage of another person" (this section). But it is distinguishable from one of surety, in that the former is a separate contract whereby the promisor is bound independently of the person for whose benefit it is made, while the latter is a contract whereby the promisor is bound jointly with the principal on the same contract. (*Emerson-Brantingham Imp. Co. v. Raugstad*, 65 M 297, 211 P 305.) *Anderson v. Border et al.*, 75 M 516, 525, 244 P 494.

Nature of Contract of Guaranty

Although the contract of guaranty is collateral to the contract of the principal debtor, the two are distinct and independent, there being, as to the contract of guaranty, no privity, mutuality or joint liability between the principal debtor and his guarantor. *Baroch v. Greater Montana Oil Co.*, 70 M 93, 96, 225 P 800.

The double liability to the creditors of an insolvent state bank imposed by section 6036, R. C. M. 1921, since repealed, as amended by chapter 9, Laws of 1923, upon a holder of stock in such bank, is in the nature of a guaranty, and therefore will not support an attachment as upon a contract for the direct payment of money in an action by the receiver to collect an assessment levied upon the stock of a de-

liquent stockholder. *Muri v. Young*, 75 M 213, 218, 245 P 956.

Stockholder Liability is in Nature a Guaranty

Held, that the statutory liability imposed upon holders of bank stock by section 6036, R. C. M. 1921, since repealed, for debts of a bank, is in the nature of a guaranty—not primary, but secondary—and that the liability is created within the meaning of section 93-2715, providing that actions to recover on such liability must be brought within three years after the liability "was created"—not when the statute imposing it was enacted, nor when the relation of debtor and creditor between the bank and plaintiff first arose, but when the bank became insolvent—and that therefore the complaint in such an action showing on its face that it was commenced within the three-year period was sufficient as against a general demurrer. *Mitchell v. Banking Corporation of Mont.*, 83 M 581, 595, 273 P 1055.

When Liability of Guarantors Becomes Fixed

Before a principal may be said to have ratified an unauthorized act of his agent, it must be shown that the former accepted the results of the act of the latter with the intent to ratify and will full knowledge of all the material circumstances. *Outlook F. E. Co. v. American S. Co.*, 70 M 8, 32, 223 P 905.

Id. In an action by an elevator company against its former manager and his surety to recover for funds misappropriated by him in grain gambling transactions, refusal of the court to submit the question of ratification of the manager's acts by the company was proper, where it appeared that the gambling transactions were carried on with a commission house in Minneapolis under fictitious names which made reports to the manager so drawn as to conceal their real character, and that the directors of the company did not know of their existence until after the termination of the manager's employment who had informed them that he was not gambling.

References

Square Butte State Bank v. Ballard, 64 M 554, 560 et seq., 210 P 889; *Northwestern F. & M. Ins. Co. v. Pollard*, 74 M 142, 150, 238 P 594; *First Nat. Bank v. Hergert et al.*, 94 M 197, 202, 22 P 2d 169; *Jackson v. Thelen*, 96 M 177, 29 P 2d 646.

Collateral References

Guaranty ⊕ 1.
38 C.J.S. Guaranty § 2.
See 24 Am. Jur. 869, Guaranty, generally.

30-102. (8172) Knowledge of principal not necessary to creation of guaranty. A person may become guarantor even without the knowledge or consent of the principal.

History: En. Sec. 3601, Civ. C. 1895; re-en. Sec. 5657, Rev. C. 1907; re-en. Sec. 8172, R. C. M. 1921. Cal. Civ. C. Sec. 2788. Field Civ. C. Sec. 1535.

Collateral References

Guaranty \Rightarrow 1.
38 C.J.S. Guaranty § 15.

30-103. (8173) Necessity of a consideration. Where a guaranty is entered into at the same time with the original obligation, or with the acceptance of the latter by the guarantee, and forms with that obligation a part of the consideration to him, no other consideration need exist. In all other cases there must be a consideration distinct from that of the original obligation.

History: En. Sec. 3610, Civ. C. 1895; re-en. Sec. 5658, Rev. C. 1907; re-en. Sec. 8173, R. C. M. 1921. Cal. Civ. C. Sec. 2792. Field Civ. C. Sec. 1536.

Operation and Effect

The codes preserve the general distinction between suretyship and guaranty, which is that a surety is bound with the principal as an original promisor on the same contract, while the guarantor makes his own separate contract. This section was enacted with regard to this distinction. *Cole Mfg. Co. v. Morton*, 24 M 58, 61, 60 P 587.

Where a promissory note was not accepted until a guaranty was produced about a week after the execution of the note, and the two instruments were delivered together, plaintiff in an action on the guaranty was not required to show an independent consideration for it, a showing of consideration for the note having been sufficient under this section. *Schauer v. Morgan et al.*, 67 M 455, 464, 216 P 347.

A contract of guaranty is made for the benefit of the guarantor, mainly, and if made at the same time as the original obligation, no other consideration need exist. *Lyon v. Featherman*, 80 M 504, 512, 261 P 268.

What is Sufficient Consideration

The guaranty must be based upon a consideration (this section). By both the pleading and proof the consideration is forbearance to sue or to take steps to collect the notes or the extension thereof.

Forbearance to enforce a legal right is a sufficient consideration to support a contract. *Doorly v. Goodman*, 71 M 529, 537, 230 P 779.

Before plaintiff manufacturing company would enter into a renewal contract with a distributor of its goods, it required him to furnish a written contract of guaranty signed by responsible parties agreeing to pay the company on termination of the renewal contract the amount due it from the distributor at the time of the execution of the guaranty or what might become due thereafter; in consideration it promised to furnish the distributor with more goods. The guaranty was furnished, no further goods, however, being thereafter ordered. Held, in an action to recover on the guaranty, that there was a sufficient consideration to support the contract of guaranty of the distributor's indebtedness existing at the time of the execution of the contract, to-wit, extension of time of payment, and that, in addition, the agreement as to payment of existing and future indebtedness, being indivisible, was based upon the further consideration that the company would sell more goods to the distributor, the fact that he thereafter did not order more goods not affecting its sufficiency. *W. T. Rawleigh Co. v. Washburn et al.*, 80 M 308, 316 et seq., 260 P 1039.

Collateral References

Guaranty \Rightarrow 14, 16(3).
38 C.J.S. Guaranty §§ 23, 26.
24 Am. Jur. 905, Guaranty, §§ 48 et seq.

30-104. (8174) Guaranty to be in writing, etc. Except as prescribed by the next section, a guaranty must be in writing, and signed by the guarantor; but the writing need not express a consideration.

History: En. Sec. 3611, Civ. C. 1895; re-en. Sec. 5659, Rev. C. 1907; re-en. Sec. 8174, R. C. M. 1921. Cal. Civ. C. Sec. 2793. Field Civ. C. Sec. 1537.

Guaranty Imposed by Law Need Not be in Writing

Where a liability in the nature of a guaranty is imposed by law, it does not

fall within the provision of this section, requiring a contract of guaranty to be in writing. *Muri v. Young*, 75 M 213, 218, 245 P 956.

Collateral References

Frauds, Statute of 13; Guaranty 10.
37 C.J.S. Frauds, Statute of § 12; 38 C.J.S. Guaranty § 20.

30-105. (8175) Engagement to answer for obligation of another—when deemed original. A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing:

1. Where the promise is made by one who has received property of another upon an undertaking to apply it pursuant to such promise; or by one who has received a discharge from an obligation, in whole or in part, in consideration of such promise.

2. Where the creditor parts with value, or enters into an obligation, in consideration of the obligation in respect to which the promise is made, in terms or under circumstances such as to render the party making the promise the principal debtor, and the person in whose behalf it is made, his surety.

3. Where the promise, being for an antecedent obligation of another, is made upon the consideration that the party receiving it cancels the antecedent obligation, accepting the new promise as a substitute therefor, or upon the consideration that the party receiving it releases the property of another from a levy, or upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person.

4. Where a factor undertakes, for a commission, to sell merchandise and guarantee the sale.

5. Where the holder of an instrument for the payment of money, upon which a third person is or may become liable to him, transfers it in payment of a precedent debt of his own, or for a new consideration, and in connection with such transfer enters into a promise respecting such instrument.

History: En. Sec. 3612, Civ. C. 1895; re-en. Sec. 5660, Rev. C. 1907; re-en. Sec. 8175, R. C. M. 1921. Cal. Civ. C. Sec. 2794. Field Civ. C. Sec. 1538.

Consideration Necessary

The consideration which, under subdivision 3 of this section, will convert a promise to answer for the obligation of a third person into an original obligation of the promisor, so as to take it out of the statute of frauds, must be one tangible at law, a legal, pecuniary benefit, rather than a moral or sentimental purpose. *Bennighoff v. Robbins*, 54 M 66, 76, 166 P 687.

Oral Agreement by Husband to Pay Wife's Attorney to Bring About Reconciliation

An oral agreement between the husband and his wife's attorney to pay for the latter's services in an action for separate maintenance in case he brought about a reconciliation, held an original undertak-

ing within the meaning of subdivisions 1 and 2, this section, and not a guaranty, and therefore not void under the statute of frauds. *Walker v. Hill*, 90 M 111, 121, 300 P 260.

Oral Obligation to Pay Antecedent Obligation of Another

The weight of authority seems to uphold this rule, namely: When the original debt was antecedently contracted and subsists, the promise to pay it is original if founded upon a new consideration moving to the promisor, and beneficial to him, and such that the promisor thereby comes under an independent duty of payment, irrespective of the liability of the principal debtor. *McCormick v. Johnson*, 31 M 266, 270, 78 P 500.

Id. A promise by partners to pay an existing debt of a corporation to another in consideration of such other person giving them an agency for sale of his coal is an original obligation, which, under

subdivision 3 of this section, need not be in writing.

Where a promise is made to pay the antecedent obligation of another upon the condition that the party receiving it will cancel the obligation, accepting the new promise in substitution therefor, it is an original undertaking or agreement and not a mere promise to answer for the debt of another within the meaning of the statute of frauds, and need not be in writing. *Tannhauser v. Shea*, 88 M 562, 295 P 268.

Oral Promise to Pay Where Promisor Has Received Property

Where, upon the winding up of a co-partnership of which defendant was a member, he retained certain partnership funds and agreed to pay plaintiff a debt due him for wages from the firm, defendant's promise was upon a consideration beneficial to himself, and was valid though not in writing. *Carlson v. Barker*, 36 M 486, 492, 93 P 646.

Original Promise Within the Meaning of This Section

A promise to answer for the obligation of another is to be deemed the original obligation of the promisor when the creditor parts with value in terms, or under circumstances, such as put the promisor in the attitude of principal debtor, and the person he promises for in the attitude of surety. Such terms or circumstances do

not appear where a person introduces strangers to a storekeeper and says, "If they don't pay, I will." *Fortman v. Leggerini*, 51 M 238, 244, 152 P 33.

Where two directors of a corporation in need of financial aid orally agreed with each other that each would answer to the other for advances made by each to it, provided things could not be so arranged that both should be made whole by the corporation, neither became a principal debtor to the other, and the agreement was not taken out of subdivision 2 of this section, since credit was not given to the promisor exclusively. *Bennighoff v. Robbins*, 54 M 66, 76, 166 P 687.

Where a merchant would not sell merchandise to a sugar-beet grower unless plaintiff bank promised to pay therefor, its promise to do so made it the principal debtor and constituted an "original obligation" within the meaning of this section, not required to be in writing. *First Nat. Bank v. Hergert et al.*, 94 M 197, 203, 22 P 2d 169.

References

Cited or applied as section 5660, Revised Codes, in *McGowan Commercial Co. v. Midland Coal & Lumber Co.*, 41 M 211, 225, 108 P 655.

Collateral References

Frauds, Statute of—23 et seq.
37 C.J.S. Frauds, Statute of § 16.

30-106. (8176) Acceptance of guaranty. A mere offer to guaranty is not binding until notice of its acceptance is communicated by the guarantee to the guarantor; but an absolute guaranty is binding upon the guarantor without notice of acceptance.

History: En. Sec. 3613, Civ. C. 1895; re-en. Sec. 5661, Rev. C. 1907; re-en. Sec. 8176, R. C. M. 1921. Cal. Civ. C. Sec. 2795. Field Civ. C. Sec. 1539.

Collateral References

Guaranty—7.
38 C.J.S. Guaranty § 11.

30-107. (8177) Guaranty of incomplete contract. In a guaranty of a contract, the terms of which are not then settled, it is implied that its terms shall be such as will not expose the guarantor to greater risks than he would incur under those terms which are most common in similar contracts at the place where the principal contract is to be performed.

History: En. Sec. 3620, Civ. C. 1895; re-en. Sec. 5662, Rev. C. 1907; re-en. Sec. 8177, R. C. M. 1921. Cal. Civ. C. Sec. 2799. Field Civ. C. Sec. 1540.

Collateral References

Guaranty—36.
38 C.J.S. Guaranty § 43.

30-108. (8178) Guaranty that an obligation is good or collectible. A guaranty to the effect that an obligation is good, or is collectible, imports that the debtor is solvent, and that the demand is collectible by the usual legal proceedings, if taken with reasonable diligence.

History: En. Sec. 3621, Civ. C. 1895; re-en. Sec. 5663, Rev. C. 1907; re-en. Sec. 8178, R. C. M. 1921. Cal. Civ. C. Sec. 2800. Field Civ. C. Sec. 1541.

30-109. (8179) Recovery upon such guaranty. A guaranty, such as is mentioned in the last section, is not discharged by an omission to take proceedings upon the principal debt, or upon any collateral security for its payment, if no part of the debt could have been collected thereby.

History: En. Sec. 3622, Civ. C. 1895;
re-en. Sec. 5664, Rev. C. 1907; re-en. Sec.
8179, R. C. M. 1921. Cal. Civ. C. Sec. 2801.
Field Civ. C. Sec. 1542.

Collateral References
Guaranty ⇨ 70, 71.
38 C.J.S. Guaranty § 61.

30-110. (8180) Guarantor's liability upon such guaranty. In the case mentioned in section 30-108 the removal of the principal from the state, leaving no property therein from which the obligation might be satisfied, is equivalent to the insolvency of the principal in its effect upon the rights and obligations of the guarantor.

History: En. Sec. 3623, Civ. C. 1895;
re-en. Sec. 5665, Rev. C. 1907; re-en. Sec.
8180, R. C. M. 1921. Cal. Civ. C. Sec. 2802.
Field Civ. C. Sec. 1543.

38 C.J.S. Guaranty §§ 43, 59.
24 Am. Jur. 920, Guaranty, §§ 71 et seq.

Guaranty of payment at maturity as covering expenses of collection. 4 ALR 2d 138.

Collateral References
Guaranty ⇨ 36, 44.

CHAPTER 2

GUARANTORS—LIABILITY AND EXONERATION

- Section 30-201. Guaranty—how construed.
30-202. Liability upon guaranty of payment or performance.
30-203. Liability upon guaranty of a conditional obligation.
30-204. Obligation of guarantor cannot exceed that of the principal.
30-205. Guarantor not liable on an illegal contract.
30-206. Continuing guaranty, what called.
30-207. Revocation.
30-208. What dealings with debtor exonerate guarantor.
30-209. Void promises.
30-210. Rescission of alteration.
30-211. Part performance.
30-212. Delay of creditor does not discharge guarantor.
30-213. Guarantor indemnified by the debtor, not exonerated.
30-214. Discharge of principal by act of law does not discharge guarantor.

30-201. (8181) Guaranty—how construed. A guaranty is to be deemed unconditional unless its terms import some condition precedent to the liability of the guarantor.

History: En. Sec. 3630, Civ. C. 1895;
re-en. Sec. 5666, Rev. C. 1907; re-en. Sec.
8181, R. C. M. 1921. Cal. Civ. C. Sec. 2806.
Field Civ. C. Sec. 1544.

M. Ins. Co. v. Pollard, 74 M 142, 150, 238
P 594; General Finance Co. v. Powell, 114
M 473, 480, 138 P 2d 255.

References
Square Butte State Bank v. Ballard, 64
M 554, 560, 210 P 889; Northwestern F. &

Collateral References
Guaranty ⇨ 42.
38 C.J.S. Guaranty §§ 7, 43.
24 Am. Jur. 910, Guaranty, §§ 56, 57.

30-202. (8182) Liability upon guaranty of payment or performance. A guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal, and without demand or notice.

History: En. Sec. 3631, Civ. C. 1895;
re-en. Sec. 5667, Rev. C. 1907; re-en. Sec.
8182, R. C. M. 1921. Cal. Civ. C. Sec. 2807.
Field Civ. C. Sec. 1545.

Operation and Effect
Where a purchase-money mortgage of farm machinery provided that on default of the purchaser in payment of any part

of the principal of the notes given by him, the seller was authorized to take possession of the machinery and sell it at public auction without further demand, or at a private sale with or without notice, the liability of the guarantors of the notes became fixed when the buyer failed to make payment at maturity of the notes. *Minneapolis Thresh. Machine Co. v. Jameison*, 70 M 27, 32, 223 P 893.

References

Square Butte State Bank v. Ballard, 64 M 554, 564, 210 P 889; *Mulany v. Mur-*

ray, 68 M 245, 251, 216 P 1105; *Northwestern F. & M. Ins. Co. v. Pollard*, 74 M 142, 238 P 594; *General Finance Co. v. Powell*, 114 M 473, 480, 138 P 2d 255.

Collateral References

Guaranty—45, 46.

38 C.J.S. Guaranty §§ 62, 63.

24 Am. Jur. 920, Guaranty, §§ 71 et seq.

Guaranty of payment at maturity as covering expenses of collection. 4 ALR 2d 138.

30-203. (8183) Liability upon guaranty of a conditional obligation.

Where one guarantees a conditional obligation, his liability is commensurate with that of the principal, and he is not entitled to notice of the default of the principal, unless he is unable, by the exercise of reasonable diligence, to acquire information of such default, and the creditor has actual notice thereof.

History: En. Sec. 3632, Civ. C. 1895; re-en. Sec. 5668, Rev. C. 1907; re-en. Sec.

8183, R. C. M. 1921. Cal. Civ. C. Sec. 2808. Field Civ. C. Sec. 1546.

30-204. (8184) Obligation of guarantor cannot exceed that of the principal. The obligation of a guarantor must be neither larger in amount nor in other respects more burdensome than that of the principal; and if in its terms it exceeds it, it is reducible in proportion to the principal obligation.

History: En. Sec. 3633, Civ. C. 1895; re-en. Sec. 5669, Rev. C. 1907; re-en. Sec. 8184, R. C. M. 1921. Cal. Civ. C. Sec. 2809. Field Civ. C. Sec. 1547.

Effect of Impossibility of Performance of Contract by Principal

In holding a contract void because the impossibility preventing performance was due to the nature of the thing the contracting company undertook to do, i. e., to obtain a yield of gasoline which could not, by any means be done, held that the

contractor was entitled to a recovery on the quantum meruit; his bond did not permit recovery of damages; a collateral promise in the contract consisting of warranty was invalid and would not support action for breach of warranty; and contractor's lien was supported by the implied contract. *Smith Engineering Co. v. Rice*, 102 F 2d 492.

Collateral References

Guaranty—36.

38 C.J.S. Guaranty § 51.

30-205. (8185) Guarantor not liable on an illegal contract. A guarantor is not liable if the contract of the principal is unlawful; but he is liable notwithstanding any mere personal disability of the principal, though the disability be such as to make the contract void against the principal.

History: En. Sec. 3634, Civ. C. 1895; re-en. Sec. 5670, Rev. C. 1907; re-en. Sec. 8185, R. C. M. 1921. Cal. Civ. C. Sec. 2810. Field Civ. C. Sec. 1548.

References

Smith Engineering Co. v. Rice, 102 F 2d 492.

Collateral References

Guaranty—5.

38 C.J.S. Guaranty § 16.

30-206. (8186) Continuing guaranty, what called. A guaranty relating to a future liability of the principal, under successive transactions, which either continue his liability or from time to time renew it after it has been satisfied, is called a continuing guaranty.

History: En. Sec. 3640, Civ. C. 1895; re-en. Sec. 5671, Rev. C. 1907; re-en. Sec.

8186, R. C. M. 1921. Cal. Civ. C. Sec. 2814. Field Civ. C. Sec. 1549.

Collateral References
Guaranty⊕38.

38 C.J.S. Guaranty § 54.

30-207. (8187) Revocation. A continuing guaranty may be revoked at any time by the guarantor, in respect to future transactions, unless there is a continuing consideration as to such transactions which he does not renounce.

History: En. Sec. 3641, Civ. C. 1895; re-en. Sec. 5672, Rev. C. 1907; re-en. Sec. 8187, R. C. M. 1921. Cal. Civ. C. Sec. 2815. Field Civ. C. Sec. 1550.

Collateral References

Guaranty⊕24(1).
38 C.J.S. Guaranty § 36.
24 Am. Jur. 916, Guaranty, §§ 64, 65.

30-208. (8188) What dealings with debtor exonerate guarantor. A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any wise impaired or suspended.

History: En. Sec. 3650, Civ. C. 1895; re-en. Sec. 5673, Rev. C. 1907; re-en. Sec. 8188, R. C. M. 1921. Cal. Civ. C. Sec. 2819. Field Civ. C. Sec. 1551.

Actual Injury to Surety Not Necessary

A surety is exonerated in like manner with a guarantor (sec. 30-407). Therefore, if a creditor without the consent of the surety does any act which in contemplation of law alters the surety's liability, increases his risk or deprives him even for a moment of the right to pay the debt and assume the position of the creditor, or of his right to seek indemnity, the surety is discharged and the fact that he may not have been actually injured is immaterial. *United States B. & L. Assn. v. Burns*, 90 M 402, 416 et seq., 4 P 2d 703.

Alteration of Contract Releasing Surety

Where the grantor of mortgaged real property conveys it, the grantee assuming the mortgage (the grantor thus becoming a surety and the grantee the principal debtor), and thereafter the mortgagee enters into a written agreement with the grantee under which he relinquishes his right to receive the gross revenues from the property as provided for under the mortgage contract, requires the grantee to pay only what is left after paying operating expenses and waives default in the payment of taxes as well as his right to foreclose the mortgage because of defaults in paying monthly installments of rent, the original obligation is so materially altered as to release the surety under section 30-507, and this section. *United States B. & L. Assn. v. Burns*, 90 M 402, 416 et seq., 4 P 2d 703.

Amendment of Complaint as Release

A surety is exonerated in like manner with a guarantor (sec. 30-407). Therefore,

the surety on an undertaking to secure the release of property from attachment enters into the obligation with reference to the cause as it then stands; and if the plaintiff in the action in which the attachment was levied, without the consent of the surety, subsequently changes his pleading so as to state another and different cause of action, it is such a change as will work a release of the surety. *Gilna v. Fidelity & Deposit Co. et al.*, 83 M 231, 239, 272 P 540.

Compromise of Claim as Release

A guarantor of the payment of a note is relieved from liability when the cashier of the holder, with the knowledge of the holder, accepts as payment from the principal debtor a conveyance of land, and cancels the note, and executes a note to the holder for the amount of the debt of the principal debtor. *Stanford v. Coram*, 26 M 285, 304, 67 P 1005.

Under this section, 30-407 and 30-501, held that where a creditor bank in an action against the receiver of an insolvent debtor bank compromised its claim against the latter thereon, thus discharging its obligation and suspending its rights and remedies against the principal, without the consent of the sureties, they were exonerated. *First Nat. Bank v. Holding et al.*, 90 M 529, 536, 4 P 2d 709.

Extension of Time for Payment as Release

A surety is exonerated in like manner with a guarantor (sec. 30-407). Therefore, held, that where a mortgagee granted a purchaser of the mortgaged property, who had assumed the debt, an extension of one year within which to make payment at a higher rate of interest than that originally provided for, without the consent of his grantor, thus materially altering the terms

of the obligation to pay debt, the grantor (surety) was released from liability and therefore the mortgagee was not entitled to a deficiency judgment against him in his action to foreclose, brought against the original purchaser from the mortgagor and subsequent purchasers. *Shipman v. Terrill et al.*, 84 M 322, 337, 276 P 21.

References

Cited or applied as section 5673, Revised

30-209. (8189) Void promises. A promise by a creditor, which for any cause is void, or voidable by him at his option, does not alter the obligation or suspend or impair the remedy, within the meaning of the last section.

History: En. Sec. 3651, Civ. C. 1895; re-en. Sec. 5674, Rev. C. 1907; re-en. Sec. 8189, R. C. M. 1921. Cal. Civ. C. Sec. 2820. Field Civ. C. Sec. 1552.

Codes, in *Dodd v. Vucovich*, 38 M 188, 99 P 296; *Vinson v. Pelletier et al.*, 78 M 254, 255 P 1067; *National Surety Co. v. Lincoln County*, 238 Fed 705, 712.

Collateral References

Guaranty 53-57.
38 C.J.S. Guaranty §§ 71-76.

References

Cited or applied as section 5674, Revised Codes, in *Dodd v. Vucovich*, 38 M 188, 193, 99 P 296; *United States B. & L. Assn. v. Burns*, 90 M 402, 418, 4 P 2d 703.

30-210. (8190) Rescission of alteration. The rescission of an agreement altering the original obligation of a debtor, or impairing the remedy of a creditor, does not restore the liability of a guarantor who has been exonerated by such agreement.

History: En. Sec. 3652, Civ. C. 1895; re-en. Sec. 5675, Rev. C. 1907; re-en. Sec. 8190, R. C. M. 1921. Cal. Civ. C. Sec. 2821. Field Civ. C. Sec. 1553.

30-211. (8191) Part performance. The acceptance, by a creditor, of anything in partial satisfaction of an obligation, reduces the obligation of a guarantor thereof, in the same measure as that of the principal, but does not otherwise affect it.

History: En. Sec. 3653, Civ. C. 1895; re-en. Sec. 5676, Rev. C. 1907; re-en. Sec. 8191, R. C. M. 1921. Cal. Civ. C. Sec. 2822. Field Civ. C. Sec. 1554.

385, 391, 236 P 545; *Vinson v. Pelletier et al.*, 78 M 254, 271, 255 P 1067.

Collateral References

Guaranty 59, 60.
38 C.J.S. Guaranty §§ 77, 78.

References

Mutual Oil Co. v. Hamilton et al., 73 M

30-212. (8192) Delay of creditor does not discharge guarantor. Mere delay on the part of a creditor to proceed against the principal, or to enforce any other remedy, does not exonerate a guarantor.

History: En. Sec. 3654, Civ. C. 1895; re-en. Sec. 5677, Rev. C. 1907; re-en. Sec. 8192, R. C. M. 1921. Cal. Civ. C. Sec. 2823. Field Civ. C. Sec. 1555.

Collateral References

Guaranty 70.
38 C.J.S. Guaranty § 61.

References

Northwestern F. & M. Ins. Co. v. Pollard, 74 M 142, 150, 238 P 594.

30-213. (8193) Guarantor indemnified by the debtor, not exonerated. A guarantor, who has been indemnified by the principal, is liable to the creditor to the extent of the indemnity, notwithstanding that the creditor, without the assent of the guarantor, may have modified the contract or released the principal.

History: En. Sec. 3655, Civ. C. 1895; re-en. Sec. 5678, Rev. C. 1907; re-en. Sec. 8193, R. C. M. 1921. Cal. Civ. C. Sec. 2824. Field Civ. C. Sec. 1556.

Collateral References
Guaranty 48.

38 C.J.S. Guaranty § 67.

30-214. (8194) Discharge of principal by act of law does not discharge guarantor. A guarantor is not exonerated by the discharge of his principal by operation of law, without the intervention or omission of the creditor.

History: En. Sec. 3656, Civ. C. 1895;
re-en. Sec. 5679, Rev. C. 1907; re-en. Sec.
8194, R. C. M. 1921. Cal. Civ. C. Sec. 2825.
Field Civ. C. Sec. 1557.

Collateral References
Guaranty 50, 64.
38 C.J.S. Guaranty §§ 69-71, 83.

CHAPTER 3

INDEMNITY

- Section 30-301. Indemnity defined.
30-302. Indemnity for a future wrongful act void.
30-303. Indemnity for a past wrongful act valid.
30-304. Indemnity extends to acts of agents.
30-305. Indemnity to several.
30-306. Persons indemnifying liable jointly or severally with person indemnified.
30-307. Rules for interpreting agreement of indemnity.
30-308. When person indemnifying is a surety.

30-301. (8163) Indemnity defined. Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person.

History: En. Sec. 3580, Civ. C. 1895;
re-en. Sec. 5648, Rev. C. 1907; re-en. Sec.
8163, R. C. M. 1921. Cal. Civ. C. Sec. 2772.
Field Civ. C. Sec. 1524.

Operation and Effect

Where, for the purpose of inducing the purchase of corporate stock, the seller gave the buyer a promissory note payable in three years, the back of which bore the indorsement that when the stock had paid dividends to the amount of the purchase

price, the note should be void, the agreement, evidenced by the note and indorsement, was one of indemnity within the meaning of this section, and not of guaranty. *Peterson v. Nelson*, 77 M 539, 549, 252 P 368.

Indemnity 1.

Collateral References

42 C.J.S. Indemnity § 1.
27 Am. Jur. 455, Indemnity, generally.

30-302. (8164) Indemnity for a future wrongful act void. An agreement to indemnify a person against an act thereafter to be done is void, if the act be known by such person, at the time of doing it, to be unlawful.

History: En. Sec. 3581, Civ. C. 1895;
re-en. Sec. 5649, Rev. C. 1907; re-en. Sec.
8164, R. C. M. 1921. Cal. Civ. C. Sec. 2773.
Field Civ. C. Sec. 1525.

Effect of Trespass

An implied promise to indemnify a sheriff for making an attachment held not void under this section where the rights of the rival claimants to the attached personalty were not clear, the fact that the steps taken by the officer, originally supposed proper, subsequently proved a trespass not rendering the promise void. *Weir v. Hum Tong*, 100 M 1, 6, 46 P 2d 45.

tions attaching creditor. Later in conversion suit some of the furniture was held exempt and claimant awarded damages against sheriff for its retention. In sheriff's action to recover from attaching creditor on implied promise of indemnity the claim of the attaching creditor that officer knew his act was unlawful and the indemnity agreement was therefore void under this section was without merit. *Weir v. Hum Tong*, 100 M 1, 6, 46 P 2d 45.

Collateral References

Indemnity 3.
42 C.J.S. Indemnity § 7.

Implied Indemnity Agreement Sustained

A sheriff attached furniture on instruc-

30-303. (8165) Indemnity for a past wrongful act valid. An agreement to indemnify a person against an act already done is valid, even though the act was known to be wrongful, unless it was a felony.

History: En. Sec. 3582, Civ. C. 1895; 8165, R. C. M. 1921. Cal. Civ. C. Sec. 2774.
re-en. Sec. 5650, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1526.

30-304. (8166) Indemnity extends to acts of agents. An agreement to indemnify against the acts of a certain person applies not only to his acts and their consequences, but also to those of his agents.

History: En. Sec. 3583, Civ. C. 1895; Collateral References
re-en. Sec. 5651, Rev. C. 1907; re-en. Sec. Indemnity § 9(1).
8166, R. C. M. 1921. Cal. Civ. C. Sec. 2775. 42 C.J.S. Indemnity § 13.
Field Civ. C. Sec. 1527.

30-305. (8167) Indemnity to several. An agreement to indemnify several persons applies to each, unless a contrary intention appears.

History: En. Sec. 3584, Civ. C. 1895; 8167, R. C. M. 1921. Cal. Civ. C. Sec. 2776.
re-en. Sec. 5652, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1528.

30-306. (8168) Persons indemnifying liable jointly or severally with person indemnified. One who indemnifies another against an act to be done by the latter is liable jointly with the person indemnified, and separately to every person injured by such act.

History: En. Sec. 3585, Civ. C. 1895;
re-en. Sec. 5653, Rev. C. 1907; re-en. Sec.
8168, R. C. M. 1921. Cal. Civ. C. Sec.
2777. Field Civ. C. Sec. 1529.

Action Against Insurance Company Not Maintainable Until Liability of Insured Adjudicated

Where an insurance company agrees under a public liability policy to indemnify the owner of an automobile for damages arising from its operation, specifically providing, however, that no action against it (the insurer) for injuries sustained shall be brought unless final judgment remains unsatisfied, this section, declaring that the insurer is jointly liable with the indemnitee, does not operate prior to an adjudication of liability against the insured; hence an action by the injured person prior to such adjudication does not lie against the insurer alone nor against it joined as defendant with the insured. *Conley v. United States Fidelity Co.*, 98 M 31, 37 P 2d 565.

"An Act to be Done"

The phrase "an act to be done," as used in this section, with reference to which the indemnity exists, clearly implied an act the nature of which is known to the parties, and one of which is yet anticipated. It also strongly implies that the liability contemplated is to accrue from the doing of the act, and not upon the contract of indemnity. *Cummings v. Reins Copper Co.*, 40 M 599, 620, 107 P 904;

Conley v. United States Fidelity Co., 98 M 31, 37 P 2d 565.

Declaratory of the Common Law

This section is simply declaratory of the common law, and has no application to a case in which one company has contracted to indemnify another employing company for damages to its employees; one of the companies, if answerable at all, is liable for contract; the other for a tort. *Cummings v. Reins Copper Co.*, 40 M 599, 620, 107 P 904.

General Import of Section

The import of this section is, that the indemnitor gives a bond, in consideration of which the indemnitee agrees to or is induced to act, or refrain from acting, to the injury of a third person. *Northam v. Casualty Co. of America*, 177 Fed 981, 984.

"To Be Done By"

The phrase "to be done by," as used in this section, implies on the part of the indemnitee an agreement or obligation to commit the tort in question, as if the phrase were "an act required (or demanded or requested) to be done by" the indemnitee, and, as so construed, the section is merely declaratory of the common law. *Northam v. Casualty Co. of America*, 177 Fed 981, 984.

Collateral References

Indemnity § 7.
42 C.J.S. Indemnity § 10.

30-307. (8169) Rules for interpreting agreement of indemnity. In the interpretation of a contract of indemnity, the following rules are to be applied, unless a contrary intention appears:

1. Upon an indemnity against liability, expressly, or in other equivalent terms, the person indemnified is entitled to recover upon becoming liable.

2. Upon an indemnity against claims, or demands, or damages, or costs, expressly, or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof.

3. An indemnity against claims, or demands, or liability, expressly, or in other equivalent terms, embraces the costs of defense against such claims, demands, or liability incurred in good faith, and in the exercise of a reasonable discretion.

4. The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity, but the person indemnified has the right to conduct such defenses, if he chooses to do so.

5. If, after request, the person indemnifying neglects to defend the person indemnified, a recovery against the latter, suffered by him in good faith, is conclusive in his favor against the former.

6. If the person indemnifying, whether he is a principal or a surety in the agreement, has not reasonable notice of the action or proceeding against the person indemnified, or is not allowed to control its defense, judgment against the latter is only presumptive evidence against the former.

7. A stipulation, that a judgment against the person indemnified shall be conclusive upon the person indemnifying, is inapplicable if he had a good defense upon the merits, which by want of ordinary care he failed to establish in the action.

History: En. Sec. 3586, Civ. C. 1895; re-en. Sec. 5654, Rev. C. 1907; re-en. Sec. 8169, R. C. M. 1921. Cal. Civ. C. Sec. 2778. Field Civ. C. Sec. 1530.

Operation and Effect

Where the names of two sureties appear in the body of an indemnifying bond, which is, however, signed by but one, the condition of the bond is notice to the obligee, so as to permit the defense, by the surety signing, that his liability was conditioned on obtaining the signature of his cosurety. *City of Butte v. Cook*, 29 M 88, 95, 74 P 67.

The burden is on the indemnifying person in a suit on the contract of indemnity to rebut the presumption raised by this section. *City of Butte v. Cook*, 29 M 88, 92, 74 P 67.

In an action on an indemnity policy, the burden is upon the insurer to rebut the presumption provided for by this section, that if after request the insurer neglects to defend the person indemnified, a recovery against the latter suffered by him in good faith is conclusive in his favor against the insurer. *Independent M. & C. Co. v. Aetna L. I. Co.*, 68 M 114, 157, 216 P 1109.

References

Union Electric Co. v. Lovell Livestock Co., 93 M 577, 583, 20 P 2d 255.

Collateral References

Indemnity—6-11.
42 C.J.S. Indemnity § 8.
27 Am. Jur. 462, Indemnity, §§ 13-15.

30-308. (8170) When person indemnifying is a surety. Where one, at the request of another, engages to answer in damages, whether liquidated or unliquidated, for any violation of duty on the part of the latter, he is entitled to be reimbursed in the same manner as a surety, for whatever he may pay.

History: En. Sec. 3587, Civ. C. 1895; re-en. Sec. 5655, Rev. C. 1907; re-en. Sec. 8170, R. C. M. 1921. Cal. Civ. C. Sec. 2779. Field Civ. C. Sec. 1531.

Collateral References
Indemnity ⇨ 16.
42 C.J.S. Indemnity § 38.

CHAPTER 4

SURETYSHIP—SURETIES AND THEIR LIABILITY

- Section 30-401. Surety defined.
30-402. Apparent principal may show that he is surety.
30-403. Limit of surety's obligation.
30-404. Rules of interpretation.
30-405. Judgment against surety does not alter the relation.
30-406. Surety exonerated by performance or offer of performance.
30-407. Surety discharged by certain acts of the creditor.

30-401. (8195) Surety defined. A surety is one who, at the request of another, and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person, or hypothecates property as security therefor.

History: En. Sec. 3670, Civ. C. 1895; re-en. Sec. 5680, Rev. C. 1907; re-en. Sec. 8195, R. C. M. 1921. Cal. Civ. C. Sec. 2831. Field Civ. C. Sec. 1558.

defendants would pay such sum, not exceeding two hundred dollars, the defendants were sureties within the meaning of this section. *Cole Mfg. Co. v. Morton*, 24 M 58, 61, 60 P 587.

Distinction Between Surety and Guarantor

The codes preserve the general distinction between suretyship and guaranty, which is that a surety is bound with the principal as an original promisor on the same contract, while the guarantor makes his own separate contract. This distinction is to be observed in this section. *Cole Mfg. Co. v. Morton*, 24 M 58, 61, 60 P 587.

Pledging Property as Surety for Obligation of Another—Pledgor a Surety

The owner of property who pledges it as security for the obligation of another person becomes a surety, and as such is discharged from liability where the creditor, without the pledgor's consent, alters the terms of the original obligation or in anywise impairs or suspends any remedies he may have against the principal. *Vinson v. Pelletier et al.*, 78 M 254, 271, 255 P 1067.

Surety in General

Where part of an agreement creating an agency was a bond executed to plaintiff by the agent and the defendants, conditioned that if the agent failed to perform his duties, and pay over to the plaintiff such sums as might be due him, the

When Negotiable Instruments Act Supersedes the Law of Suretyship

Held, that the Uniform Negotiable Instruments Act (secs. 55-101 to 55-1706) supersedes the law of suretyship (secs. 30-401 to 30-507) as theretofore applicable to negotiable instruments, and that therefore one who signed a note as maker bound himself absolutely to pay, though in fact but an accommodation maker, and could not escape liability to a holder in due course under a plea of having been a surety only. *Merchants' Nat. Bank v. Smith et al.*, 59 M 280, 288, 196 P 523.

References

Cited or applied as section 5680, Revised Codes, in *Columbus State Bank v. Erb*, 50 M 422, 449, 147 P 617; *State ex rel. Barnett v. Reynolds et al.*, 68 M 572, 576, 220 P 525; *Butte Mach. Co. v. Carbonate Hill Mill. Co.*, 75 M 167, 170, 242 P 956; *Gary Hay & Grain Co., Inc. v. Carlson*, 79 M 111, 123, 255 P 722.

Collateral References

Principal and Surety ⇨ 1.
72 C.J.S. Principal and Surety § 2.
50 Am. Jur. 903, Suretyship, § 2.

30-402. (8196) Apparent principal may show that he is surety. One who appears to be a principal, whether by the terms of a written instrument or otherwise, may show that he is in fact a surety, except as against persons who have acted on the faith of his apparent character of principal.

History: En. Sec. 3671, Civ. C. 1895; re-en. Sec. 5681, Rev. C. 1907; re-en. Sec. 8196, R. C. M. 1921. Cal. Civ. C. Sec. 2832. Field Civ. C. Sec. 1559.

Operation and Effect

In an action between the original parties to a contract, it is competent to show

that the purchaser of an automobile was the principal and each of the other defendants a surety only. *Stanhope v. Shambow*, 54 M 360, 364, 170 P 753.

Collateral References

Principal and Surety↔45.
72 C.J.S. Principal and Surety § 12.

30-403. (8197) Limit of surety's obligation. A surety cannot be held beyond the express terms of his contract, and if such contract prescribes a penalty for its breach, he cannot in any case be liable for more than the penalty.

History: En. Sec. 3680, Civ. C. 1895; re-en. Sec. 5682, Rev. C. 1907; re-en. Sec. 8197, R. C. M. 1921. Cal. Civ. C. Sec. 2836. Field Civ. C. Sec. 1560.

Operation and Effect

Stay of execution being a consideration of great value, sureties who execute an undertaking therefor have a right to rely upon the letter of their bond, and to stand upon the entirety of the expressed consideration therein, and their liability cannot be extended by implication. This principle is formulated in this section and the next succeeding section. *State ex rel. Reins v. District Court*, 22 M 449, 453, 57 P 89, 145.

Where the law defines the duties of a public officer, his sureties are responsible for the faithful performance of such du-

ties only, and not for acts not pertaining thereto; and under this rule an action did not lie against the sureties on a county assessor's bond to recover moneys improperly paid to him as compensation for the collection by him of certain city taxes, which is a duty imposed by law upon other officers. *City of Butte v. Bennetts*, 51 M 27, 30, 149 P 92.

References

Merchants' Nat. Bank v. Smith et al., 59 M 280, 288, 196 P 523; *Gilna v. Fidelity & Deposit Co. et al.*, 83 M 231, 239, 272 P 540.

Collateral References

Principal and Surety↔66.
72 C.J.S. Principal and Surety § 90.
50 Am. Jur. 921, Suretyship, §§ 29 et seq.

30-404. (8198) Rules of interpretation. In interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts.

History: En. Sec. 3681, Civ. C. 1895; re-en. Sec. 5683, Rev. C. 1907; re-en. Sec. 8198, R. C. M. 1921. Cal. Civ. C. Sec. 2837. Field Civ. C. Sec. 1561.

Operation and Effect

Though sureties are, in a sense, favorites in the law, such rule does not prevent a recovery when the facts are sufficient to show that the provisions of a bond given by them have been breached. *Roper v. Caterpillar Tractor Co. et al.*, 98 M 76, 89, 37 P 2d 812.

References

Cited or applied as section 3681, Civil Code, in *State ex rel. Reins v. District Court*, 22 M 449, 453, 57 P 89, 145; *Whittaker v. United States Fidelity & Guaranty Co.*, 300 Fed 129.

Collateral References

Principal and Surety↔59.
72 C.J.S. Principal and Surety § 100.

30-405. (8199) Judgment against surety does not alter the relation. Notwithstanding the recovery of judgment by a creditor against a surety, the latter still occupies the relation of surety.

History: En. Sec. 3682, Civ. C. 1895; re-en. Sec. 5684, Rev. C. 1907; re-en. Sec. 8199, R. C. M. 1921. Cal. Civ. C. Sec. 2838. Field Civ. C. Sec. 1562.

Collateral References

Principal and Surety↔163.
72 C.J.S. Principal and Surety § 277.

30-406. (8200) Surety exonerated by performance or offer of performance. Performance of the principal obligation, or an offer of such performance, duly made as provided in this code, exonerates a surety.

History: En. Sec. 3683, Civ. C. 1895; re-en. Sec. 5685, Rev. C. 1907; re-en. Sec. 8200, R. C. M. 1921. Cal. Civ. C. Sec. 2839. Based on Field Civ. C. Sec. 1563.

Collateral References

Principal and Surety—90.
72 C.J.S. Principal and Surety § 232.
50 Am. Jur. 932, Suretyship, §§ 40 et seq.

30-407. (8201) Surety discharged by certain acts of the creditor. A surety is exonerated:

1. In like manner with a guarantor;
2. To the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his rights, or which lessens his security; or,
3. To the extent to which he is prejudiced by an omission of the creditor to do anything, when required by the surety, which it is his duty to do.

History: En. Sec. 3684, Civ. C. 1895; re-en. Sec. 5686, Rev. C. 1907; re-en. Sec. 8201, R. C. M. 1921. Cal. Civ. C. Sec. 2840. Field Civ. C. Sec. 1564.

Crystallization of the Common Law

The next section, providing that a surety has all the rights of a guarantor, and this section and section 30-208, declaring when a surety and a guarantor are exonerated, are but crystallizations of common-law principles, and therefore common-law rules must be followed in their interpretation, unless otherwise provided by statute. United States B. & L. Assn. v. Burns, 90 M 402, 416 et seq., 4 P 2d 703.

Effect of Impossibility of Performance of Contract by Principal

In holding a contract void because the impossibility preventing performance was due to the nature of the thing the contracting company undertook to do, i. e., to obtain a yield of gasoline which could not, by any means be done, held that the contractor was entitled to a recovery on the quantum meruit; his bond did not permit recovery of damages; a collateral promise in the contract consisting of warranty was invalid and would not support action for breach of warranty; and contractor's lien was supported by the implied contract. Smith Engineering Co. v. Rice, 102 F 2d 492.

Operation in General

Where indorsers on a note knew of, and impliedly gave their assent to, sales of livestock mortgaged to secure it, they were estopped, on the theory that their liability was that of sureties only, to insist that the mortgagee, by permitting the mortgagor to make the sales, had impaired the mortgage security, and that they had been injured by the mortgagor's mismanagement and misappropriation of the proceeds. Columbus State Bank v. Erb, 50 M 442, 453, 147 P 617.

Release of Sureties in General

The surety on an undertaking to secure

the release of property from attachment enters into the obligation with reference to the cause as it then stands; and if the plaintiff in the action in which the attachment was levied, without the consent of the surety, subsequently changes his pleading so as to state another and different cause of action, it is such a change as will work a release of the surety. Gilna v. Fidelity & Deposit Co. et al., 83 M 231, 272 P 540.

In an action on the official bond of a sheriff to recover damages for the wrongful conversion of attached property by the officer, in which defendant surety claimed that its rights had been prejudiced by the release of sureties on an indemnity bond given the sheriff on refusal to release the attached property, held under the above rule, that since the released sureties were not liable under their bond for the tort committed by the sheriff, defendant surety company was not prejudiced by their release within the meaning of this section, and therefore their release did not result in its exoneration to the extent of the alleged prejudice. McGinley v. Maryland Casualty Co., 85 M 1, 6, 277 P 414.

Under section 30-208, this section and the following section, held that where a creditor bank in an action against the receiver of an insolvent debtor bank compromised its claim against the latter thereon, thus discharging its obligation and suspending its rights and remedies against the principal, without the consent of the sureties, they were exonerated. First Nat. Bank v. Holding et al., 90 M 529, 536, 4 P 2d 709.

Release of Surety Special Defense and Must be Plead

Release of a surety is a special defense which must be pleaded; hence where it was not pleaded, refusal to permit defendant sureties to ask a witness for plaintiff whether plaintiff had not accepted a receiver's certificate in partial satisfaction of the obligation sued on, in an effort to establish that defense, was proper; the ruling was further correct because of fail-

ure of an offer of proof that the certificate had been accepted in partial satisfaction of plaintiff's claim or that the sureties had been prejudiced by its acceptance. *Mutual Oil Co. v. Hamilton et al.*, 73 M 385, 391, 236 P 545.

When Negotiable Instrument Act Supersedes the Law of Suretyship

Held, that the Uniform Negotiable Instruments Act (secs. 55-101 to 55-1706) supersedes the law of suretyship (secs. 30-401 to 30-507) as theretofore applicable to negotiable instruments, and that therefore one who signed a note as maker bound himself absolutely to pay, though in fact but an accommodation maker, and could not escape liability to a holder in due course under a plea of having been a surety only. *Merchants' Nat. Bank v. Smith et al.*, 59 M 280, 288, 196 P 523.

Where Prejudice or Injury Must be Shown to Release Sureties

Where a lease of real property provided that rent should be paid quarterly in advance, a bond being given to secure the payment of the rent, and the lessor voluntarily, and without consideration therefor, reduced the rent for one quarter, and at different times permitted the lessee to

make payments at irregular intervals, and not as provided in the lease, the sureties on the bond were not released from liability under any of the subdivisions of this section, in the absence of any showing that they were injured or prejudiced by the action of the lessor. *Dodd v. Vucovich*, 38 M 188, 193, 99 P 296. See *National Surety Co. v. Lincoln County*, 238 Fed 705, 711.

The second and third subdivisions of this section are controlling, notwithstanding the provisions of section 30-208, so that a surety is not released by premature payments to his principal, whereby the surety could not be injured. *National Surety Co. v. Lincoln County*, 238 Fed 705, 712.

References

Vinson v. Pelletier et al., 78 M 254, 255 P 1067.

Collateral References

Principal and Surety §90.
72 C.J.S. *Principal and Surety* § 232.

Discharge of surety by release of mortgage or other security given for note. 2 ALR 2d 260.

CHAPTER 5

RIGHTS OF SURETIES AND CREDITORS

- Section 30-501. Surety has rights of guarantor.
 30-502. Surety may require the creditor to proceed against the principal.
 30-503. Surety may compel principal to perform obligations when due.
 30-504. A principal bound to reimburse his surety.
 30-505. Surety's right of subrogation—contribution from cosureties.
 30-506. Surety entitled to benefit of securities held by creditor.
 30-507. The property of principal to be taken first.
 30-508. Creditor entitled to benefit of securities held by surety.

30-501. (8202) Surety has rights of guarantor. A surety has all the rights of a guarantor, whether he becomes personally responsible or not.

History: En. Sec. 3690, Civ. C. 1895; re-en. Sec. 5687, Rev. C. 1907; re-en. Sec. 8202, R. C. M. 1921. Cal. Civ. C. Sec. 2844. Field Civ. C. Sec. 1565.

Crystallization of Common Law

This section, providing that a surety has all the rights of a guarantor, and the preceding section and section 30-208, declaring when a surety and a guarantor are exonerated, are but crystallizations of common-law principles, and therefore common-law rules must be followed in their interpretation, unless otherwise provided by statute. *United States B. & L. Assn. v. Burns*, 90 M 402, 416, 4 P 2d 703.

References

Mutual Oil Co. v. Hamilton et al., 73 M 385, 391, 236 P 545; *Shipman v. Terrill et al.*, 84 M 322, 338, 276 P 21; *First Nat. Bank v. Holding et al.*, 90 M 529, 536, 4 P 2d 709; *Brown v. Federal Surety Co.*, 91 M 389, 400, 8 P 2d 647; *Smith Engineering Co. v. Rice*, 102 F 2d 492, 499.

Collateral References

Principal and Surety §167.
72 C.J.S. *Principal and Surety* § 286.

30-502. (8203) Surety may require the creditor to proceed against the principal. A surety may require his creditor to proceed against the principal, or to pursue any other remedy in his power which the surety cannot himself pursue, and which would lighten his burden; and if in such case the creditor neglects to do so, the surety is exonerated to the extent to which he is thereby prejudiced.

History: En. Sec. 3691, Civ. C. 1895; re-en. Sec. 5688, Rev. C. 1907; re-en. Sec. 8203, R. C. M. 1921. Cal. Civ. C. Sec. 2845. Field Civ. C. Sec. 1566.

Operation and Effect

Under this section and 30-506, the surety on a bond of a road contractor given the state highway commission pursuant to section 32-1608, acquired an equity in the earnings of the contractor remaining in the hands of the commission, superior to that of a bank to which the contractor had made an assignment of moneys due him under the contract as security for loans extended, and was entitled to have the funds retained by the commission applied in satisfaction of labor and material claims, payment of which was secured by the bond, before any portion of it was paid to the assignee. *Lanstrum et al. v. Zumwalt et al.*, 73 M 502, 513, 237 P 205.

Under this section, an administratrix with the will annexed must withhold from the distributive share of a former executor (who was also a beneficiary under the will) any moneys for which such former executor became indebted to the estate during his administration thereof, when required by the surety of such former executor to do so, otherwise the surety will be exonerated to the extent that the distributive share will cover the indebtedness, since the surety as well as the estate of the former executor is liable for the indebtedness. *Maryland Casualty Co. v. Walsh*, 116 M 559, 562, 155 P 2d 759.

Collateral References

Principal and Surety \S 168.
72 C.J.S. Principal and Surety \S 287.
50 Am. Jur. 1071, Suretyship, $\S\S$ 255, 256.

30-503. (8204) Surety may compel principal to perform obligations when due. A surety may compel his principal to perform the obligations when due.

History: En. Sec. 3692, Civ. C. 1895; re-en. Sec. 5689, Rev. C. 1907; re-en. Sec. 8204, R. C. M. 1921. Cal. Civ. C. Sec. 2846. Field Civ. C. Sec. 1567.

References

Maryland Casualty Co. v. Walsh, 116 M 559, 564, 155 P 2d 759.

Collateral References

Principal and Surety \S 173.
72 C.J.S. Principal and Surety \S 300.

30-504. (8205) A principal bound to reimburse his surety. If a surety satisfies the principal obligation, or any part thereof, whether with or without legal proceedings, the principal is bound to reimburse what he has disbursed, including necessary costs and expenses; but the surety has no claim for reimbursement against other persons, though they may have been benefited by his act, except as prescribed by the next section.

History: En. Sec. 3693, Civ. C. 1895; re-en. Sec. 5690, Rev. C. 1907; re-en. Sec. 8205, R. C. M. 1921. Cal. Civ. C. Sec. 2847. Field Civ. C. Sec. 1568.

satisfied. *Maryland Casualty Co. v. Walsh*, 116 M 559, 561, 155 P 2d 759.

Equitable Assignments—Procedure to Determine Heirship

Agreement of Principal to Reimburse Surety—When Material

Since the principal is bound under this section to reimburse the surety for what he has disbursed, an agreement of principal to do so when applying for the bond becomes material only if it entitles the surety to indemnity without any part of the principal obligation having been

Where bonding company claimed an equitable assignment of principal's distributive share of estate on theory that an agreement in application for bond to indemnify surety for expense of suit incurred under the bond constituted such assignment, and proceeded under sections 91-3801 to 91-3803 to determine heirship and interests in estate, held, that neither

statutory nor contractual liability constitute equitable assignment of principal's property; nor does plaintiff's claim have priority over all other claims. *Maryland Casualty Co. v. Walsh*, 116 M 559, 562, 155 P 2d 759.

If Legally Bound to Pay

While it is the law that unless a surety is legally bound to make payment on behalf of his principal he is not entitled to reimbursement, and if he makes payment he is a volunteer-payer, it is not the law that he is legally bound only after judicial determination, the foregoing section providing otherwise; if he can prove that he was legally bound to pay, he can recover in an action for reimbursement, under attachment. *Kipp v. Paul*, 110 M 513, 515, 103 P 2d 675.

30-505. (8206) Surety's right of subrogation—contribution from co-sureties. A surety, upon satisfying the obligation of the principal, is entitled to enforce every remedy which the creditor then has against the principal to the extent of reimbursing what he has expended, and also to require all his co-sureties to contribute thereto, without regard to the order of time in which they became such.

History: En. Sec. 3694, Civ. C. 1895; re-en. Sec. 5691, Rev. C. 1907; re-en. Sec. 8206, R. C. M. 1921. Cal. Civ. C. Sec. 2848. Field Civ. C. Sec. 1569.

Cross-Reference

Subrogation of surety on appeal bond, sec. 93-8715.

Implied Contract of Co-sureties to Contribute

Where one of several sureties is compelled to pay the principal debtor's obligation, the law implies a contract on the part of his co-sureties to contribute their share, and such implied contract is one for the direct payment of money, warranting the issuance of a writ of attachment in an action for contribution against the co-sureties, even though he may not have been judicially compelled to make payment. *Kipp v. Paul*, 110 M 518, 519, 103 P 2d 675.

Operation and Effect

Where deposits of state funds are secured by a bond, and the surety is compelled to pay the amount thereof upon failure of the bank, the right of the state, if existent and not lost in some way, passes by subrogation to the surety. *Aetna Accident & Liability Co. v. Miller*, 54 M 377, 382, 170 P 760.

30-506. (8207) Surety entitled to benefit of securities held by creditor. A surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor, or by a co-surety at the time

Operation and Effect

The relations between parties to accommodation paper are those of principal and surety, and therefore the right of the accommodation party to recourse against the party accommodated is that of a surety against the principal debtor, i. e., the principal is bound to reimburse the surety for what he had disbursed, including necessary costs and expenses and an agreement to repay is unnecessary to constitute a cause of action to recover the amount paid by the accommodation maker in a suit by his special administrator. *Bielenberg v. Higgins et al.*, 85 M 69, 71, 277 P 636.

Collateral References

Principal and Surety—185.
72 C.J.S. Principal and Surety § 307.
50 Am. Jur. 1049, Suretyship, § 221.

An action by a surety for contribution from his co-surety is one on an implied contract for money paid by the former for the use and benefit of the latter, which the latter unconditionally and absolutely is required to pay, under this section, in a definite sum, to-wit, his proportion of the amount which plaintiff was required to pay on the undertaking; hence the action is one for the direct payment of money in which attachment may issue. *Wall v. Brookman*, 72 M 228, 232, 232 P 774.

Proper Case for Attachment Proceedings

Where a surety is compelled to pay the principal's obligation, the law implies a contract on the part of the principal to reimburse his surety, and such a contract is one for the direct payment of money presenting a proper case for attachment proceedings. *Kipp v. Paul*, 110 M 513, 515, 103 P 2d 675.

Collateral References

Principal and Surety—194; Subrogation—7.
72 C.J.S. Principal and Surety § 352;
83 C.J.S. Subrogation § 47.
50 Am. Jur. 1082, Suretyship, §§ 270 et seq.

of entering into the contract of suretyship, or acquired by him afterwards, whether the surety was aware of the security or not.

History: En. Sec. 3695, Civ. C. 1895; re-en. Sec. 5692, Rev. C. 1907; re-en. Sec. 8207, R. C. M. 1921. Cal. Civ. C. Sec. 2849. Field Civ. C. Sec. 1570.

Operation and Effect

Under section 30-502, and this section, the surety on a bond of a road contractor given the state highway commission pursuant to section 32-1608, acquired an equity in the earnings of the contractor remaining in the hands of the commission, superior to that of a bank to which the contractor had made an assignment of moneys due him under the contract as security for loans extended, and was entitled to have the funds retained by the commission applied in satisfaction of labor and material claims, payment of which was secured by the bond, before any portion of it was paid to the assignee. *Lanstrum et al. v. Zumwalt et al.*, 73 M 502, 513, 237 P 205.

Where a road construction contractor in

his application for a surety company bond to secure the performance of his contract assigns his tools, equipment, etc., to the surety, the assignment to become of full force and effect upon his failure or inability to complete the work, the application constitutes a chattel mortgage upon the property as between him and the surety. *Brown v. Federal Surety Co.*, 91 M 389, 400, 8 P 2d 647.

References

Cited or applied as section 5692, Revised Codes, in *Aetna Accident & Liability Co. v. Miller*, 54 M 377, 382, 170 P 760; *Merchants' Nat. Bank v. Smith et al.*, 59 M 280, 288, 196 P 523; *McGinley v. Maryland Casualty Co.*, 85 M 1, 6, 277 P 414.

Collateral References

Subrogation \Rightarrow 7, 9.
83 C.J.S. Subrogation §§ 47, 58.
50 Am. Jur. 1072, Suretyship, §§ 257, 258.

30-507. (8208) The property of principal to be taken first. Whenever property of a surety is hypothecated with property of the principal, the surety is entitled to have the property of the principal first applied to the discharge of the obligation.

History: En. Sec. 3696, Civ. C. 1895; re-en. Sec. 5693, Rev. C. 1907; re-en. Sec. 8208, R. C. M. 1921. Cal. Civ. C. Sec. 2850. Field Civ. C. Sec. 1571.

30-508. (8209) Creditor entitled to benefit of securities held by surety. A creditor is entitled to the benefit of everything which a surety has received from the debtor by way of security for the performance of the obligation, and may, upon the maturity of the obligation, compel the application of such security to its satisfaction.

History: En. Sec. 3700, Civ. C. 1895; re-en. Sec. 5694, Rev. C. 1907; re-en. Sec. 8209, R. C. M. 1921. Cal. Civ. C. Sec. 2854. Field Civ. C. Sec. 1572.

Operation and Effect

In an action to recover on an appeal bond, where it appeared that a stranger to the original action had deposited in bank a sum of money to indemnify the sureties on the bond, the principal of subrogation embodied in this section, may not be in-

voked by the creditor. *O'Neill v. State Savings Bank*, 34 M 521, 526, 87 P 970.

References

Kinyon Inc. Co. v. Belmont State Bank, 69 M 282, 287, 221 P 286.

Collateral References

Principal and Surety \Rightarrow 147(1).
72 C.J.S. Principal and Surety § 282.
50 Am. Jur. 1020, Suretyship, §§ 177 et seq.

CHAPTER 6

LETTERS OF CREDIT

- Section 30-601. Letter of credit defined.
30-602. How addressed.
30-603. Liability of the writer.
30-604. Letters of credit either general or special
30-605. Nature of general letter of credit.

- 30-606. Extent of general letter of credit.
 30-607. A letter of credit may be a continuing guaranty.
 30-608. When notice of the writer necessary.
 30-609. The credit given must agree with the terms of the letter.

30-601. (8210) Letter of credit defined. A letter of credit is a written instrument, addressed by one person to another, requesting the latter to give credit to the person in whose favor it is drawn.

History: En. Sec. 3710, Civ. C. 1895;
 re-en. Sec. 5695, Rev. C. 1907; re-en. Sec.
 8210, R. C. M. 1921. Cal. Civ. C. Sec. 2858.

Collateral References

Banks and Banking 191.
 9 C.J.S. Banks and Banking §§ 175-183.
 24 Am. Jur. 888, Guaranty, §§ 20-28.

Cross-Reference

Banks may issue letters of credit, sec.
 5-1001.

30-602. (8211) How addressed. A letter of credit may be addressed to several persons in succession.

History: En. Sec. 3711, Civ. C. 1895;
 re-en. Sec. 5696, Rev. C. 1907; re-en. Sec.
 8211, R. C. M. 1921. Cal. Civ. C. Sec. 2859.

30-603. (8212) Liability of the writer. The writer of a letter of credit is, upon the default of the debtor, liable to those who gave credit in compliance with its terms.

History: En. Sec. 3712, Civ. C. 1895;
 re-en. Sec. 5697, Rev. C. 1907; re-en. Sec.
 8212, R. C. M. 1921. Cal. Civ. C. Sec. 2860.

Collateral References

24 Am. Jur. 890, Guaranty, § 23.

30-604. (8213) Letters of credit either general or special. A letter of credit is either general or special. When the request for credit in a letter is addressed to specified persons by name or description, the letter is special. All other letters of credit are general.

History: En. Sec. 3713, Civ. C. 1895;
 re-en. Sec. 5698, Rev. C. 1907; re-en. Sec.
 8213, R. C. M. 1921. Cal. Civ. C. Sec. 2861.

30-605. (8214) Nature of general letter of credit. A general letter of credit gives any person to whom it may be shown authority to comply with its request, and by his so doing it becomes, as to him, of the same effect as if addressed to him by name.

History: En. Sec. 3714, Civ. C. 1895;
 re-en. Sec. 5699, Rev. C. 1907; re-en. Sec.
 8214, R. C. M. 1921. Cal. Civ. C. Sec. 2862.

30-606. (8215) Extent of general letter of credit. Several persons may successively give credit upon a general letter.

History: En. Sec. 3715, Civ. C. 1895;
 re-en. Sec. 5700, Rev. C. 1907; re-en. Sec.
 8215, R. C. M. 1921. Cal. Civ. C. Sec. 2863.

30-607. (8216) A letter of credit may be a continuing guaranty. If the parties to a letter of credit appear, by its terms, to contemplate a course of future dealings between the parties, it is not exhausted by giving a credit, even to the amount limited by the letter, which is subsequently reduced or satisfied by payments made by the debtor, but is to be deemed a continuing guaranty.

History: En. Sec. 3716, Civ. C. 1895; 9 C.J.S. Banks and Banking §§ 175-183;
 re-en. Sec. 5701, Rev. C. 1907; re-en. Sec. 38 C.J.S. Guaranty § 7.
 8216, R. C. M. 1921. Cal. Civ. C. Sec. 2864.

Collateral References

Banks and Banking 191, and other
 particular topics; Guaranty 38.

30-608. (8217) When notice of the writer necessary. The writer of a letter of credit is liable for credit given upon it without notice to him, unless its terms express or imply the necessity of giving notice.

History: En. Sec. 3717, Civ. C. 1895;
 re-en. Sec. 5702, Rev. C. 1907; re-en. Sec.
 8217, R. C. M. 1921. Cal. Civ. C. Sec. 2865.

30-609. (8218) The credit given must agree with the terms of the letter. If a letter of credit prescribes the persons by whom, or the mode in which, the credit is to be given, or the terms of credit, or limits the amount thereof, the writer is not bound except for transactions which, in these respects, conform strictly to the terms of the letter.

History: En. Sec. 3718, Civ. C. 1895;
 re-en. Sec. 5703, Rev. C. 1907; re-en. Sec.
 8218, R. C. M. 1921. Cal. Civ. C. Sec. 2866.

TITLE 31

HIGHWAY PATROL

- Chapter 1. Montana highway patrol—creation—powers and duties, 31-101 to 31-162.
2. Highway patrolmen's retirement system, 31-201 to 31-227.
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CHAPTER 1

MONTANA HIGHWAY PATROL—CREATION—POWERS AND DUTIES

- Section 31-101. Montana highway patrol created.
31-102. Board defined—chairman.
31-103. Organization—rules and regulations.
31-104. Supervisor—term—salary—supervisory power—resident requirement.
31-105. Qualifications of patrolmen—salary—probationary training—discharge—demotion—suspension—hearing.
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31-107. Speed limits—establishment of speed zones and penalties.
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- 31-152. Right of appeal to court.
- 31-153. Unlawful use of license.
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- 31-155. Driving while license suspended or revoked.
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- 31-157. Employing unlicensed chauffeur.
- 31-158. Renting motor vehicle to another.
- 31-159. Penalty for misdemeanor.
- 31-160. Uniformity of interpretation.
- 31-161. Short title.
- 31-162. Constitutionality.

31-101. Montana highway patrol created. There is hereby created a "Montana highway patrol" under the control and supervision of the Montana highway patrol board.

History: En. Sec. 1, Ch. 199, L. 1943.

Cross-Reference

NOTE.—Earlier Acts were Ch. 185, Laws 1935 appearing as sections 1741.2 to 1741.12, R. C. M. 1935, amended by Ch. 182, Laws 1937 and by Ch. 199, Laws 1943.

Accidents on highways, reports, sec. 32-1208.

Collateral References

Highways—92.
39 C.J.S. Highways § 162.

31-102. Board defined—chairman. The members of the state highway commission shall comprise the Montana highway patrol board and the chairman of the state highway commission shall be the chairman of the Montana highway patrol board.

History: En. Sec. 2, Ch. 199, L. 1943.

31-103. Organization—rules and regulations. The Montana highway patrol board shall maintain a permanent place of business at the state capitol and shall meet at least once each month for the purpose of transacting its business. The Montana highway patrol shall provide for clerical help, provide for the maintenance of the patrol and for the employment and supervision of the patrol in conformity with the provisions of this act. The Montana highway patrol shall furnish the governor of the state of Montana with automobile transportation upon his request, provided that such transportation shall be limited to travel and transportation of the governor while on official business of the state of Montana.

History: En. Sec. 3, Ch. 199, L. 1943;
amd. Sec. 1, Ch. 55, L. 1945.

31-104. Supervisor — term — salary — supervisory power — resident requirement. The board shall select a highway patrol supervisor who shall hold his office until his appointment has terminated for cause, as herein-after set forth, and shall receive a salary of six thousand dollars (\$6,000.00) per annum, and necessary traveling expenses. The supervisor shall have direct control and supervision of all patrolmen, subject to the approval

of the Montana highway patrol board. The person named as supervisor shall have been a continuous resident of Montana for at least five (5) years.

History: En. Sec. 4, Ch. 199, L. 1943.

Collateral References

NOTE.—The supervisor's salary in the above section has been changed to conform to later amendments to section 31-105.

Highways 93, 94, 95(1).

39 C.J.S. Highways §§ 163-165, 167, 168.

31-105. Qualifications of patrolmen—salary—probationary training—discharge—demotion—suspension—hearing. The board shall designate and name assistant supervisors, not to exceed four (4) in number, patrol sergeants not to exceed four (4) in number, one (1) director of public safety and education, and patrolmen in such numbers as the board may deem necessary. Said patrolmen shall be chosen in equal numbers in the twelve (12) highway districts. Replacements and additions to the force shall be selected in the same manner. The salaries of patrolmen and other officers shall not exceed those named in the following schedule to wit: Patrolmen: three hundred and fifty dollars (\$350.00) per month; sergeants, three hundred and seventy-five dollars (\$375.00) per month; assistant supervisors, director of public safety and education, four hundred dollars (\$400.00) per month; supervisor, six thousand dollars (\$6,000.00) per year; provided, however, that the salary of a probationary patrolman shall not exceed two hundred and fifty dollars (\$250.00) per month during his period of probationary service; in the event that said patrolman is appointed permanently, he shall receive his salary at time of appointment plus twenty dollars (\$20.00) per month for each additional year of service up to and including three hundred fifty dollars (\$350.00) per month. Assistant supervisors, a director of public safety and education, and sergeants shall be selected from the patrolmen by the supervisor, subject to the approval of the highway patrol board. The duties and jurisdiction of the assistant supervisors, director of public safety and sergeants shall be outlined, defined and under the control of the supervisor, subject to the approval of the Montana highway patrol board.

(a) Patrolmen shall possess the following qualifications:

1. Sound and active physical and mental condition.
2. Good moral character.
3. Resident of Montana for at least five (5) years last past.
4. Pass a satisfactory test in the operation of both automobiles and motorcycles.
5. Not over fifty-five per cent (55%) of the patrol shall belong to one political party.

6. Citizen of the United States and state of Montana.

For the purposes of this act, the supervisor, assistant supervisors, director of public safety and education, sergeants and patrolmen shall all be deemed patrolmen. The Montana highway patrol board shall prepare a schedule of compensation and expenses for all patrolmen and submit it to the state board of examiners for their approval, in conformity with this act. All patrolmen shall be placed under probationary training and service for a period of six (6) months to one (1) year, during which time the highway patrol supervisor must recommend to the highway patrol board for permanent appointments or the patrolmen will automatically be dis-

missed. Patrolmen filling vacancies caused by the incumbents' entrance into the armed forces of the United States, shall, on the return of the incumbents be placed in the patrol reserve, without pay; otherwise they shall hold their permanent appointments while there are sufficient operating funds. Reserve patrolmen shall then be used for future replacements in the permanent patrol.

Every person employed or appointed and designated as a supervisor, assistant supervisor, sergeant, director of public safety and education, or patrolman under and pursuant to the provisions of this act, except as above provided, shall continue in service and hold his position without demotion until suspended, demoted, or discharged in the manner hereinafter provided, for one or more of the causes specified in the following paragraph.

(b) Causes for suspension, demotion, or discharge will be:

1. Conviction of any crime involving moral turpitude in any court of competent jurisdiction subsequent to the commencement of such employment.

2. Gross neglect of duty or wilful violation or disobedience of orders or regulations.

3. Loitering about or entering places of ill fame, ill repute, or where gambling is known to be conducted or to be in progress, except in the immediate discharge of duty.

4. Conduct unbecoming an officer.

5. Drinking intoxicating liquor while using state-owned cars or in uniform, or being intoxicated in a public place.

6. Sleeping while on duty.

7. Incapacity, or partial incapacity, materially affecting his ability to perform his official duties.

8. Gross inefficiency in performing duties.

9. Active participation in any political campaign by supporting or opposing, directly or indirectly, any political candidate, or contributing financially or otherwise, directly or indirectly, to the success or defeat of any political party or candidate. The charge or charges against any such employee shall be made in writing and shall be signed and sworn to by the person making the same, which written charge or charges shall be filed with the supervisor of the Montana highway patrol. Any charges involving suspension or dismissal of the supervisor or an assistant supervisor shall be filed directly with the highway patrol board.

Upon the filing of the same, if the supervisor, in his opinion, believes that such charges constitute grounds for discharge, he shall order a hearing to be had thereon before the highway patrol board and fix a time for such hearing, otherwise he shall dismiss such charges.

(c) At least ten (10) days before the time appointed for said hearing, written notice specifying the charge or charges filed and stating the name of the person or persons making the charge or charges shall be served on the said employee personally, if his whereabouts is known, in the state of Montana. If at the time, the whereabouts of the said employee is unknown, or if he be outside of the state of Montana, service may be made upon him

by mailing the said written notice to him at his last known place of residence in Montana.

If the supervisor orders a hearing he may suspend such employee pending the rendition of the decision made in such case.

The highway patrol board shall be the authority to hear such charge or charges and render a decision and appropriate order.

The highway patrol board shall have the power to compel the attendance of witnesses at any such hearing and to examine them under oath and to require the production of books, papers, and other evidence at such hearing and for that purpose issue subpoenas and cause the same to be served and executed in any part of the state.

The employee accused shall be entitled to be confronted with the witnesses against him and have an opportunity to cross-examine the same and to introduce at such hearing testimony in his own behalf and shall be entitled to be represented by counsel at such hearing. The highway patrol board shall within fifteen (15) days after such hearing render its decision in writing and file same in its office with the supervisor and with the employee accused also.

If, after such hearing, the highway patrol board finds that any such charge or charges made against the employee are true, it may punish the offending party by reprimand, suspension without pay, demotion, or dismissal.

(d) Any employee who is so suspended, demoted, or dismissed may have a right of appeal to the district court of Lewis and Clark county, within ten (10) days after such decision or determination of the highway patrol board, and said court shall review such decision or determination in a summary manner and shall render its decision upon such appeal within ninety (90) days from the filing of such appeal in said court. If such decision or determination of the highway patrol board shall be finally reversed or modified by said court, the said employee shall be reinstated in his position and the highway patrol board shall pay to the said employee any salary or wages withheld from him pending the determination of the charge or charges, or as may be directed by the court.

The highway patrol board shall have the authority to order the supervisor to file charges with the board if the supervisor in his judgment does not believe the charge or charges warrant a hearing.

When the highway patrol supervisor has cause to believe that any member of the highway patrol has violated any of the hereinabove specified grounds for suspension, demotion or discharge, or his conduct has warranted reprimanding, he may, with the approval of the Montana highway patrol board, suspend, demote or reprimand the member. Suspension shall be without pay and for a period not to exceed twenty (20) days in time. In cases of demotion, the member shall receive the pay of the classification to which he is demoted.

History: En. Sec. 5, Ch. 199, L. 1943;
amd. Sec. 1, Ch. 187, L. 1951; amd. Sec.
1, Ch. 219, L. 1953.

Collateral References

Highways 93.
39 C.J.S. Highways §§ 163-166.

31-106. Equipment of patrolmen. The highway patrol board shall equip patrolmen with either automobiles or motorcycles, and all said

equipment shall be fitted with a distinctive siren and a particularly designated light at night. The patrol board shall furnish all permanent patrolmen with one initial overcoat, and one cap, one blouse, one shirt, and one pair of trousers per man per year, or three-fourths of their respective values in cash, with the approval of the assistant supervisor of their respective districts.

History: En. Sec. 6, Ch. 199, L. 1943. 39 C.J.S. Highways § 168.

Collateral References

Highways 95(1).

31-107. Speed limits—establishment of speed zones and penalties. No person shall drive a motor vehicle on a public highway of this state at a speed greater or less than is reasonable and prudent to conditions then existing.

Maximum speed limits for trucks and/or tractors and trucks and/or tractors and trailers weighing two (2) tons or more gross with or without load shall be forty-five (45) miles per hour.

Maximum speed limits for all other motor vehicles shall be fifty-five (55) miles per hour during the hours when lights on vehicles are required.

The supervisor of the highway patrol is authorized and empowered to determine and establish on any public highway of the state of Montana, or any portion thereof, limited speed zones and minimum speed zones. The boards of county commissioners in the counties in which they have jurisdiction, are authorized and empowered to determine and establish on any road or street without the limits of corporate towns in their respective counties limited speed zones and in the absence of action by said supervisor of the highway patrol, which speed limits shall constitute the maximum or minimum speed at which any person may drive or operate any vehicle upon such zoned highway or portion thereof so zoned and on which the maximum or minimum speed permissible in said zone has been conspicuously posted.

Every person operating a motor vehicle at a speed in excess of the maximum speed limits herein provided or less than the minimum speed limits herein provided shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished upon a first conviction by a fine of not less than five dollars (\$5.00) and not more than one hundred dollars (\$100.00), or by imprisonment for a period of not more than thirty (30) days or by both such fine and imprisonment, and on a second or subsequent conviction may at the discretion of the court be punished by a fine of not less than twenty-five dollars (\$25.00) nor more than one hundred fifty dollars (\$150.00), or by imprisonment for a period of not more than sixty (60) days, or by both such fine and imprisonment.

History: En. Sec. 7, Ch. 199, L. 1943;
amd. Sec. 1, Ch. 94, L. 1949.

Cross-Reference

Speed and traffic regulations, secs. 32-1101 to 32-1132.

31-108. Acts constituting crimes. For the purpose of this act, the following acts committed relative to the use of the highways and the operation of motor vehicles in the state of Montana shall constitute a crime punishable by law as hereinafter provided:

1. Driving a motor vehicle without all proper licenses or permits as now required or hereafter provided.
2. Starting a parked vehicle, passing a motor or other vehicle, changing direction, or stopping on the highway improperly or without giving proper signals as required by law. The following shall constitute proper warning or signals:
 - (1) Blow horn when passing.
 - (2) Left turn—left hand and arm extended horizontally.
 - (3) Right turn—left hand and arm extended upward.
 - (4) Stop or decrease speed—left hand and arm extended downward.
3. Passing a motor or other vehicle on blind curves, hills, or any other place where view is obstructed or obscured, or over an unbroken centerline.
4. Driving a vehicle, of any type, at night without suitable lights or reflectors as prescribed by the Montana highway patrol board, who shall have authority to fix characteristics and adjustment of said lights and/or reflectors.
5. Resisting or interfering with a patrolman making a legal arrest.
6. Driving an automotive vehicle in a reckless manner, or in excess of speeds designated by the highway patrol supervisor at dangerous points. Driving an automotive vehicle in a reckless manner is the violation of two (2) or more of the highway patrol board regulations or of the Montana motor vehicle code or any one or more violations of this act that has caused an accident, or in a manner which indicates a wilful disregard for one's own safety or the safety of others.
7. Operating a motor vehicle in an unsafe mechanical condition. This pertains specifically to brakes, lights, visibility of glass enclosures and windshields, steering devices and mechanical features enabling the operator to handle his car in a safe manner under all normal conditions.
8. Driving an automotive vehicle in excess of forty (40) miles per hour on all sharp curves marked with standard highway markers.
9. Failing to observe "school zone" signs, "stop" signs, and other signs or signals legally placed along or on the highways.
10. Towing a trailer which is not equipped with safety chains or hitch approved by the supervisor or an assistant supervisor, tail light or approved reflector, and which is not constructed so as to operate without wobbling.
11. Propelling a bicycle on the public highway one-half ($\frac{1}{2}$) hour after sundown or one-half ($\frac{1}{2}$) hour before sunup which is not equipped with a white light visible under normal conditions at least five hundred (500) feet to the front and a rear light or reflex mirror exhibiting a red light to the rear. Bicycles shall travel on the right hand side of the road.
12. No vehicle shall increase speed while being passed until the passing vehicle has pulled ahead and returned to the proper driving lane, nor shall he crowd or in any other way interfere with the passing of another vehicle.
13. Operating a motor vehicle without windshield wiper and rearview mirror.
14. Permitting "wrecker cars" or other towing agencies' equipment to block the highways without first placing flares at night and red flags during

the day a sufficient distance, depending upon conditions, front and rear to protect oncoming traffic.

15. Allowing parked, disabled, or stalled motor truck, bus, trailer, or house trailer on the highway without having flares or lanterns during the night time, and red flags in the day time, placed at a sufficient distance, depending on conditions, front and rear, to allow oncoming traffic an opportunity to stop; and not removing such motor vehicle, trailer, or house trailer from the highway as quickly as possible.

16. Vehicles entering the main highways from a side road or drive must completely stop before entering said highway and right-of-way must be given to a vehicle traveling on the main highways.

17. Stopping, turning or parking on or along the main traveled highway where such vehicle can not be seen by the driver of any other vehicle approaching from either direction within five hundred (500) feet and unless drivers approaching from opposite directions are visible to each other when both are at least five hundred (500) feet from the vehicle to be stopped, turned, or parked, except in cases of justifiable emergency.

18. Walking on other than the left hand side of the road.

19. Failing to drive to the right of the centerline at all times except when overtaking or passing a motor or other vehicle. Passing is allowed only where the driver overtaking another vehicle can see sufficient clear road to pass and return to his side of the road before endangering an approaching vehicle coming in the opposite direction.

20. Failing to observe the word, signal, or whistle of a highway patrolman, who is hereby given the authority to stop, examine and test any vehicle operating on the highway.

21. Operating a motor vehicle with more than three (3) persons in the driver's seat.

22. Operating a motor vehicle unless such vehicle is equipped with muffler in good working order and in constant operation to prevent excessive and unusual noise, and it shall be unlawful to use muffler "cut-outs."

23. Operating a motor vehicle in any town or municipality on state and federal highways at a speed exceeding twenty-five (25) miles per hour, unless otherwise posted.

24. Operating a motor truck, bus or vehicle towing any trailer or trailer house without carrying three (3) flares, lanterns, bombshells, electric flares or portable reflectors capable of reflecting light in opposite directions (such reflectors must present reflecting surfaces of at least twelve (12) square inches in each direction from which other motor vehicles would approach) and/or operating a trailer without suitable tail light and reflector.

25. Using red or blue lights or a combination of red and blue lights on the front of any motor vehicle except police cars, sheriff's cars, emergency ambulances, wreckers or fire fighting apparatus.

26. The use of sirens except on motor vehicles owned or operated by the highway patrol, police departments, sheriffs' forces, emergency ambulances or fire departments.

27. Operating a vehicle on any highway under construction or undergoing repair at a speed exceeding thirty-five (35) miles per hour or failing to stop when flagged.

28. Operating a truck, trailer or motor vehicle of a greater width than eighty (80) inches upon any state or federal highway in this state without a white, yellow or green light and reflector on each side of the body facing the front and on each side of the rear of such vehicle, a red light and reflector facing the rear.

29. Failure to turn out a spotlight when approaching and meeting a vehicle.

30. Operating a motor vehicle with more than ten per cent (10%) of the windshield and front, side and rear windows artificially obstructed in such a manner as to impair the view of the driver.

31. Operating a motor vehicle without a horn in good working order capable of emitting sound audible under normal conditions from a distance of not less than two hundred (200) feet.

32. Refusal by any driver on the demand of an officer of the Montana highway patrol to submit to test of the lights and brakes of the motor vehicle which he is driving upon the highways of this state or to exhibit his driver's license.

33. Driving any motor vehicle on the streets or highways of this state after the fifteenth day of February, without having license plates for the current year displayed thereon.

34. Walking, riding a horse or driving a horse or team on a highway while under the influence of intoxicating liquors.

35. Shooting from or across the traveled part of a federal-aided highway of the state of Montana.

36. Failing to dim lights when approaching a car from either the front or the rear.

37. Following a motor or other vehicle at a distance which is too close to be reasonable and prudent under existing conditions.

38. Riding on the running boards or fenders of a motor vehicle.

39. Operating a motor vehicle in a careless, thoughtless or negligent manner, which has endangered or might endanger the operator or other persons or vehicles on the highway, but which does not indicate a reckless disregard of safety either for himself or others.

40. Driving or operating an automobile, truck, motorcycle or any other motor vehicle upon or over any highway or street or public thoroughfare within the state of Montana, whether within or without a municipality, while under the influence of intoxicating liquor or any drug or narcotic.

History: En. Sec. 8, Ch. 199, L. 1943; amd. Sec. 1, Ch. 118, L. 1949.

NOTE.—Licenses referred to in paragraph (1) of the above section are covered by sections 31-117 to 31-162.

Cross-Reference

Drunken driving prohibited, secs. 32-1105 to 32-1108.

Negligence as Cause of Injuries Jury Question


Although plaintiff may have been guilty of negligence for violations of portions of this section, it is still a question for the jury to determine whether his negligence or that of defendant was cause of injuries sustained. *Moore v. Jacobsen*, — M —, 263 P 2d 713, 717.

Right to Stop on Highways

The right to stop on the highway for

the purpose of making repairs is contemplated by paragraphs 15 and 17 of this section. *Moore v. Jacobsen*, — M —, 263 P 2d 713, 716.

Collateral References

Automobiles  324.

61 C.J.S. Motor Vehicles § 588 et seq.

Liability for failure to provide motor vehicle with adequate rearview mirror. 27 ALR 2d 1040.

Sudden or unsignaled stop or slowing of motor vehicle as negligence. 29 ALR 2d 5.

31-109. Penalties—revocation of driver's license. The violation of any of the provisions of the above-mentioned sections, or other provisions of the state motor vehicle laws, other than driving in a reckless manner or while under the influence of intoxicating liquor or any drug or narcotic, shall be punishable as follows:

For the first offense the offender, in the discretion of the patrolmen, may be issued a "warning" card or be punished, on conviction, by a fine of not less than two dollars (\$2.00) nor more than ten dollars (\$10.00).

For the second offense of the above-mentioned provisions, the penalty shall be not less than ten dollars (\$10.00) nor more than twenty-five dollars (\$25.00).

For the third and subsequent offenses, the penalty shall be not less than twenty-five dollars (\$25.00) nor more than one hundred dollars (\$100.00).

On failure of payment of fines, the offender, in cases of misdemeanor, shall be imprisoned in the county jail in the county in which the offense has been committed, and said imprisonment shall be computed upon the basis of a two-dollar (\$2.00) fine for each day's incarceration.

For the offense of driving in a reckless manner, the fine for the first offense shall be not less than ten dollars (\$10.00) nor more than three hundred dollars (\$300.00) and/or imprisonment in the county jail for a term of not less than five (5) days nor more than thirty (30) days.

For the second offense, the fine shall be not less than three hundred dollars (\$300.00) nor more than five hundred dollars (\$500.00) and/or imprisonment in the county jail for a term of not less than thirty (30) days nor more than six (6) months.

For the third offense, the fine shall be not less than five hundred dollars (\$500.00) nor more than one thousand dollars (\$1,000.00) and/or imprisonment in the state prison for a term of not less than six (6) months nor more than three (3) years.

For the offense of driving while under the influence of intoxicating liquor or any drug or narcotic, the offender shall be punishable as provided by section 32-1108, and subject to the provisions of chapter 4 of Title 53.

In addition to the above-mentioned penalties, upon conviction of a motor vehicle driver of any of the above-mentioned offenses, it shall be at the discretion of the justice of the peace or district court judge to revoke the driver's driving license for a period of not more than one (1) year.

Any person driving, operating or running any motor vehicle upon or over any highway, state or public thoroughfare, of the state of Montana, whether within or without a municipality during any period of time that his driver's license is suspended or revoked or while ineligible to purchase or possess a driver's license during such period of suspension or revocation, shall be guilty of a misdemeanor and punishable by a fine of not less than

ten dollars (\$10.00) nor more than one hundred dollars (\$100.00), and/or imprisonment in the county jail for a term of not more than sixty (60) days.

In the event of such order of revocation, an appeal may be had to any court of competent jurisdiction for a review of the order. For the purpose of determining second or subsequent offense under the highway patrol law, the forfeiture of bail is equivalent to conviction.

Upon conviction the court costs, or any part thereof, may also be assessed against the defendant in the discretion of the court.

History: En. Sec. 9, Ch. 199, L. 1943.

NOTE.—The operation of this section is affected by Ch. 267, Laws 1947, Secs. 31-117 to 31-162 of this code.

NOTE.—The sections of Chapter 4 of Title 53, referred to above, as said chapter existed when this section was enacted, were repealed by Sec. 36, Ch. 204, Laws

1951 and were superseded by sections 53-418 to 53-458 enacted as Ch. 204, Laws 1951.

Collateral References

Automobiles § 55, 359.
60 C.J.S. Motor Vehicles § 129; 61 C.J.S. Motor Vehicles § 594.

31-110. Offenses for which arrest may be made by patrolmen—murder, etc.—patrolmen when police officers—forbidden to act in labor disputes or congregate to preserve peace in one county—temporary control of traffic in cities and towns—investigations of accidents—examination as to ability of person to operate vehicle—inspection of livestock. In addition to the above duties, the highway patrol supervisor and all patrolmen are authorized under this act to make arrests for the following offenses committed; if committed in the presence of said supervisor or any of said patrolmen, or if committed in a rural district, upon the request of a peace officer, or if committed in a city or town of less than twenty-five hundred (2500) inhabitants, upon the request of any peace officer, or the mayor of said city or town: The crimes of murder, assault with a deadly weapon, arson, burglary, larceny, kidnapping, illegal transportation of narcotics, or violation of the Dyer act regarding the transportation of stolen automobiles. Provided, that such highway patrolmen shall have no authority and are expressly forbidden to make arrests in labor disputes or in preventing violence in connection with strikes, and shall not be permitted to perform any duties whatsoever in connection with labor disputes, strikes or boycotts, and shall not be permitted to congregate or act as a unit in one county to suppress riots or preserve the peace.

Patrolmen shall be deemed police officers in making arrests in all offenses occurring on the highways and in the use of motor vehicles or the registration thereof, and for the purpose of serving warrants of arrest in connection with such violations.

The highway patrol shall have the authority to examine any person operating a motor vehicle, who is a repeated violator of traffic regulations or who appears to be mentally or physically deficient, to determine his ability to operate a motor vehicle, and if, after such examination, it reasonably appears to said examiner that said person is unsafe or unfit to operate a motor vehicle, the examiner may recommend to the justice court or district court for issuance of an order prohibiting such person from operating any motor vehicle and revoking his driver's license. A written copy of the order shall be delivered to the registrar of motor vehicles, who

shall repossess such person's driver's license and refuse to sell a driver's license to such person until the receipt of instructions from the highway patrol that said order of revocation has been cancelled.

The patrolmen are also hereby empowered to stop any truck or motor vehicle in which livestock or livestock products are being transported and ascertain whether the driver of such truck or vehicle is rightfully in possession of such livestock or livestock products; and whenever the patrolmen have good reason to believe that such livestock or livestock products have been stolen, they are empowered to take possession of the same until such livestock or livestock products can be delivered into the custody of the sheriff or until such time as the facts as to the actual ownership can be ascertained.

History: En. Sec. 10, Ch. 199, L. 1943.

Collateral References

NOTE.—See also sections 31-142 to 31-152, relating to revocation of drivers' licenses, which were enacted subsequent to the above section.

Highways ~~C~~95(1).

39 C.J.S. Highways § 168.

31-111. Driver to procure driver's license—fees—who can purchase.

[Every driver of a motor vehicle, including motorcycles, shall annually procure a driver's license from the county treasurer of the county in which the applicant resides. The fee for a driver's license of a motor vehicle shall be seventy-five cents (75c), purchased annually on or before January 1, and said license shall expire on December 31 of the same year. The driver shall exhibit his driver's license to any patrolmen at the patrolman's request.]

It shall be unlawful, and is hereby prohibited for any blind person to purchase a driver's license or drive a motor vehicle in the state of Montana. It shall be unlawful, and is hereby prohibited, for any person under the age of fifteen (15) years, any person who is addicted to the use of drugs, any habitual drunkard, or person otherwise physically handicapped, to purchase a driver's license or drive a motor vehicle in the state of Montana, without first securing written permission from the state highway patrol supervisor or assistant supervisor. Driver's licenses sold without such written permission shall be subject to revocation by the registrar of motor vehicles, and any such driver must surrender his license to any patrolman in the state upon service of a written order from the registrar.

Any person violating any of the provisions of sections 31-110 and 31-111 shall be deemed guilty of a misdemeanor and upon conviction, punishable by a fine of not more than fifty dollars (\$50.00) or imprisonment in the county jail not to exceed thirty (30) days, or by both such fine and imprisonment.

History: En. Sec. 11, Ch. 199, L. 1943.

Collateral References

NOTE.—The first paragraph of this section (in brackets) was superseded by Sec. 19, Ch. 267, Laws 1947 (sec. 31-135, subsequently amended). The operation of the other portions of this section is affected by said Ch. 267, Laws 1947 (secs. 31-117 to 31-162) which did not specifically repeal or amend the driver's license statutes then existing.

Automobiles ~~C~~137.

60 C.J.S. Motor Vehicles § 150.

5 Am. Jur. 591, Automobiles, §§ 151 et seq.

Civil rights and liabilities as affected by failure to comply with regulations as to registration of automobile or motorcycle or licensing of operator. 16 ALR 1108.

Loan of car to unlicensed driver as affecting liability of owner for negligence. 68 ALR 1015.

Validity of statute or ordinance relating to grant of license or permit to operate automobile. 71 ALR 616.

Lack of automobile registration or operator's license as evidence of negligence. 73 ALR 162.

Construction and application of statutes requiring "chauffeurs" licenses. 105 ALR 69.

31-112. Duty of patrolman upon making an arrest—power to fix and accept bail—fees of justices of peace. Patrolmen, upon making an arrest, shall either deliver the offender to the nearest justice of the peace during office hours, or to the county jail, or in lieu thereof, deliver to the offender a form of summons describing the nature of the offense with instructions thereon for the offender to report to the nearest justice of the peace, or in lieu of reporting to the nearest justice of the peace, the patrolman has the right to set and accept a deposit for appearance justifiable for the offense charged. In the event the patrolman sets and accepts bail, he shall give a signed receipt to the offender setting forth the amount received. The patrolman shall then deliver the bail money to the justice of the peace before whom the offender is to appear, and the justice of the peace shall give a receipt to the patrolman for the amount of bail money delivered. After filing of the complaint and appearance of the defendant, the justice of the peace shall assume jurisdiction and may set, fix and accept further appearance bail bond.

For the purpose of this act only, the fees of justices of the peace in all offenses in which the statutory fine is five dollars (\$5.00) or less, shall be one dollar (\$1.00), but if the statutory fine is in excess of five dollars (\$5.00), the justices of the peace shall be permitted the fee now prescribed by law; provided that no additional fees shall be paid justices of the peace where salaries are fixed by law.

History: En. Sec. 12, Ch. 199, L. 1943.

31-113. Disposition of moneys. The state treasurer shall deposit to the credit of the state general fund all moneys received by him from the collection of motor vehicle driver's license fees under section 31-111.

History: En. Sec. 13, Ch. 199, L. 1943.

NOTE.—See note to sec. 31-111.

31-114. Fees—fines and forfeitures. All fees, fines and forfeitures collected in any court from persons apprehended or arrested by patrolmen for violation of this act and the laws and regulations relating to the use of state highways and the operation of vehicles thereon must be paid to the state treasurer of Montana and by him credited to the general fund of the state; and at the time of payment of any such fee, fine or forfeiture there shall be filed with the state treasurer a complete statement showing the total of the fees, fines or forfeitures received or incurred, which statement shall give the title of the court and cause and be subscribed to by the person or officer making such payments.

History: En. Sec. 14, Ch. 199, L. 1943.

31-115. Court costs—fees and expenses of counties. The court, after deducting all costs and fees, shall immediately transmit the balance of said fine to the state treasurer as provided by law. The expenses of the county, except fees of officers who are paid a regular salary, shall constitute a proper claim against the state of Montana and said claim or claims shall

be paid in the manner provided by law out of the funds appropriated for such purposes.

History: En. Sec. 15, Ch. 199, L. 1943.

31-116. Reports. Justices of the peace and county treasurers shall furnish to the highway patrol statements of all fees, fines and forfeitures and records of cases which involve the state highway patrol as the board may request.

History: En. Sec. 16, Ch. 199, L. 1943.

31-117. Drivers' examination section of highway patrol. There is hereby created a drivers' examination section of the Montana highway patrol, under the direct control and supervision of the Montana highway patrol board. Said board shall maintain a permanent place of business at the state capitol and shall meet at least once each month for the purpose of transacting business either as the drivers' examining board, the highway patrol board, or jointly for the two. The board shall select a chief examiner, an assistant chief examiner, and as many examiners as it deems necessary and shall provide for the necessary clerical help.

The chief examiner, assistant chief examiner, and all examiners shall have the same qualifications as are required for members of the Montana highway patrol. The chief examiner shall rank as an assistant supervisor, the assistant chief examiner shall rank as a sergeant, and the examiners shall rank as patrolmen.

History: En. Sec. 1, Ch. 267, L. 1947; amd. Sec. 1, Ch. 141, L. 1951.

NOTE.—Uniform State Law. Sections 31-117 through 31-162 constitute the "Uniform Motor Vehicle Operators' and Chauffeurs' License Act" approved by the National Conference of Commissioners on Uniform State Laws in 1926 and adopted in the states of Arkansas, Colorado, Dela-

ware, Idaho, Iowa, Kansas, Kentucky, Michigan, Missouri, Nevada, New Mexico, Oklahoma, Oregon, Tennessee, Utah, Virginia, Washington and also in Hawaii. This act was declared obsolete by the National Conference of Commissioners on Uniform State Laws in August, 1943. See Handbook of the National Conference, 1943, p. 69.

31-118. Definitions. The following words and phrases when used in this act shall, for the purpose of this act, have the meanings respectively ascribed to them in sections 31-119 to 31-124.

History: En. Sec. 2, Ch. 267, L. 1947.

31-119. Vehicle—motor vehicle—farm tractor—school bus. (a) Vehicle. Every device in, upon, or by which any person or property is or may be transported or drawn upon a public highway, excepting devices moved by human or animal power or used exclusively upon stationary rails or tracks.

(b) Motor vehicle. Every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails.

(c) Farm tractor. Every motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines, and other implements of husbandry.

(d) School bus. Every motor vehicle owned by a public or governmental agency and operated for the transportation of children to or from

school or privately owned and operated for compensation for the transportation of children to or from school.

History: En. Sec. 3, Ch. 267, L. 1947.

31-120. Person—operator—chauffeur—owner. (a) Person. Every natural person, firm, copartnership, association, or corporation.

(b) Operator. Every person, other than a chauffeur, who drives or is in actual physical control of a motor vehicle upon a highway or who is exercising control over or steering a vehicle being towed by a motor vehicle.

(c) Chauffeur. Every person who is employed by another for the principal purpose of driving a motor vehicle and every person who drives a school bus transporting school children or any motor vehicle when in use for the transportation of persons or property for compensation, but shall not include persons driving farm trucks or hauling farm products for producers of said farm products.

(d) Owner. A person who holds the legal title of a vehicle or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with the immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this act.

History: En. Sec. 4, Ch. 267, L. 1947.

31-121. Nonresident. Every person who is not a resident of this state.

History: En. Sec. 5, Ch. 267, L. 1947.

31-122. Street or highway. The entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel.

History: En. Sec. 6, Ch. 267, L. 1947.

31-123. Supervisor—board. (a) Supervisor. The supervisor of the Montana highway patrol.

(b) Board. The Montana highway patrol board acting directly or through its duly authorized officers or agents.

History: En. Sec. 7, Ch. 267, L. 1947.

31-124. Suspension, revocation and cancellation. (a) Suspension means that the driver's license and privilege to drive a motor vehicle on the public highways are temporarily withdrawn but only during the period of such suspension.

(b) Revocation means that the driver's license and privilege to drive a motor vehicle on the public highways are terminated and shall not be renewed or restored, except that an application for a new license may be presented and acted upon by the board after the expiration of at least one (1) year after date of revocation.

(c) Cancellation means that a driver's license is annulled and terminated because of some error or defect or because the licensee is no longer entitled to such license, but the cancellation of a license is without preju-

dice and application for a new license may be made at any time after such cancellation.

History: En. Sec. 8, Ch. 267, L. 1947.

31-125. Operators and chauffeurs must be licensed. (a) No person, except those hereinafter expressly exempted, shall drive any motor vehicle upon a highway in this state unless such person has a valid license as an operator or chauffeur under the provisions of this act. No person shall drive a motor vehicle as a chauffeur unless he holds a valid chauffeur's license. No person shall receive a chauffeur's license unless and until he surrenders to the board any operator's license issued to him or an affidavit that he does not possess an operator's license.

(b) Any person holding a valid chauffeur's license hereunder need not procure an operator's license.

(c) Whenever a city or town requires an operator or chauffeur to obtain a local driving license or permit, such a license or permit shall not be issued unless the applicant therefor presents a state driver's license valid under the provisions of this act.

History: En. Sec. 9, Ch. 267, L. 1947;
amd. Sec. 1, Ch. 37, L. 1951.

or operator's license as evidence of operator's negligence. 29 ALR 2d 963.

Collateral References

Lack of proper automobile registration

31-126. What persons are exempt from license. The following persons are exempt from license hereunder:

1. Any person while operating a motor vehicle in the service of the Army, Navy, or Marine Corps of the United States;

2. Any person while driving or operating any road machine, farm tractor, or implement of husbandry temporarily operated or moved on a highway;

3. A nonresident who is at least fifteen (15) years of age and who has in his immediate possession a valid operator's license issued to him in his home state or country may operate a motor vehicle in this state only as an operator;

4. A nonresident who is at least eighteen (18) years of age and who has in his immediate possession a valid chauffeur's license issued to him in his home state or country may operate a motor vehicle in this state either as an operator or chauffeur subject to the age limits applicable to chauffeurs in this state except that any such person must be licensed as chauffeur hereunder before accepting employment as a chauffeur from a resident of this state;

5. Any nonresident who is at least eighteen (18) years of age, whose home state or country does not require the licensing of operators, may operate a motor vehicle as an operator only, for a period of not more than ninety (90) days in any calendar year, if the motor vehicle so operated is duly registered in the home state or country of such nonresident.

History: En. Sec. 10, Ch. 267, L. 1947.

31-127. What persons shall not be licensed. The board shall not issue any license hereunder:

1. To any person, as an operator, who is under the age of fifteen (15) years, except that the board may issue a restricted license as hereinafter provided to any person who is at least thirteen (13) years of age;

2. To any person, as a chauffeur, employed by another for the principal purpose of driving a motor vehicle when in use exclusively for the transportation of property for compensation, who is under the age of eighteen (18) years, nor to any person, as a chauffeur, who is employed by another for the principal purpose of driving a motor vehicle transporting passengers for hire or transporting school children, who is under the age of twenty-one (21) years;

3. To any person, as an operator or chauffeur, whose license has been suspended during such suspension, nor to any person whose license has been revoked, except as provided in section 31-149;

4. To any person, as an operator or chauffeur, who is an habitual drunkard, or is addicted to the use of narcotic drugs;

5. To any person, as an operator or chauffeur, who has previously been adjudged to be afflicted with or suffering from any mental disability or disease and who has not at the time of application been restored to competency by the methods provided by law;

6. To any person, as an operator or chauffeur, who is required by this act to take an examination, unless such person shall have successfully passed such examination;

7. To any person who is required under the provisions of the motor-vehicle financial responsibility laws of this state to deposit proof of financial responsibility and who has not deposited such proof.

History: En. Sec. 11, Ch. 267, L. 1947.

31-128. Classification of chauffeurs—special restrictions. (a) The board upon issuing a chauffeur's license shall indicate thereon the class of license so issued and shall appropriately examine each applicant according to the class of license applied for and may impose such rules and regulations for the exercise thereof as it may deem necessary for the safety and welfare of the traveling public.

(b) No person who is under the age of twenty-one (21) years shall drive any school bus transporting school children or any motor vehicle when in use for the transportation of persons for compensation nor in either event until he has been licensed as a chauffeur for either such purpose and the license so indicates. The board shall not issue a chauffeur's license for either such purpose unless the applicant has had at least one (1) year of driving experience prior thereto and has filed with the board one (1) or more certificates signed by a total of at least three (3) responsible people to whom he is well known certifying as to his good character and habits and the board is fully satisfied as to the applicant's competency and fitness to be employed.

History: En. Sec. 12, Ch. 267, L. 1947.

31-129. Instruction permits and temporary licenses. (a) Any person who is at least fourteen (14) years of age may apply to the board for an instruction permit. The record may in its discretion, after the applicant has successfully passed all parts of the examination other than the driving

test, issue to the applicant an instruction permit which shall entitle the applicant while having such permit in his immediate possession to drive a motor vehicle upon the public highways for a period of sixty (60) days when accompanied by a licensed operator or chauffeur who is occupying a seat beside the driver, except in the event the permittee is operating a motorcycle. Any such instruction permit may be renewed or a new permit issued for an additional period of ninety (90) days.

(b) The board upon receiving proper application may in its discretion issue a restricted instruction permit effective for a school year or more restricted period to an applicant who is enrolled in a driver-training program approved by the board even though the applicant has not reached the legal age to be eligible for an operator's license. Such instruction permit shall entitle the permittee when he has such a permit in his immediate possession to operate a motor vehicle only on a designated highway or within a designated area but only when an approved instructor is occupying a seat beside the permittee.

(c) The board may in its discretion issue a temporary driver's permit to an applicant for an operator's license permitting him to operate a motor vehicle while the board is completing its investigation and determination of all facts relative to such applicant's right to receive an operator's license. Such permit must be in his immediate possession while operating a motor vehicle, and it shall be invalid when the applicant's license has been issued or for good cause has been refused.

History: En. Sec. 13, Ch. 267, L. 1947.

31-130. Application for license or instruction permit. (a) Every application for an instruction permit or for an operator's or chauffeur's license shall be made upon a form furnished by the board. Every application shall be accompanied by the proper fee and payment of such fee shall entitle the applicant to not more than three attempts to pass the examination within a period of 6 months from the date of application.

(b) Every such application shall state the full name, date of birth, sex, and residence address of the applicant, and briefly describe the applicant, and shall state whether the applicant has theretofore been licensed as an operator or chauffeur, and, if so, when and by what state or country, and whether any such license has ever been suspended or revoked, or whether an application has ever been refused, and, if so, the date of and reason for such suspension, revocation, or refusal.

History: En. Sec. 14, Ch. 267, L. 1947.

31-131. Application of minors. (a) The application of any person under the age of eighteen (18) years for an instruction permit or operator's license shall be signed and verified before a person authorized to administer oaths by both the father and mother of the applicant, if both are living and have custody of him, or in the event neither parent is living then by the person or guardian having such custody or by an employer of such minor, or in the event there is no guardian or employer then by other responsible person who is willing to assume the obligation imposed under this act upon a person signing the application of a minor.

(b) Any negligence or wilful misconduct of a minor under the age of eighteen (18) years when driving a motor vehicle upon a highway shall be imputed to a person who has signed the application of such minor for a permit or license, which person shall be jointly and severally liable with such minor for any damages caused by such negligence or wilful misconduct (except as otherwise provided in sub-paragraph (c) of this section).

(c) In the event a minor deposits or there is deposited upon his behalf proof of financial responsibility in respect to the operation of a motor vehicle owned by him, or if not the owner of a motor vehicle, then with respect to the operation of any motor vehicle, in form and in amounts as required under the motor-vehicle financial responsibility laws of this state, then the board may accept the application of such minor when signed by one parent or the guardian of such minor, and while such proof is maintained such parent or guardian shall not be subject to the liability imposed under sub-paragraph (b) of this section.

History: En. Sec. 15, Ch. 267, L. 1947.

Collateral References

Operation and Effect

Where subdivision (c) of this section is not resorted to at the time application for license is made, subdivision (b) applies and a defendant who signed the application of a minor is liable for damages caused by the minor's negligence. *Moore v. Jacobsen*, — M —, 263 P 2d 713, 717.

Construction and effect of statutes which make parent, custodian, or other person signing minor's application for vehicle operator's license liable for licensee's negligence or wilful misconduct. 26 ALR 2d 1320.

31-132. Release from liability. Any person who has signed the application of a minor for a license may thereafter file with the board a verified written request that the license of said minor so granted be cancelled. Thereupon the board shall cancel the license of said minor and the person who signed the application of such minor shall be relieved from the liability imposed under this act by reason of having signed such application on account of any subsequent negligence or wilful misconduct of such minor in operating a motor vehicle.

History: En. Sec. 16, Ch. 267, L. 1947.

31-133. Cancellation of license upon death of person signing minor's application. The board upon receipt of satisfactory evidence of the death of the persons who signed the application of a minor for a license shall cancel such license and shall not issue a new license until such time as a new application, duly signed and verified, is made as required by this act. This provision shall not apply in the event the minor has attained the age of eighteen (18) years.

History: En. Sec. 17, Ch. 267, L. 1947.

31-134. Examination of applicants. (a) The board shall examine every applicant for an operator's or chauffeur's license, except as otherwise provided in this section. Such examination shall include a test of the applicant's eyesight, his ability to read and understand highway signs regulating, warning, and directing traffic, his knowledge of the traffic laws of this state, and shall include an actual demonstration of ability to exercise ordinary and reasonable control in the operation of a motor vehicle. The board shall make provision for giving an examination either in the

county where the applicant resides or at a place adjacent thereto reasonably convenient to the applicant within not more than thirty (30) days from the date the application is received.

(b) The board shall issue without examination an operator's license to any person applying therefor within six (6) months after this section takes effect who furnishes evidence satisfactory to the board that he is not disqualified under the provisions of this act and that he has previously operated a motor vehicle in a satisfactory manner for a period of not less than one (1) year.

History: En. Sec. 18, Ch. 267, L. 1947.

31-135. Licenses issued to operators and chauffeurs. (a) The highway patrol board shall have authority to appoint county treasurers and other qualified officers to act as its agent or agents for the sale of driver's licenses, and shall make necessary rules and regulations governing such sales. The board shall, upon payment of three dollars (\$3.00), issue to every applicant qualifying therefor, an operator's or chauffeur's license as applied for, which license shall be purchased biennially on or before the operator's or chauffeur's birthday, and shall expire on the anniversary of the date of birth of the operator or chauffeur, two (2) years or less after the date of issue, and shall bear thereon, a distinguishing number issued to the licensee, the full name, date of birth, residence address, and a brief description of the licensee and either a facsimile of the signature of the licensee or a space upon which he shall write his signature in pen and ink, immediately upon receipt of the license. No license shall be valid until it has been so signed by the licensee, but all operators' or chauffeurs' licenses renewed in the year 1951 shall expire December 31, 1951.

(b) Every operator's or chauffeur's license issued hereunder shall be valid for a term of two (2) years, except as otherwise provided, and shall be renewed for a like period on or before the second anniversary of the licensee's date of birth next succeeding date of issue for a further period of two (2) years from such anniversary, upon receipt of the application and fee as in the case of original application as provided herein. Notwithstanding the foregoing provisions the highway patrol board shall change the expiration dates to a system of staggered expiration dates based on the anniversary date of birth of the applicant and shall collect additional fees as hereinafter provided.

(c) Effective January 1, 1952, and until December 31, 1952, each applicant who was born prior to January 1, 1910, shall apply for an operator's or chauffeur's license to expire on the 1953 anniversary of his birth and shall pay, therefor, a fee of twenty-five cents (25c) for each two (2) months' period, or fraction thereof, of the effective life of such license. Each applicant who was born on or after January 1, 1910, shall apply for an operator's or chauffeur's license to expire on the 1954 anniversary of his birth, and shall pay therefor, a fee of twenty-five cents (25c) for each two (2) months, or fraction thereof, of the effective life of such license.

(d) Whenever the board issues an original license to a person under the age of twenty-one (21) years, such license shall be designated and clearly marked as a "provisional license." Any license so designated and

marked may be suspended by the board for a period of not more than twelve (12) months, when its record discloses that the licensee, subsequent to the issuance of such license, has been guilty of careless or negligent driving. Upon renewal as applicable to operator's licenses, the board may for any reasonable cause, as shown by its records, designate the renewal of the license as provisional, otherwise, a license in usual form shall be issued subject to other provisions of the laws of Montana.

(e) It shall be unlawful for any person to have in his possession or under his control, more than one (1) Montana operator's or chauffeur's license at any one time.

History: En. Sec. 19, Ch. 267, L. 1947;
amd. Sec. 1, Ch. 135, L. 1951; amd. Sec.
1, Ch. 130, L. 1953.

31-136. License to be carried and exhibited on demand. Every licensee shall have his operator's or chauffeur's license in his immediate possession at all times when operating a motor vehicle and shall display the same upon demand of a justice of the peace, a peace officer, a highway patrolman, or a field deputy or inspector of the board. However, no person charged with violating this section shall be convicted if he produces in court or the office of the arresting officer an operator's or chauffeur's license theretofore issued to him and valid at the time of his arrest.

History: En. Sec. 20, Ch. 267, L. 1947.

31-137. Restricted licenses. (a) The board upon issuing an operator's or chauffeur's license shall have authority whenever good cause appears to impose restrictions suitable to the licensee's driving ability with respect to the type of or special mechanical control devices required on a motor vehicle which the licensee may operate or such other restrictions applicable to the licensee as the board may determine to be appropriate to assure the safe operation of a motor vehicle by the licensee.

(b) The board may either issue a special restricted license or may set forth such restrictions upon the usual license form.

(c) The board may upon receiving satisfactory evidence of any violation of the restrictions of such license suspend or revoke the same but the licensee shall be entitled to a hearing as upon suspension or revocation under this act.

(d) It is a misdemeanor for any person to operate a motor vehicle in any manner in violation of the restrictions imposed in a restricted license issued to him.

History: En. Sec. 21, Ch. 267, L. 1947.

31-138. Duplicate certificates. In the event that an instruction permit or operator's or chauffeur's license issued under the provisions of this act is lost or destroyed, the person to whom the same was issued may, upon the payment of a fee of fifty cents (50c), obtain a duplicate, or substitute thereof, upon furnishing proof satisfactory to the board that such permit or license has been lost or destroyed.

History: En. Sec. 22, Ch. 267, L. 1947;
amd. Sec. 1, Ch. 36, L. 1953.

31-139. Repealed—Chapter 135, Laws of 1951.**Repeal**

This section (Sec. 23, Ch. 267, L. 1947), relating to the expiration of operators'

and chauffeurs' licenses, was repealed by Sec. 2, Ch. 135, Laws 1951. See Sec. 31-135.

31-140. Notice of change of address or name. Whenever any person after applying for or receiving an operator's or chauffeur's license shall move from the address named in such application or in the license issued to him or when the name of a licensee is changed by marriage or otherwise such person shall within ten (10) days thereafter notify the board in writing of his old and new addresses or of such former and new names and of the number of any license then held by him.

History: En. Sec. 24, Ch. 267, L. 1947.

31-141. Records to be kept by the board. (a) The board shall file every application for a license received by it and shall maintain suitable indexes containing, in alphabetical order:

1. All applications denied and on each thereof note the reasons for such denial;

2. All applications granted; and

3. The name of every licensee whose license has been suspended or revoked by the board and after each such name note the reasons for such action.

(b) The board shall also file all accident reports and abstracts of court records of convictions received by it under the laws of this state and in connection therewith maintain convenient records or make suitable notations in order that an individual record of each licensee showing the convictions of such licensee and the traffic accidents in which he has been involved shall be readily ascertainable and available for the consideration of the board upon any application for renewal of license and at other suitable times.

History: En. Sec. 25, Ch. 267, L. 1947.

31-142. Authority of board to cancel licenses. (a) The board is hereby authorized to cancel any operator's or chauffeur's license upon determining that the licensee was not entitled to the issuance thereof hereunder or that said licensee failed to give the required or correct information in his application or committed any fraud in making such application.

(b) Upon such cancellation, the licensee must surrender the license so cancelled to the board.

History: En. Sec. 26, Ch. 267, L. 1947.

31-143. Suspending privileges of nonresidents and reporting convictions. (a) The privilege of driving a motor vehicle on the highways of this state given to a nonresident hereunder shall be subject to suspension or revocation by the board in like manner and for like causes as an operator's or chauffeur's license issued hereunder may be suspended or revoked.

(b) The board is further authorized, upon receiving a record of the conviction in this state of a nonresident driver of a motor vehicle of any offense under the motor-vehicle laws of this state, to forward a certified

copy of such record to the motor vehicle administrator in the state wherein the person so convicted is a resident.

History: En. Sec. 27, Ch. 267, L. 1947.

31-144. Suspending resident's license upon conviction in another state.

The board is authorized to suspend or revoke the license of any resident of this state or the privilege of a nonresident to drive a motor vehicle in this state upon receiving notice of the conviction of such person in another state of an offense therein which, if committed in this state, would be grounds for the suspension or revocation of the license of an operator or chauffeur.

History: En. Sec. 28, Ch. 267, L. 1947.

31-145. When court to forward license to board and report convictions.

(a) Whenever any person is convicted of any offense for which this act makes mandatory the revocation of the operator's or chauffeur's license of such person by the board, the court in which such conviction is had shall require the surrender to it of all operator's and chauffeur's licenses then held by the person so convicted and the court shall thereupon forward said licenses to the board and at the same time forward a record of such conviction to the board and to the registrar of motor vehicles.

(b) Every court having jurisdiction over offenses committed under this act, or any other act of this state or municipal ordinance regulating the operation of motor vehicles on highways, shall forward to the board a record of the conviction of any person in said court for a violation of any said laws other than regulations governing standing or parking, and may recommend the suspension of the operator's or chauffeur's license of the person so convicted.

(c) For the purposes of this act the term "conviction" shall mean a final conviction. Also, for the purposes of this act a forfeiture of bail or collateral deposited to secure a defendant's appearance in court, which forfeiture has not been vacated, shall be reported to the board by the court having jurisdiction.

History: En. Sec. 29, Ch. 267, L. 1947.

31-146. Mandatory revocation of license by board. The board shall forthwith revoke the license of any operator or chauffeur upon receiving a record of such operator's or chauffeur's conviction of any of the following offenses, when such conviction has become final:

1. Manslaughter resulting from the operation of a motor vehicle;
2. Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug;
3. Any felony in the commission of which a motor vehicle is used;
4. Failure to stop and render aid as required under the laws of this state in the event of a motor-vehicle accident resulting in the death or personal injury of another;
5. Perjury or the making of a false affidavit or statement under oath to the board under this act or under any other law relating to the ownership or operation of motor vehicles;
6. Conviction, or forfeiture of bail not vacated, upon three (3) charges of reckless driving committed within a period of twelve (12) months.

History: En. Sec. 30, Ch. 267, L. 1947.

Cross-Reference

Revocation of driver's license, sec. 31-109.

31-147. Authority of board to suspend or revoke license. (a) The board is hereby authorized to suspend the license of an operator or chauffeur without preliminary hearing upon a showing by its records or other sufficient evidence that the licensee:

1. Has committed an offense for which mandatory revocation of license is required upon conviction;
2. Has been involved as a driver in any accident resulting in the death or personal injury of another or serious property damage;
3. Has been convicted with such frequency of serious offenses against traffic regulations governing the movement of vehicles as to indicate a disrespect for traffic laws and a disregard for the safety of other persons on the highways;
4. Is an habitually reckless or negligent driver of a motor vehicle;
5. Is incompetent to drive a motor vehicle;
6. Has permitted an unlawful or fraudulent use of such license; or
7. Has committed an offense in another state which if committed in this state would be grounds for suspension or revocation.

(b) Upon suspending the license of any person as hereinbefore in this section authorized, the board shall immediately notify the licensee in writing and upon his request shall afford him an opportunity for a hearing as early as practical within not to exceed twenty (20) days after receipt of such request in the county wherein the licensee resides unless the board and the licensee agree that such hearing may be held in some other county. Upon such hearing the supervisor or his duly authorized agent may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers and may require a re-examination of the licensee. Upon such hearing the board shall either rescind its order of suspension, or, good cause appearing therefor, may extend the suspension of such license or revoke such license and upon revocation the board shall forthwith notify the registrar of motor vehicles.

History: En. Sec. 31, Ch. 267, L. 1947.

31-148. Board may require re-examination. The board having good cause to believe that a licensed operator or chauffeur is incompetent or otherwise not qualified to be licensed, may upon written notice of at least five (5) days to the licensee require him to submit to an examination. Upon the conclusion of such examination the board shall take action as may be appropriate and may suspend or revoke the license of such person or permit him to retain such license, or may issue a license subject to restrictions as permitted under section 31-137. Refusal or neglect of the licensee to submit to such examination shall be ground for suspension or revocation of his license.

History: En. Sec. 32, Ch. 267, L. 1947.

31-149. Period of suspension or revocation. (a) The board shall not suspend a driver's license or privilege to drive a motor vehicle on the public highways for a period of more than one (1) year, except as permitted under section 31-155.

(b) Any person whose license or privilege to drive a motor vehicle on the public highways has been revoked shall not be entitled to have such license or privilege renewed or restored unless the revocation was for a cause which has been removed, except that after the expiration of one (1) year from the date on which the revoked license was surrendered to and received by the board such person may make application for a new license as provided by law, but the board shall not then issue a new license unless and until it is satisfied after investigation of character, habits, and driving ability of such person that it will be safe to grant the privilege of driving a motor vehicle on the public highways.

History: En. Sec. 33, Ch. 267, L. 1947.

31-150. Surrender and return of license. The board upon suspending or revoking a license shall require that such license shall be surrendered to and be retained by the board except that at the end of the period of suspension such license so surrendered shall be returned to the licensee.

History: En. Sec. 34, Ch. 267, L. 1947.

31-151. No operation under foreign license during suspension or revocation in this state. Any resident or nonresident whose operator's or chauffeur's license or right or privilege to operate a motor vehicle in this state has been suspended or revoked as provided in this act shall not operate a motor vehicle in this state under a license, permit, or registration certificate issued by any other jurisdiction or otherwise during such suspension or after such revocation until a new license is obtained when and as permitted under this act.

History: En. Sec. 35, Ch. 267, L. 1947.

31-152. Right of appeal to court. Any person denied a license or whose license has been cancelled, suspended, or revoked by the board except where such cancellation or revocation is mandatory under the provisions of this act shall have the right to file a petition within thirty (30) days thereafter for a hearing in the matter in the district court in the county wherein such person shall reside and such court is hereby vested with jurisdiction and it shall be its duty to set the matter for hearing upon thirty (30) days' written notice to the board, and thereupon to take testimony and examine into the facts of the case and to determine whether the petitioner is entitled to a license or is subject to suspension, cancellation, or revocation of license under the provisions of this act.

History: En. Sec. 36, Ch. 267, L. 1947.

31-153. Unlawful use of license. It is a misdemeanor for any person:

1. To display or cause or permit to be displayed or have in his possession any cancelled, revoked, suspended, fictitious, or fraudulently altered operator's or chauffeur's license;
2. To lend his operator's or chauffeur's license to any other person or knowingly permit the use thereof by another;
3. To display or represent as one's own any operator's or chauffeur's license not issued to him;
4. To fail or refuse to surrender to the board upon its lawful demand any operator's or chauffeur's license which has been suspended, revoked or cancelled;

5. To use a false or fictitious name in any application for an operator's or chauffeur's license or to knowingly make a false statement or to knowingly conceal a material fact or otherwise commit a fraud in any such application;

6. To permit any unlawful use of an operator's or chauffeur's license issued to him; or

7. To do any act forbidden or fail to perform any act required by this act.

History: En. Sec. 37, Ch. 267, L. 1947.

31-154. Making false affidavit perjury. Any person who makes any false affidavit, or knowingly swears or affirms falsely to any matter or thing required by the terms of this act to be sworn to or affirmed, is guilty of perjury and upon conviction shall be punishable by fine or imprisonment as other persons committing perjury are punishable.

History: En. Sec. 38, Ch. 267, L. 1947.

31-155. Driving while license suspended or revoked. (a) Any person who drives a motor vehicle on any public highway of this state at a time when his privilege so to do is suspended or revoked shall be guilty of a misdemeanor and upon conviction shall be punished by imprisonment for not less than two (2) days nor more than six (6) months and there may be imposed in addition thereto a fine of not more than five hundred dollars (\$500.00).

(b) The board upon receiving a record of the conviction of any person under this section upon a charge of driving a vehicle while the license of such person was suspended shall extend the period of such suspension for an additional like period and if the conviction was upon a charge of driving while a license was revoked the board shall not issue a new license for an additional period of one (1) year from and after the date such person would otherwise have been entitled to apply for a new license.

History: En. Sec. 39, Ch. 267, L. 1947.

31-156. Permitting unauthorized minor to drive. No person shall cause or knowingly permit his child or ward under the age of eighteen (18) years to drive a motor vehicle upon any highway when such minor is not authorized hereunder or in violation of any of the provisions of this act.

History: En. Sec. 40, Ch. 267, L. 1947.

31-157. Employing unlicensed chauffeur. No person shall employ as a chauffeur of a motor vehicle any person not then licensed as provided by this act.

History: En. Sec. 41, Ch. 267, L. 1947.

31-158. Renting motor vehicle to another. (a) No person shall rent a motor vehicle to any other person unless the latter person is then duly licensed hereunder or, in the case of a nonresident, then duly licensed under the laws of the state or country of his residence except a nonresident whose home state or country does not require that an operator be licensed.

(b) No person shall rent a motor vehicle to another until he has inspected the operator's or chauffeur's license of the person to whom the

vehicle is to be rented and compared and verified the signature thereon with the signature of such person written in his presence.

(c) Every person renting a motor vehicle to another shall keep a record of the registration number of the motor vehicle so rented, the name and address of the person to whom the vehicle is rented, the number of the license of said latter person and the date and place when and where said license was issued. Such record shall be open to inspection by any police officer or officer or employee of the board.

History: En. Sec. 42, Ch. 267, L. 1947.

31-159. Penalty for misdemeanor. (a) It is a misdemeanor for any person to violate any of the provisions of this act unless such violation is by this act or other law of this state declared to be a felony.

(b) Unless another penalty is in this act or by the laws of this state provided, every person convicted of a misdemeanor for the violation of any provision of this act shall be punished by a fine of not more than five hundred dollars (\$500.00) or by imprisonment for not more than six (6) months, or by both such fine and imprisonment.

History: En. Sec. 43, Ch. 267, L. 1947.

31-160. Uniformity of interpretation. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

History: En. Sec. 44, Ch. 267, L. 1947.

31-161. Short title. This act may be cited as the Uniform Motor Vehicle Operators' and Chauffeurs' License Act.

History: En. Sec. 45, Ch. 267, L. 1947.

31-162. Constitutionality. If any part or parts of this act shall be held to be unconstitutional such unconstitutionality shall not affect the validity of the remaining parts of this act. The legislature hereby declares that it would have passed the remaining parts of this act if it had known that such part or parts thereof would be declared unconstitutional.

History: En. Sec. 46, Ch. 267, L. 1947.

CHAPTER 2

HIGHWAY PATROLMEN'S RETIREMENT SYSTEM

Section	31-201.	Definitions.
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	31-203.	Montana highway patrolmen's retirement board.
	31-204.	Administrative expenses.
	31-205.	Payments into the Montana highway patrolmen's retirement fund— investment.
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	31-207.	Membership.
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	31-211.	Retirement.
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- 31-215. Involuntary retirement allowance.
- 31-216. Compulsory retirement allowance.
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- 31-218. Payments upon death.
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- 31-221. Exemption from taxes and execution.
- 31-222. Nomination of beneficiary.
- 31-223. Service in the armed forces of the United States.
- 31-224. Fraud—correction of errors.
- 31-225. Restrictions upon payments.
- 31-226. Subrogation.
- 31-227. Payments under other laws.

31-201. Definitions. The following words and phrases as used in this act, unless a different meaning is plainly implied by the context, shall have the following meanings:

“Accumulated deductions,” the total of the amounts deducted from the salary of a contributor and paid into the fund, and standing to his credit in the fund, together with the regular interest thereon.

“Beneficiary,” any person in receipt of a retirement allowance under this act.

“Board,” the Montana highway patrolmen’s retirement board.

“Compulsory retirement age,” sixty years of age.

“Compulsory,” any person who has accumulated deductions in the fund, standing to his credit.

“Final salary,” the average annual compensation received by a contributor before any deductions have been made, and exclusive of maintenance, allowances and expenses, for the five years of service immediately preceding retirement, or, in the event a member has not served five years, the total retirement compensation earned, divided by the number of years served.

“Fund,” the Montana highway patrolmen’s retirement fund.

“Involuntary retirement,” a retirement not for cause and before retirement age.

“Member’s annuity,” payments for life derived from contributions made by the contributor.

“Optional retirement age,” the age at which a contributor may retire after twenty (20) years’ service or more.

“Retirement age,” the age at which a member retires after twenty-five (25) years of creditable service with the Montana highway patrol.

“Retirement allowance,” the state annuity plus the member’s annuity.

“State annuity,” payments for life derived from contributions made by the state of Montana.

History: En. Sec. 1, Ch. 37, L. 1945.

31-202. Montana highway patrolmen’s retirement system. A retirement system is hereby established for the members of the Montana highway patrol.

History: En. Sec. 2, Ch. 37, L. 1945.

31-203. Montana highway patrolmen’s retirement board. There is hereby established the Montana Highway Patrolmen’s Retirement Board, which shall consist of five (5) members, who shall be the chairman of the Montana highway patrol board, the supervisor of the Montana highway

patrol, the attorney for the Montana highway patrol, and two (2) members of the Montana highway patrolmen's association, to be annually elected by the said association. The secretary of the Montana highway patrol board shall act as secretary of the board.

History: En. Sec. 3, Ch. 37, L. 1945.

31-204. Administrative expenses. The expense of the administration of this act, exclusive of the payment of retirement allowances and other benefits, shall be paid by the state of Montana, by appropriation out of the general fund, made on the basis of budgets submitted by the board.

History: En. Sec. 4, Ch. 37, L. 1945.

31-205. Payments into the Montana highway patrolmen's retirement fund—investment. All appropriations made by the state of Montana, all contributions by members of the Montana highway patrol, in the amount hereinafter specified, and all interest on and increase of the investments and moneys under this account shall be paid to the state treasurer, who shall credit said payments to the Montana highway patrolmen's retirement fund. Whenever there is on deposit in the Montana highway patrolmen's retirement fund a sum in excess of twenty-five thousand dollars (\$25,000.00), such excess will be invested by the state board of land commissioners as part of the long term investment fund and any of the fund less than twenty-five thousand dollars (\$25,000.00) in amount shall be invested by the state board of land commissioners as part of the short term investment fund when so directed by the Montana highway patrolmen's retirement board.

History: En. Sec. 5, Ch. 37, L. 1945;
amd. Sec. 1, Ch. 158, L. 1949; amd. Sec.
1, Ch. 176, L. 1953.

31-206. Rules and regulations—actuarial data. The board shall, from time to time, establish such rules and regulations for the administration of this act as may be deemed necessary. It shall keep such data as shall be necessary for actuarial valuation purposes. It shall cause to be made periodic actuarial investigations into the mortality and service experience of the contributors to and the beneficiaries of the fund, and shall adopt for the retirement system one or more mortality tables.

History: En. Sec. 6, Ch. 37, L. 1945.

31-207. Membership. Every member of the Montana highway patrol, including the supervisor and assistant supervisors, but excepting the present supervisor, shall be required to become a member of the retirement system established by this act on July 1, 1945, and thereafter when first becoming a member of the Montana highway patrol. Contributions by members under this act shall commence with the first payroll after July 1, 1945. If any person who becomes a member of the Montana highway patrol subsequent to July 1, 1945, shall have been at any time theretofore a member of the Montana highway patrol, he shall receive credit for any such service prior to July 1, 1945, upon complying with the provisions of this act.

History: En. Sec. 7, Ch. 37, L. 1945.

31-208. Service allowance. In computing the length of service of a contributor for retirement purposes, full credit shall be given to each con-

tributor for each year of service rendered to the patrol including service rendered prior to July 1, 1945, upon complying with the provisions of this act. As soon as practicable, the retirement board shall issue to each original member a certificate certifying the aggregate length of his service prior to July 1, 1945. Such certificate shall be final and conclusive as to his prior service unless thereafter modified by the board upon application of the contributor. The time during which a contributor is absent from service without pay shall not be counted in computing the service of a contributor unless approved by the board.

History: En. Sec. 8, Ch. 37, L. 1945.

31-209. Payments by contributors. Every member shall be required to contribute into the fund a sum equal to three and one-half per cent ($3\frac{1}{2}\%$) of his monthly salary, which sum shall be deducted from his salary and credited to his account in the fund. Every member who was in the employ of the Montana highway patrol prior to July 1, 1945, shall have the option and he may elect to make back payments to the date when he first entered the service of the Montana highway patrol. Such back payments may be spread over a period of two (2) years by having the regular payroll deduction of the contributor increased in an amount equal to the total of his back payments divided by twenty-four (24), which deduction increase shall be credited to such back payments owing and shall be continued until the full amount of such back payments shall have been completed. Any such deduction increase may be anticipated in part or in full by the contributor at any time and must be anticipated in full at the time of retirement before a retirement allowance is granted, and if not so anticipated and paid in full then a member's annuity shall be calculated on the total accumulated deductions standing to his credit in the fund, and the state annuity shall be reduced in proportion to the reduction which occurs in the member's annuity due to the amount of back payments not so anticipated. Every contributor who shall elect to make such back payments shall receive full credit under this act for all contributions made into the fund and for all service credits to which he might thereby be entitled, provided that when a member has served twenty-five (25) years in the Montana highway patrol all payments by him and contributions to his credit from the fund shall cease.

History: En. Sec. 9, Ch. 37, L. 1945.

31-210. Contributions by the state of Montana. The state of Montana shall annually contribute to the fund ten per cent (10%) of all moneys received by the state of Montana from the collection of the motor vehicle driver's license fee provided for in section 31-111 for a period of ten (10) years from and after July 1, 1945. But not to exceed seven and one-half ($7\frac{1}{2}$ c) cents for each such license sold, in the event the present fee should be raised in the ensuing ten (10) years.

History: En. Sec. 10, Ch. 37, L. 1945.

NOTE.—See note to sec. 31-111 and also sec. 31-135.

31-211. Retirement. Any member in service who has completed at least twenty-five (25) years of creditable service may retire on a service retirement allowance upon written application to the board setting forth

at what time, not less than thirty (30) days nor more than ninety (90) days subsequent to the filing thereof, he desires to be retired.

History: En. Sec. 11, Ch. 37, L. 1945.

31-212. Voluntary retirement. If a contributor has served twenty (20) years of creditable service with the Montana highway patrol, he is hereby granted the option and privilege of retiring and in such case, his retirement allowance shall be proportionately reduced on an actuarial basis.

History: En. Sec. 12, Ch. 37, L. 1945.

31-213. Retirement allowance. Upon retirement from service a member shall receive a service retirement allowance which shall consist of the state annuity plus the member's annuity. The member's annuity shall be the actuarial equivalent of his aggregate contributions at the time of retirement and the state annuity shall be in an amount which, when added to the member's annuity, will provide a total retirement allowance of one-half ($\frac{1}{2}$) of his average final salary.

History: En. Sec. 13, Ch. 37, L. 1945.

31-214. Disability retirement allowance. In case of the total disability of a contributor, permanent in character, regardless of the length of service of the contributor, a disability retirement allowance shall be granted the contributor in an amount calculated on the actuarial equivalent of the member's annuity and the state annuity standing to his credit at the time of his disability retirement; provided that if such total disability is a direct result of any service to the Montana highway patrol in line of duty, then such patrolman who is totally and permanently disabled shall be retired on total retirement allowance of one-half his average final salary regardless of his length of service.

History: En. Sec. 14, Ch. 37, L. 1945;
amd. Sec. 1, Ch. 109, L. 1947.

31-215. Involuntary retirement allowance. Should a contributor be discontinued from service, not voluntarily, after having completed ten (10) years of total service, but before reaching retirement age, he shall, upon filing of application in the manner herein provided for retirement, be paid as he may elect as follows: (a) the full amount of accumulated deductions standing to his credit; or (b) a member's annuity of equivalent actuarial value to his accumulated deductions standing to his credit, plus a state annuity having a value equal to the present value of a state annuity then standing to his credit.

History: En. Sec. 15, Ch. 37, L. 1945.

31-216. Compulsory retirement allowance. Any member, regardless of his years of service, who has attained the age of sixty (60) years, shall forthwith be retired. If he shall have served twenty-five (25) years or more, he shall receive the full retirement allowance as provided herein. If he shall have served less than twenty-five (25) years, he shall be entitled to the same options as provided in section 31-215.

History: En. Sec. 16, Ch. 37, L. 1945.

31-217. Refunds in case of resignation or discharge. Where a contributor resigns of his own volition, or is discharged for cause before becoming entitled to a retirement allowance, then seventy-five per cent (75%) of the accumulated deductions standing to his credit shall be paid to him.

History: En. Sec. 17, Ch. 37, L. 1945;
amd. Sec. 2, Ch. 109, L. 1947.

31-218. Payments upon death. If the board shall find that a contributor died as a direct and proximate result of injury received in the course of his employment, a retirement allowance shall be paid to his widow so long as she remains his widow and if and when such widow dies or remarries, then to his children under eighteen (18) years of age while they are under eighteen (18) years of age, and if and when there are no children under eighteen (18) years of age, then to the member's parent or parents if they are dependent.

Such retirement allowance shall consist of: (a) a member's annuity which shall be the actuarial equivalent of the contributor's accumulated deductions standing to his credit; and (b) a state annuity equal to fifty per cent (50%) of the final salary of the contributor, less the amount which is paid to any such widow or children or dependent parent or parents under the workmen's compensation act of the state of Montana, during the period such compensation is paid or payable.

History: En. Sec. 18, Ch. 37, L. 1945.

31-219. Payments in case of death from natural causes. (a) If the beneficiary dies before receiving in payments the present value of his member's annuity and the state annuity as it was at the time of his retirement, the balance shall be paid to his legal representatives or to such person having an insurable interest in his life as he shall nominate by written designation duly acknowledged and filed with the board. (b) If a member dies before reaching retirement age, his legal representatives or the person having an insurable interest in his life as he shall nominate by written designation duly acknowledged and filed with the board, shall be entitled to either of the two options as provided in section 31-215.

History: En. Sec. 19, Ch. 37, L. 1945.

31-220. Monthly payments of retirement allowances. The retirement allowances granted under the provisions of this act shall be paid in equal monthly installments and shall not be increased, decreased, revoked or repealed unless by act of the legislative assembly of the state of Montana.

History: En. Sec. 20, Ch. 37, L. 1945.

31-221. Exemption from taxes and execution. Any money received or to be paid as a member's annuity, state annuity or return of deductions or the right of any of these, shall be exempt from any state or municipal tax and from levy, sale, garnishment, attachment or any other process whatsoever and shall be unassignable.

History: En. Sec. 21, Ch. 37, L. 1945.

31-222. Nomination of beneficiary. Every contributor shall have the authority to name his beneficiary by written designation duly acknowledged

and filed with the board, and to change the beneficiary in like manner. Such designation and all changes must be filed with the board up until, but not after, the time of retirement.

History: En. Sec. 22, Ch. 37, L. 1945.

31-223. Service in the armed forces of the United States. Any member of the Montana highway patrol now in or hereafter inducted into the armed forces of the United States, shall have the option: (a) to continue his payments into the fund; or (b) allow the board to make his payments for him during such military service, in which event he shall repay the fund the full amount of such payments upon his return to the Montana highway patrol, and such repayments must be made within two (2) years after his return to the patrol in the same manner as provided in section 31-209, provided that a member's service in the armed forces of the United States shall be credited to and made a part of the member's service allowance.

History: En. Sec. 23, Ch. 37, L. 1945.

31-224. Fraud—correction of errors. (a) No person shall knowingly make any false statement, or shall falsify or permit to be falsified any record or records of the retirement system herein established in any attempt to defraud such system. (b) Should any such change in records fraudulently made or any mistake in records inadvertently made result in any contributor or beneficiary receiving more or less than he would have been entitled to had the records been correct, then, on the discovery of such error, the board shall correct such error and shall adjust the payments which shall be made to the contributor or annuitant in such manner that the actuarial equivalent of the benefit to which he was correctly entitled shall be paid.

Any person violating any of the provisions of subsection (a) of this section shall be guilty of a misdemeanor, and, upon conviction, shall be sentenced to pay a fine not exceeding one thousand (\$1,000.00) dollars or suffer imprisonment not exceeding one (1) year, or both, in the discretion of the court.

History: En. Sec. 24, Ch. 37, L. 1945.

31-225. Restrictions upon payments. If any beneficiary is convicted of a felony, the board shall have the authority to revoke or suspend, for as long a time as it sees fit, disbursement of the state annuity. Where the illness or injuries causing a contributor to be retired, or where the death of a contributor is directly and proximately caused by such contributor's immoral or intemperate conduct or gross negligence, the board shall have the authority to refuse, revoke, or suspend for as long a time as it sees fit disbursement of the state annuity.

History: En. Sec. 25, Ch. 37, L. 1945.

31-226. Subrogation. Where a third person is liable to the member or his dependents for injury or death, the state shall be subrogated to the right of the member or the dependents against such third person; but only to the extent of the state annuity payable under this act by the state. Any recovery against such third person, in excess of the state annuity theretofore

paid or thereafter to be paid by the state shall be paid forthwith to the contributor or the person designated by the contributor.

History: En. Sec. 26, Ch. 37, L. 1945.

31-227. Payments under other laws. All payments provided for in this act are in addition to any other benefits now or hereafter provided for under the workmen's compensation act of the state of Montana.

History: En. Sec. 27, Ch. 37, L. 1945.

TITLE 32

HIGHWAYS, BRIDGES AND FERRIES

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CHAPTER 1

HIGHWAYS—DEFINITIONS AND CLASSIFICATIONS

- Section 32-101. Name or title of act.
32-102. Highways deemed to include what.
32-103. Public highways defined.
32-104. Classification—common and main highways.
32-105. Abandonment or vacation of highways.
32-106. Width of way or road.
32-107. Rights acquired by public in highway.

32-101. (1610) Name or title of act. This act shall be known as the “General Highway Law.”

History: En. Sec. 1, Ch. 72, L. 1913; re-en. Sec. 1, Ch. 141, L. 1915; re-en. Sec. 1, Ch. 172, L. 1917; re-en. Sec. 1610, R. C. M. 1921.

Collateral References
Highways—19.
39 C.J.S. Highways § 37.

NOTE.—For earlier acts see chapter 44, Laws of 1903, and sections 1337-1456, Revised Codes of 1907.

32-102. (1611) Highways deemed to include what. Within the meaning of this act, a highway shall be deemed to include its necessary embankments, retaining walls, culverts, sluices, and drains, and a bridge shall be deemed to include its superstructures, abutments, and piers and approaches, except dirt fills.

History: En. Sec. 2, Ch. 72, L. 1913; amd. Sec. 2, Ch. 141, L. 1915; re-en. Sec. 2 Ch. 172, L. 1917; re-en. Sec. 1611, R. C. M. 1921.

Collateral References
Highways—18.
39 C.J.S. Highways § 1.

32-103. (1612) Public highways defined. All highways, roads, lanes, streets, alleys, courts, places, and bridges laid out or erected by the public, or now traveled or used by the public, or if laid out or erected by others, dedicated or abandoned to the public, or made such by the partition of real property, are public highways.

History: En. Sec. 2600, Pol. C. 1895; amd. Sec. 1, Ch. 44, L. 1903; re-en. Sec. 1337, Rev. C. 1907; amd. Sec. 3, Ch. 72, L. 1913; re-en. Sec. 3, Ch. 141, L. 1915; re-en. Sec. 3, Ch. 172, L. 1917; re-en. Sec. 1612, R. C. M. 1921. Cal. Pol. C. Sec. 2618.

NOTE.—For history of this and following sections see *Barnard Realty Co. v. City of Butte*, 48 M 102, 111, 136 P 1064.

Bridges

In view of the statute upon the subject, a bridge is a part and parcel of the highway upon which it is built. *State ex rel. Foster v. Ritch*, 49 M 155, 157, 140 P 731; *State ex rel. Donlan v. Board of Commrs.*, 49 M 517, 523, 143 P 984; *State ex rel. Furnish v. Mullendore*, 53 M 109, 113, 161 P 949, 953.

Where one voluntarily erects a bridge intending that it should become a part of an existing public highway and belong to the public as such, or does so under an arrangement by which he might be compensated for the labor and materials furnished in constructing it, he may not claim to be the owner, or attempt to restrain the public in the free use thereof. *State ex rel. Donlan v. Board of Commrs.*, 49 M 517, 523, 143 P 984.

Dedication or Abandonment

Dedication or abandonment is not shown by mere user until the period of limitation of actions to recover real property has elapsed. *Montana Ore Purchasing Co. v. Boston & B. Consol. Min. Co.*, 25 M 427, 431, 65 P 420.

Definitions

Under this section, a road becomes a county road when it is "laid out," whether "erected" or not; to "lay out" a road means locating and establishing a new highway, —the taking of all necessary legal steps for the establishment of, and looking toward its construction, but does not include the actual physical act of construction; when so laid out, it does not become extinct through not being opened or used by the public. *French v. County of Lewis and Clark*, 87 M 448, 454, 288 P 455.

Operation and Effect

This section, as it appeared in the Political Code of 1895, was construed to be a remedial statute, curing irregularities, but not supplying jurisdiction, where none was acquired, in the creation of roads, and as

recognizing the existence of highways by prescription when they had been used or traveled by the people generally for the period named in the statute of limitations. *State v. Auchard*, 22 M 14, 16, 55 P 361; *Montana Ore Purchasing Co. v. Boston & B. Consol. Min. Co.*, 25 M 427, 431, 65 P 420.

The keeping of a record by the county commissioners of a certain county road, together with other facts showing its use by the public, was *prima facie* evidence showing that it was a public road within the meaning of the above section. *Smith v. Zimmer*, 45 M 282, 293, 125 P 420.

Those roads only are declared to be public highways which had been established by the public authorities, or were recognized by them and used generally by the public, or which had become such by prescription or adverse use, at the time of the enactment of this section as section 2600 of the Political Code of 1895. *Barnard Realty Co. v. City of Butte*, 48 M 102, 109, 136 P 1064.

It was not the intention of the legislature that all public highways, including roads, streets, alleys, courts, culverts, and bridges composing the same, should be appraised as county property, and the value thus set upon them considered in the adjustment of the property rights and liabilities of counties out of which a new one has been created. *State ex rel. Foster v. Ritch*, 49 M 155, 157, 140 P 731.

The grant authorized by section 2477, Revised Codes of the United States, is nothing more than an offer of a right of way for the construction of a public highway across the public domain, and can only become fixed when the highway is established and constructed in the manner authorized by the laws of the state in which the land is situated, and where that offer is accepted by user, that user must be shown to have continued over the exact route claimed for the statutory period prior to July 1st, 1895. *State ex rel. Damsie v. Nolan*, 58 M 167, 172, 191 P 150.

The streets of a city are public highways, and though the city is charged with the duty of keeping them in repair and the cost of maintenance is imposed upon the city, nevertheless jurisdiction over them is primarily in the state, and the city acts with respect to them subject to the general laws of the state. *City of Helena v. Helena Light & Railway Co.*, 63 M 108, 120, 207 P 337.

Under section 2477, United States Revised Statutes, a grant of a right of way for highway purposes over public domain does not become operative until accepted by the public by the construction of a highway according to the provisions of state law. *Warren v. Chouteau County*, 82 M 115, 122, 265 P 676.

Prescription

Where it is sought to establish a public road over the lands of another by prescription, the evidence must be convincing that the public have pursued a definite, fixed course, continuously and uninterruptedly, coupled with an assumption of control and right of use adversely under claim or color of right for the statutory period. *Moulton et al. v. Irish et al.*, 67 M 504, 507 et seq., 218 P 1053.

A road may not be held to have been established by prescription where it is made to appear that it was never traveled by the general public. *Warren v. Chouteau County*, 82 M 115, 122, 265 P 676.

The fact that a passage over a road has been for years barred by gates or other obstructions to be opened and closed by the parties passing thereover is strong evidence, in an action in which a public road by prescription is claimed, of a mere license to the public to pass over the way. *Peasley v. Trosper*, 103 M 401, 406, 63 P 2d 131.

Id. In order to establish a public highway by prescription by proof of travel over it for the statutory period, the testimony must definitely show a use of the identical strip of lands over which the right is claimed, coupled with an assumption of control, and not merely by the owner's permission.

Roads Over Indian Lands—Judicial Notice

Regulations of the department of the interior concerning rights of way over Indian lands must be judicially noticed

by the courts, and under Sec. 2, Ch. 161, 38 Stat. 1189, road authorities are not required to secure the consent or approval of the secretary of the interior before proceeding to the establishment thereof, the consent of the superintendent of the particular agency being sufficient. *Peasley v. Trosper*, 103 M 401, 406, 63 P 2d 131.

What Are Public Roads

Under this section public highways are such as have been established by the public authorities or were recognized by them and used generally by the public, or which had become such by prescription or adverse use at the time of the enactment of the statute. *Peasley v. Trosper*, 103 M 401, 405, 63 P 2d 131.

When Road Over Indian Land Deemed Public

Under Act of Congress (38 Stat. 1189), a road across Indian lands in this state is deemed a public road when it is opened and laid out by the legal authorities charged with the duty of laying out and opening public roads under state laws and having jurisdiction of the territory embraced within the Indian reservation. *Peasley v. Trosper*, 103 M 401, 407, 63 P 2d 131.

References

Cited or applied as section 2600, Political Code in *State ex rel. Rocky Mt. Bell Tel. Co. v. Red Lodge*, 30 M 338, 340, 76 P 758; as Sec. 3, Ch. 72, Laws 1913, in *State ex rel. Furnish v. Mullendore*, 53 M 109, 113, 161 P 949, 953; *State ex rel. McMaster v. District Court*, 80 M 228, 231, 260 P 134; *Norton v. Great Northern Ry. Co. et al.*, 87 M 270, 290, 278 P 521; *State ex rel. State Highway Commission v. District Court et al.*, 105 M 44, 52, 69 P 2d 112; *State ex rel. Great Falls Housing Authority v. City of Great Falls*, 110 M 318, 328, 100 P 2d 915.

32-104. (1613) Classification—common and main highways. Public highways in this state shall hereafter be classed as common highways, main highways, and state highways. All highways which are not established or improved in the manner hereinafter provided for state highways, shall be common or public highways. Common or public highways shall be such as are established or improved in the manner provided by chapter 4 of this title.

History: En. Sec. 4, Ch. 72, L. 1913; re-en. Sec. 4, Ch. 141, L. 1915; re-en. Sec. 4, Ch. 172, L. 1917; re-en. Sec. 1613, R. C. M. 1921.

References

State ex rel. McMaster v. District Court, 80 M 228, 231, 260 P 134; *Park County v. Miller*, 117 M 157, 159, 159 P 2d 358.

32-105. (1614) Abandonment or vacation of highways. All public highways once established must continue to be public highways until abandoned by operation of law, or by judgment of a court of competent jurisdiction.

tion, or by the order of the board of county commissioners of the county in which they are situated; but no order to abandon any highway shall be valid unless preceded by due notice and hearing as provided in this act; and no state highway can be abandoned except on the joint order of the board of county commissioners and the state highway commission.

History: En. Sec. 5, Ch. 72, L. 1913; re-en. Sec. 5, Ch. 141, L. 1915; re-en. Sec. 5, Ch. 172, L. 1917; re-en. Sec. 1614, R. C. M. 1921. Cal. Pol. C. Sec. 2619.

NOTE.—For earlier acts see section 2601, Political Code, 1895; re-enacted as section 2, chapter 44, Laws of 1903; re-enacted as section 1338, Revised Codes of 1907.

Operation and Effect

The mere use of land by the public as a street for the statutory period, not coupled with an assumption of jurisdiction over it by the city authorities, is insufficient to clothe the city with title by prescription. *Barnard Realty Co. v. City of Butte*, 48 M 102, 113, 136 P 1064; *id.*, 55 M 384, 390, 177 P 402.

A highway, whether a country road or a street, once established, cannot be vacated, except by an order of the public authorities having jurisdiction over it. *Barnard Realty Co. v. City of Butte*, 48 M 102, 114, 136 P 1064.

Id. Travel by one or more persons over a given route, outside of an incorporated city or town, is not of itself, in the absence of an assumption of jurisdiction

by the board of county commissioners, by some definite action, sufficient to constitute adverse use of it as a highway.

A public road established at public expense in strict conformity with statutory provisions and with the consent of the owner, who relinquished compensation as to such part of the road as ran through his land, remained such until abandoned as provided in the above section, notwithstanding the failure of the county commissioners to comply with the conditions attached to owner's consent. *Flynn v. Beaverhead County*, 49 M 347, 352, 141 P 673.

The remedy established by law for vacating or abandoning a road lies only where the road has been lawfully established; therefore a land owner who seeks to have his title to land over which a road has been illegally extended, quieted in him may not be denied relief on the alleged ground that his remedy lies in an action to vacate under the above section. *Warren v. Chouteau County*, 82 M 115, 121, 265 P 676.

Collateral References

Highways—75(1), 79(1).
39 C.J.S. Highways §§ 116, 130.

32-106. (1615) Width of way or road. The width of all public highways, except bridges, alleys, lanes, must be sixty feet unless a greater or less width is ordered by the board of county commissioners on petition of the person interested. The width of all private highways and by-roads, except bridges, must be at least twenty feet. Nothing in this act must be construed as to increase or diminish the width of either kind of a highway already established or used as such.

History: Ap. p. Sec. 10, p. 106, L. 1874; re-en. Sec. 1061, 5th Div. Rev. Stat. 1879; re-en. Sec. 1822, 5th Div. Comp. Stat. 1887; amd. Sec. 2602, Pol. C. 1895; amd. Sec. 3, Ch. 44, L. 1903; re-en. Sec. 1339, Rev. C. 1907; re-en. Sec. 6, Ch. 72, L. 1913; re-en. Sec. 6, Ch. 141, L. 1915; re-en. Sec. 6, Ch. 172, L. 1917; re-en. Sec. 1615, R. C. M. 1921. Cal. Pol. C. Sec. 2620.

Operation and Effect

It is no objection to the proceedings to open a road that the width of such proposed road was not designated either in the report of the viewers or the order opening the road, since the width of highways within the state being regulated by statute, such width prevails where the proceedings are silent upon that point.

Crowley v. Board of Commissioners, 14 M 292, 297, 36 P 313.

In this state, the lawful width of public highways is generally sixty feet. *City of Butte v. Mikowitz*, 39 M 350, 357, 102 P 593.

When a sufficient portion of a public highway is graded or otherwise prepared for travel, the invitation to the public to use the highway is confined to the prepared or used portion, and the duty then devolves upon the traveler to keep within that portion prepared for its use, and for injuries received outside of that portion he cannot recover, unless he can excuse his presence at the place where he was injured. *Howard v. Flathead Independent Tel. Co.*, 49 M 197, 202, 141 P 153.

Id. While theoretically a public highway in this state is sixty feet in width, the county is not required to grade or keep it, for its entire width, in condition for public travel; but its duty is fully discharged if the portion graded or made ready for travel is of sufficient width to accommodate the use which may be fairly anticipated to be made of it, and the authorities in control may use the remaining portions for purposes inconsistent with their use as driveways, as, for instance, for piling stones, cutting down and leaving

steep embankments, or for drainage ditches.

References

State v. Board of County Commissioners, 83 M 540, 554, 273 P 290; Norton v. Great Northern Ry. Co. et al., 85 M 270, 290, 278 P 521.

Collateral References

Highways 47.
39 C.J.S. Highways § 67.

32-107. (1616) Rights acquired by public in highway. By taking or accepting land for a highway, the public acquires only the right of way and the incidents necessary to enjoying and maintaining the same, subject to the regulations in this act and code provided.

History: En. Sec. 2620, Pol. C. 1895; L. 1913; re-en. Sec. 7, Ch. 141, L. 1915; re-en. Sec. 6, Ch. 44, L. 1903; re-en. Sec. 1342, Rev. C. 1907; re-en. Sec. 7, Ch. 72, 1616, R. C. M. 1921. Cal. Pol. C. Sec. 2631.

CHAPTER 2

ROAD TAXES AND BONDS

- Section 32-201. Road tax levy—general road tax.
32-202. Issuance of highway bonds—limit of indebtedness.
32-203. Employers to furnish lists of employees liable to tax.
32-204. County treasurer to notify employer of liability for tax.
32-205. County commissioners may levy special tax for post-war construction of highways and bridges.
32-206. Transfer of other funds.
32-207. Expenditure postponed till termination of existing war emergency.
32-208. Board of county commissioners shall adopt a budget.

32-201. (1617) Road tax levy—general road tax. For the purpose of raising revenue for the construction, maintenance, and improvement of public highways, the board of county commissioners of each county in this state may in their discretion levy and cause to be collected a general tax upon the taxable property in the county of not more than ten (10) mills on the dollar, which shall be payable to the county treasurer with other general taxes. There is also established a general road tax of two dollars (\$2.00) per annum on each male person over the age of twenty-one (21) years, and under the age of fifty (50) years, inhabitant within the county, and payable by each person liable therefor at any time within the year. The collection of these taxes shall be under the direction of the board of county commissioners; taxes from freeholders to be collected the same as other taxes, and from non-freeholders as commissioners may direct; provided, that the foregoing provisions of this section shall not apply to incorporated cities and towns which, by ordinance, provide for the levy and collection of a like general tax and a like special tax within such cities and towns for road, street, and alley purposes. All moneys collected under the provisions of this act shall belong to the general road fund of the county.

History: Ap. p. Sec. 19, p. 110, L. 1874; 1796, 5th Div. Comp. Stat. 1887; amd. Sec. re-en. Sec. 1070, 5th Div. Rev. Stat. 1879; 2640, Pol. C. 1895; amd. Sec. 1, p. 176, L. amd. Sec. 1, p. 119, L. 1885; re-en. Sec. 1897; amd. Sec. 1, p. 69, L. 1899; amd. Sec.

11, Ch. 44, L. 1903; re-en. Sec. 1344, Rev. C. 1907; amd. Sec. 1, Ch. 2, Ch. 72, L. 1913; amd. Sec. 2, Ch. 2, Ch. 141, L. 1915; amd. Sec. 2, Ch. 2, Ch. 172, L. 1917; re-en. Sec. 1617, R. C. M. 1921; amd. Sec. 1, Ch. 2, L. 1933; amd. Sec. 1, Ch. 145, L. 1947. Cal. Pol. C. Secs. 2651-2655.

NOTE.—This section, before amendment, held a violation of Section 4, Article XII of the Constitution in that the legislature levied directly a poll tax for \$2.00. Opinions of Attorney General, Vol. 18, No. 178.

Exemption of Cities and Towns Not Applicable to Special Levy for Funding Bond Purposes

Held, on application for injunction, that the exemption provided for by this section of cities and towns from payment of the five-mill levy, does not require county authorities to make the same exemption as to a special tax levy made necessary by delinquencies and required for funding outstanding registered road fund warrants, but such special tax may constitutionally be imposed upon city property, without being open to the charge of double taxation. *State ex rel. Siegfriedt v. Carbon County*, 108 M 510, 513, 92 P 2d 301.

Operation and Effect

Construing this section, before amendment by chapter 2, Laws of 1933, authorizing counties to levy annually a general tax of not less than two nor more than five mills for the construction and maintenance of public highways, the moneys collected to be placed in the general road fund, and section 1659, R. C. M. 1921 (since repealed)

providing for the creation of special road districts, under which they are given power, inter alia, to levy a tax not to exceed two mills for general road purposes on property in such districts, held that the revenue collected from the latter levy, like that from the former, must be placed in the general road fund of the counties, both being for general road purposes, and not in the road fund of any special road district into which must go funds derived from a levy authorized in addition to the two mill levy, not to exceed five mills, for district purposes. *Special Road Dist. No. 8 v. Millis*, 81 M 86, 89, 90, 261 P 885.

References

State ex rel. Case v. Bolles et al., 74 M 54, 65, 238 P 586.

Collateral References

Highways—124, 125, 128, 150.

40 C.J.S. Highways §§ 286, 287, 290, 306.

Constitutionality of statutory provisions as to political corporations or divisions which shall bear cost of maintaining highways. 2 ALR 746.

Taxation for street or highway purposes as within constitutional provisions prohibiting legislature from imposing for town, county, city or corporate purposes, or providing that legislature may invent power to levy such taxes in local authorities. 46 ALR 710.

Provisions of tax statute as to time for performance of acts by boards or officers as mandatory or directory. 151 ALR 248.

32-202. (1618) Issuance of highway bonds—limit of indebtedness. Whenever, in the judgment of the board of county commissioners of any county, it becomes necessary or advisable for the construction or improvement of any main highway or state highway therein, to raise revenue in addition to that furnished by the taxes and licenses authorized by this act, it shall be lawful for such board to issue, on the credit of the county, coupon bonds to such amounts as said board may find necessary; provided that such bonds shall not, together with all other outstanding indebtedness of the county, exceed five per centum of the value of the taxable property within such county, to be ascertained by the last preceding general assessment therein; and provided, further, that such proceedings be had prior to and in the issuance of such bonds, as are required in the case of other county bonds.

History: En. Sec. 2, Ch. 2, Ch. 72, L. 1913; re-en. Sec. 2, Ch. 2, Ch. 141, L. 1915; re-en. Sec. 2, Ch. 2, Ch. 172, L. 1917; re-en. Sec. 1618, R. C. M. 1921.

Collateral References

Counties—173(2), 174.

20 C.J.S. Counties §§ 259, 261.

See generally, 43 Am. Jur. 261, Public Securities and Obligations.

Meaning of term "assessment" or "assessed valuation" when used as basis of tax or debt limit. 156 ALR 594.

32-203. (1619) Employers to furnish lists of employees liable to tax.

Every employer having in his or its employment any person or persons liable for the special road tax of two dollars, mentioned in this act, must on or before the third Monday of March in each year, and monthly thereafter until the first day of October, furnish to the county treasurer a complete list of all the persons so employed, and if any such employer shall neglect or refuse to furnish such list, he shall forfeit to the county, in which said road tax is collectible, the sum of fifty dollars, to be recovered by an action brought in the name of the state in any justice court of said county, and the further sum of fifty dollars for each refusal or neglect to furnish such list after any demand shall have been made by the county treasurer. Upon the receipt of said lists it shall be the duty of said county treasurer to furnish to said employer furnishing such lists, printed special road tax receipt-books, with proper stubs containing memorandum of name, amount, and date attached.

History: Ap. p. Sec. 1838, 5th Div. Comp. Stat. 1887; amd. Sec. 2681, Pol. C. 1895; amd. Sec. 26, Ch. 44, L. 1903; re-en. Sec. 1353, Rev. C. 1907; amd. Sec. 3, Ch. 2, Ch. 72, L. 1913; re-en. Sec. 3, Ch. 2, Ch. 141, L. 1915; re-en. Sec. 3, Ch. 2, Ch. 172,

L. 1917; re-en. Sec. 1619, R. C. M. 1921. Cal. Pol. C. Sec. 2671.

Collateral References

Highways 150.

40 C.J.S. Highways § 306.

32-204. (1620) County treasurer to notify employer of liability for tax.

If any person required to pay the special road tax mentioned in this act does not pay the same and has no property subject to taxation, and the person owning the same is in the employment of any other person, the county treasurer must deliver to the employer a written notice, stating the amount of tax due for such employee, and from the time of receiving said notice the employer is liable to pay said tax, and the tax so paid may be deducted by such employer from the amount then due or to become due to such employee.

History: Ap. p. Sec. 1837, 5th Div. Comp. Stat. 1887; amd. Sec. 2680, Pol. C. 1895; amd. Sec. 3, p. 176, L. 1897; amd. Sec. 27, Ch. 44, L. 1903; re-en. Sec. 1354, Rev. C. 1907; re-en. Sec. 4, Ch. 2, Ch. 72, L. 1913; re-en. Sec. 4, Ch. 2, Ch. 141, L. 1915; re-en. Sec. 4, Ch. 2, Ch. 172, L. 1917; re-en. Sec. 1620, R. C. M. 1921.

NOTE.—This section relating to collection of special road tax, held a violation of Section 4, Article XII of the Constitution, following Opinion No. 178, Vol. 18, construing section 32-201. Opinions of Attorney General, Vol. 18, No. 213.

32-205. County commissioners may levy special tax for post-war construction of highways and bridges. For the purpose of accumulating and providing post-war funds for the construction, improvement, repair and maintenance of public highways and bridges, the board of county commissioners of each county in this state may, in their discretion, levy and cause to be collected during each or either of the fiscal years beginning July 1, 1945 and ending June 30, 1946, and beginning July 1, 1946 and ending June 30, 1947, a special tax upon the taxable property in the county lying outside of the corporate limits of incorporated cities and towns, of not more than five (5) mills on the dollar, which shall be payable to the county treasurer with other taxes, which levies shall be in addition to all other levies now authorized by law to be made for road and bridge purposes. All moneys

derived from such levies shall be placed in a special road and bridge fund and shall be kept separate from all other road and bridge moneys.

History: En. Sec. 1, Ch. 69, L. 1945;
amd. Sec. 1, Ch. 149, L. 1947.

32-206. Transfer of other funds. The board of county commissioners of each county may, in their discretion, at the close of each of the fiscal years ending June 30, 1945, June 30, 1946, and June 30, 1947, transfer to such special road and bridge fund any unexpended and unappropriated funds remaining in the county road fund and in the county bridge fund, over and above the amount set apart and appropriated as a reserve for the then current fiscal year.

History: En. Sec. 2, Ch. 69, L. 1945.

32-207. Expenditure postponed till termination of existing war emergency. No expenditures for any purpose whatever shall be made from such special road and bridge fund until after April 1, 1947. After such date the board of county commissioners of any county having such fund may thereafter provide for the expenditure thereof for the purpose of constructing, improving, repairing, and maintaining the public highways and bridges of the county; provided that no expenditure in excess of ten thousand dollars (\$10,000.00) for any single purpose as defined in section 16-2009 shall be made from such fund without the approval of a majority of the electors voting on the question of such expenditure at an election to be provided by law.

History: En. Sec. 3, Ch. 69, L. 1945;
amd. Sec. 1, Ch. 149, L. 1947.

32-208. Board of county commissioners shall adopt a budget. After April 1, 1947, the board of county commissioners of any county having such special road and bridge fund may adopt a budget making appropriations therefrom for the construction, improvement, repair and maintenance of the public highways and bridges in the county for the remaining portion of the then current fiscal year, notice thereof being giving, hearing thereon had and such budget adopted in the manner provided for emergency budgets by section 16-1907 for each fiscal year thereafter when any moneys are to be expended therefrom, the county budget shall contain and set forth a separate section as a budget for such special road and bridge fund, and all of the provisions of the county budget law shall apply thereto; provided, however, that at any time after the close of the fiscal year ending June 30, 1947, the board of county commissioners may in their discretion, instead of providing a separate budget for the expenditure of any moneys then in such special fund, transfer the same to the county road fund or to the county bridge fund or transfer a part thereof to each of such funds.

History: En. Sec. 4, Ch. 69, L. 1945;
amd. Sec. 1, Ch. 149, L. 1947.

CHAPTER 3

SUPERVISION OF PUBLIC HIGHWAYS

- Section 32-301. Highway proceedings to be included in minutes.
 32-302. Powers and duties of county commissioners respecting highways.
 32-303. County surveyor's duties in counties having total registered vote of fifteen thousand or over at last general election—salary.
 32-304. Road supervisor abolished, when.
 32-305. Purchase of machinery and materials.
 32-306. Road supervisors—appointment and compensation.
 32-307. Duties of road supervisors—reports, accounts and statements.
 32-308. Employment of laborers, teams, etc.
 32-309. Removal of obstructions and repair of bridges.
 32-310. Limit on amount expended in road district.
 32-311. Examination of supervisor's report—warrant for claims.
 32-312. Construction of drains and ditches—penalty for obstructions.
 32-313. Tools and implements for use of road supervisor.
 32-314. Inspection of highways and construction work—compensation.
 32-315. Law declared an emergency measure.
 32-316. Minute entry of inspection.

32-301. (1621) Highway proceedings to be included in minutes. The county clerk must include in the minutes of the board of county commissioners all proceedings and orders of the board relative to each highway within the county.

History: En. Sec. 1, Ch. 3 of Ch. 141,
 L. 1915; re-en. Sec. 1, Ch. 3 of Ch. 172, L.
 1917; re-en. Sec. 1621, R. C. M. 1921.

Collateral References
 Counties—53.
 20 C.J.S. Counties § 91.

32-302. (1622) Powers and duties of county commissioners respecting highways. The boards of county commissioners of the several counties of the state have general supervision over the highways within their respective counties.

1. They may, in their discretion, keep the county divided into suitable road districts, place each of such road districts in charge of a competent road supervisor, and order and direct each of such supervisors concerning the work to be done upon the public highway in his district.

2. They may, in their discretion, provide and order the county surveyor, or if the county surveyor is incompetent, some other competent surveyor designated by the board, to prepare suitable plat books and have recorded therein with the county clerk a full description of every public highway within the county, showing each course by bearing and distance, with a full and complete map thereof, together with a record of all other proceedings with reference to the same.

3. They must cause to be surveyed, viewed, laid out, recorded, opened, worked, and maintained such highways as are necessary for public convenience as in this act provided, and cause to be erected and maintained thereon guide-posts, as provided in this act.

4. They must abolish or abandon in the manner provided in this act such public highways as are not necessary for the public convenience.

5. They must contract, agree for, purchase, or otherwise lawfully acquire the right of way over private property for the use of public highways, and for that purpose institute, when necessary, proceeding under sections 93-9901 to 93-9926, paying for such right of way from the general road fund of the county; provided, however, where roads or trails are or

will be dedicated to public use as a highway they may construct and maintain thereon substantially constructed cattle guards, appurtenances, and gates adjacent thereto.

6. They may, in their discretion, but subject to the limitation and provisions in the constitution and codes provided, issue bonds upon the faith and credit of the county for the construction or improvements of main highways, state highways, and bridges.

7. They may, in their discretion, but subject to the limitation and restriction provided in the codes for the letting of public contracts, let out by contract the construction, maintenance, and improvement of the public highways, and the construction, maintenance, or repairs of bridges when the amount of work to be done exceeds the sum of one thousand (\$1,000.00) dollars.

8. They may, in their discretion, cause to be done whatever may be necessary for the best interests of the roads and road districts of their several counties.

9. They may limit or forbid, temporarily, any traffic or class of traffic, on the public highways or any part thereof, when in their discretion it is necessary that traffic be so restricted in order to preserve or repair such highways.

10. They must make such reports, relating to the state roads under their supervision, to the state highway commission as may be requested by said commission.

11. They may, in their discretion, employ a competent road builder, who shall be paid for his services as such not to exceed twelve (\$12.00) dollars per day and in proportion for parts of days, and his actual expenses, who shall serve during the pleasure of the board, whose duty it shall be, under the direction and control of said board, to prescribe the times and places, when and where, all work shall be done on the roads of the county, report any delinquency or inefficiency of any road overseer, or any other person employed upon any such road, to the board of county commissioners, and perform such other duties as may be prescribed by said board. Provided, that in counties where the surveyor is not paid an annual salary, he may by agreement be employed by the county commissioners to perform the services of road builder and such county surveyor shall be paid for such services as above provided. Provided, that no county surveyor shall be paid hereunder for any duty otherwise required by law to be performed by him as county surveyor. Provided, however, that nothing in this act shall be construed to alter or repeal the provisions of sections 32-303 and 32-304.

History: En. Sec. 2, Ch. 3, Ch. 172, L. 1913; amd. Sec. 2, Ch. 3, Ch. 141, L. 1915; amd. Sec. 2, Ch. 3, Ch. 172, L. 1917; amd. Sec. 1, Ch. 15, Ex. L. 1919; re-en. Sec. 1622, R. C. M. 1921; amd. Sec. 1, Ch. 128, L. 1925; amd. Sec. 1, Ch. 59, L. 1929; amd. Sec. 1, Ch. 102, L. 1947. Cal. Pol. C. Secs. 2641-2643.

Cross-References

County commissioners' powers and duties, secs. 16-1004, 16-1005.

Gravel, stone and sand may be taken from state lands for highways, sec. 81-704.

Liability of Counties

Under the statutes of Montana with respect to the care of highways and liability for injury thereon, counties and cities stand in the same relation to the travelling public insofar at least, as injury results from some act of an agent of either while engaged by either in its proprietary as distinguished from its governmental ca-

capacity. *Johnson v. City of Billings et al.*, 101 M 462, 478, 54 P 2d 579.

Liability of County Commissioners

The liability of county commissioners for injuries resulting from defective highways is not absolute, but depends upon a solution of the question whether or not they have been guilty of negligence. *Smith v. Zimmer*, 45 M 282, 303, 125 P 420.

Id. Before the individual members of a board of county commissioners can be held personally answerable for negligent conduct in refusing to repair a public highway, the board of which they are members must have actual notice of such defective condition; but if, after such actual notice to the board, any two or more members thereof negligently or wilfully refuse to cause the defect to be repaired, either directly or through the agency of the road supervisors, the members, so guilty of negligent conduct, are answerable to one who, without contributory negligence on his part, is injured thereby.

Road District Can Consist of Entire County

Under the highway law the entire county is within the county commissioners' jurisdiction so far as county roads are concerned, and as to them, unless divided into two or more road districts, the county constitutes a single road district, and so far as the general public is concerned, the result of a division is to limit the area over which each freeholder has a right of petition to the county commissioners for

the establishment of the proposed right of way for a highway, and if no division is made, the freeholder's right remains co-extensive with the county's boundaries. *Park County v. Miller*, 117 M 157, 159, 159 P 2d 358.

Worked and Maintained

An allegation in a complaint against a county for work done on a road that since the construction of a road by the county it "cared for and maintained it" held the equivalent of the statutory requirement making it the duty of the board of county commissioners to cause highways to be "worked and maintained." *French v. County of Lewis and Clark*, 87 M 448, 454, 288 P 455.

References

Cited or applied as Sec. 2, Ch. 141, Laws 1915, before amendment, in *State v. Story*, 53 M 573, 581, 165 P 748; *State ex rel. McLeod v. District Court*, 67 M 164, 169, 215 P 240; *State ex rel. Livingston v. District Court*, 90 M 191, 300 P 916; *State ex rel. McMaster v. District Court*, 80 M 228, 232, 260 P 134; *Nelson et al. v. Jackson et al.*, 97 M 299, 303, 33 P 2d 822; *State v. Bourdeau*, 126 M 266, 246 P 2d 1037.

Collateral References

Counties \hookrightarrow 47; Highways \hookrightarrow 99.
20 C.J.S. Counties § 81; 40 C.J.S. Highways § 178.

Power and duty of highway officers as regards location or routes of roads to be constructed or improved. 91 ALR 242.

32-303. (1622.1) County surveyor's duties in counties having total registered vote of fifteen thousand or over at last general election—salary. The county surveyor of all counties having a total registered vote of fifteen thousand (15,000) or over, at the last general election shall have exclusive control, supervision and direction of all highways, bridges and causeways within his county, and in the exercise of such control, supervision and direction he shall keep all highways and bridges free and clear of all obstructions; cause highways to be graded, when needed, and maintain and repair the same; cause all bridges and causeways to be made, when needed, and keep the same maintained and in good repair and renew the same when destroyed; make all surveys; establish grades; prepare plans, specifications and estimates; keep accurate cost data; approve all claims against the county for all highway, bridge and causeway construction, maintenance and repair prior to presentation to the board of county commissioners; employ deputies, men and teams, and discharge at his pleasure such deputies, men and teams, and determine how, when and where such deputies, men and teams shall work; purchase and secure all highway and bridge machinery and machinery equipment and tools to be used upon highways and bridges with the approval of the board of county commis-

sioners; purchase and secure all highway, bridge and causeway supplies and materials with the approval of the board of county commissioners; from time to time make reports and estimates of all matters relating to highways and bridges when required by the board of county commissioners; perform such other duties as are now or which may be hereafter required by law, and shall receive an annual salary for performing the duties of said office in the amount of three thousand six hundred dollars (\$3,600.00) per annum to be paid out of the contingent fund of the county in which he holds office.

History: En. Sec. 1, Ch. 102, L. 1927; amd. Sec. 1, Ch. 21, L. 1929; amd. Sec. 1, Ch. 179, L. 1931.

v. Board of County Commissioners, 104 M 21, 28, 64 P 2d 1060.

Mandate to Comply with Requirements

On application for writ of mandate to compel board of county commissioners to make the provisions of this section effective in their county, held, that the board wrongfully refused to comply with the written demand of surveyor on showing there were 16,887 registered voters in the county, although but 14,390 votes cast at general election, and applicant entitled to recover \$200 attorneys' fee, chargeable against the county. State ex rel. Durland

"Registered Vote"

Held, that the words "registered vote" mean voters who are registered and entitled to vote, and not voters who actually voted at the last general election. State ex rel. Durland v. Board of County Commissioners, 104 M 21, 26, 64 P 2d 1060.

Collateral References

Counties↔88; Highways↔105.
20 C.J.S. Counties § 139; 40 C.J.S. Highways § 177.

32-304. (1622.2) Road supervisor abolished, when. The office of road supervisor in the counties mentioned in section 32-303 is hereby abolished. Any and all laws relating to the powers and duties of road supervisors are hereby made applicable to county surveyors of all counties having a total registered vote of fifteen thousand (15,000) or over at the last general election in so far as the same are not inconsistent with any of the provisions of this act.

History: En. Sec. 2, Ch. 102, L. 1927; amd. Sec. 2, Ch. 21, L. 1929.

Collateral References

Counties↔88.
20 C.J.S. Counties § 139.

32-305. (1623) Purchase of machinery and materials. The board of county commissioners may also, in their discretion, out of the general road fund of the county, purchase and operate grading and other machinery that they may deem necessary or desirable for the improvement of the public highways in the county, and may also acquire, out of the same fund, by purchase, condemnation, lease, or gift, deposits or quarries of suitable road-building material; and any crushed rock or gravel, not directly used or needed by such county in the construction, repair, or maintenance of its roads, may be sold at not less than actual cost of production to any person, firm, or corporation desiring to use the same upon any public street or highway within the county, and the proceeds of any such sale shall be paid into the general road fund.

History: En. Sec. 3, Ch. 3 of Ch. 72, L. 1913; re-en. Sec. 3, Ch. 3 of Ch. 141, L. 1915; amd. Sec. 3, Ch. 3 of Ch. 172, L. 1917; re-en. Sec. 1623, R. C. M. 1921.

Collateral References

Highways↔110.
40 C.J.S. Highways § 203.
43 Am. Jur. 737, Public Works and Contracts.

32-306. (1624) Road supervisors—appointment and compensation. Road supervisors, when appointed, shall serve during the pleasure of the

board of county commissioners, and shall in all things be under the direction and control of said board. Every road supervisor must, before entering upon the duties of his office, be a resident elector of the road district for which he is appointed and must file with the county clerk the customary oath of office, together with a bond approved by said board for the faithful performance of his duties. As compensation for his services he shall receive not more than six dollars per day for eight hours' labor, but the time taken in going to or from his home to the place of labor shall not be included within such period of eight hours.

History: En. Sec. 4, Ch. 3, Ch. 72, L. 1913; amd. Sec. 4, Ch. 141, L. 1915; re-en. Sec. 4, Ch. 3, Ch. 172, L. 1917; amd. Sec. 2, Ch. 15, Ex. L. 1919; re-en. Sec. 1624, R. C. M. 1921.

References

Manley v. Harer et al., 73 M 253, 261,

235 P 757; Manley v. Harer et al., 82 M 30, 35, 264 P 937.

Collateral References

Counties 62, 65, 74(1).
20 C.J.S. Counties §§ 101, 106, 120.

32-307. (1625) Duties of road supervisors—reports, accounts and statements. Road supervisors, when appointed and under the direction and supervision of the board of county commissioners, must:

1. Take charge of all highways, bridges, and causeways within their respective districts; open all new roads when the same are duly established and ordered to be opened by the board of county commissioners; perform at the time and in the manner directed by the board of county commissioners whatever shall be lawfully directed by the board concerning the public highways within their respective districts.

2. Make and file with the county clerk verified reports quarterly, or oftener if required by the county commissioners, showing the number of days they have been employed during the previous three months and when and how employed; the number of days' labor performed upon the public highways in their respective districts, when and by whom performed, the character and kind of work done, and the wages agreed to be paid per day; the number of teams and implements, and the amount, value, and kind of material used, by whom and where used, and the price agreed to be paid therefor; the number and character of all the tools and implements belonging to the county within their respective districts.

3. Keep a correct account of all labor performed and animals, implements, or material furnished by himself or others upon the public highways, and give to persons performing such work or furnishing such animals, implements, or materials, a certificate stating the number of days' work performed, the character and kinds of such work, and the price agreed to be paid therefor; and the number of days any animals or implements have been used, and the price to be paid therefor, and the amount and character of all materials furnished.

History: Ap. p. Sec. 13, p. 68, L. 1899; amd. Sec. 2632, Pol. C. 1895; amd. Sec. 10, Ch. 44, L. 1903; re-en. Sec. 1360, Rev. C. 1907; amd. Sec. 5, Ch. 3, Ch. 72, L. 1913; re-en. Sec. 5, Ch. 3, Ch. 141, L. 1915; re-en. Sec. 5, Ch. 3, Ch. 172, L. 1917; re-en. Sec. 1625, R. C. M. 1921. Cal. Pol. C. Sec. 2645.

Collateral References

Liability of municipality for damage caused by fall of tree or limb. 14 ALR 2d 186.

32-308. (1626) Employment of laborers, teams, etc. Whenever it becomes necessary for any road supervisor, in the repairing of any public highway in his district, to secure the assistance of other persons, he shall be empowered to employ suitable laborers, teams, and implements, and to contract as to the price to be paid therefor, which must not exceed the rates fixed by the board of county commissioners for such laborers, teams, and implements per day of eight hours; provided, that the time taken by such laborers or teams in going to and from the place of labor shall not be included within such period of eight hours.

History: En. Sec. 6, Ch. 3, Ch. 72, L. 1913; re-en. Sec. 6, Ch. 3, Ch. 141, L. 1915; re-en. Sec. 6, Ch. 3, Ch. 172, L. 1917; amd. Sec. 3, Ch. 15, Ex. L. 1919; re-en. Sec. 1626, R. C. M. 1921.

Collateral References

Highways 113(2).

40 C.J.S. Highways § 208.

25 Am. Jur. 368, Highways, §§ 52 et seq.

Personal liability of highway officers for damage to or trespass upon land in connection with construction or maintenance of highway. 90 ALR 1481.

32-309. (1627) Removal of obstructions and repair of bridges. Whenever any public highway becomes obstructed from any cause, or any bridge needs repairing or becomes dangerous for the passage of teams or travelers, the board of county commissioners, or the county surveyor if he be the officer in charge of roads and bridges, upon being notified thereof, must cause such obstruction to be removed, or bridge repaired, for which purpose the board of county commissioners or the county surveyor, if he be the officer in charge of roads and bridges, or the road supervisor of the district may order out such number of inhabitants of the district as may be necessary to aid in removing such obstructions or repairing such bridge. If any person after three days' notice, whether said notice be oral or written, being physically able to respond, shall fail to be present at the time and place designated, or having attended, refuses to obey the direction of the person in charge of the work, or passes his time in idleness, or inattention to the duty assigned him, he shall be liable to punishment as for a misdemeanor; provided, that every person responding to any such order and performing the duties assigned him shall be compensated for his labor at a rate not to exceed four dollars (\$4.00) per day of eight hours, the time taken in going to and from the place of labor not included. Provided nothing in this act shall be construed as holding the county commissioners responsible or liable for anything other than wilful, intentional neglect or failure to act.

History: Ap. p. Sec. 12, p. 119, Ex. L. 1873; amd. Sec. 24, p. 113, L. 1874; re-en. Sec. 1075, 5th Div. Rev. Stat. 1879; re-en. Sec. 1802, 5th Div. Comp. Stat. 1887; amd. Sec. 2720, Pol. C. 1895; amd. Sec. 36, Ch. 44, L. 1903; re-en. Sec. 1372, Rev. C. 1907; amd. Sec. 7, Ch. 3, Ch. 72, L. 1913; amd. Sec. 7, Ch. 3, Ch. 141, L. 1915; re-en. Sec. 7, Ch. 3, Ch. 172, L. 1917; re-en. Sec. 1627, R. C. M. 1921; amd. Sec. 1, Ch. 81, L. 1929.

Operation and Effect

Though a road supervisor or a board of county commissioners do not have sufficient funds at their disposal to repair a dangerous place in a highway, this does

not excuse them from taking suitable measures to give notice of the obstruction, or to provide suitable barriers to prevent a traveler from being injured by it. *Smith v. Zimmer*, 45 M 282, 301, 125 P 420.

This section places the specific legal duty upon the board of county commissioners to remove obstructions in a highway, and after notice thereof any member of the board who neglects to do so becomes personally liable for any injury caused thereby, and they are not relieved of liability by merely instructing the road supervisor to erect and maintain barriers; hence an allegation in the complaint

of one who has been injured, to the effect that the board had not instructed the supervisor to erect and maintain barriers, is not required to render the pleading sufficient. *Becker v. Chapple et al.*, 72 M 199, 202 et seq., 232 P 538.

In the matter of repairing defects on highways the board of county commissioners can only act as a board; hence where in an action against all three of the commissioners to recover damages for personal injuries sustained by the fall of an automobile into an open cut caused by a washout, for failure to remedy the defect after notice, the complaint was dismissed as to two of the defendants, the remaining

commissioner, having been without authority to order the repairs made, couldn't be held liable in damages for not doing what he had no power to do. *Riggs v. Webb*, 77 M 80, 82, 249 P 1041.

References

Moore v. Industrial Accident Fund, 80 M 136, 139, 259 P 825.

Collateral References

Bridges↔21(2); Highways↔105(1), 151(1, 2).

11 C.J.S. Bridges § 35; 40 C.J.S. Highways §§ 177, 307, 309.

32-310. (1628) Limit on amount expended in road district. The amount of expenditures in any road district for labor and teams, together with the compensation to be paid to the supervisor, shall not exceed in the aggregate the sum apportioned quarterly by the board of county commissioners to such road district, but if such sum is not sufficient, said board may appropriate from the general road fund any amount which may be necessary in their judgment for the use and benefit of such district; provided, however, that the full amount of all road taxes collected in remote and outlying districts shall be expended annually by the county commissioners on the roads within the boundaries of said districts.

History: En. Sec. 8, Ch. 3 of Ch. 72, L. 1913; amd. Sec. 8, Ch. 3 of Ch. 141, L. 1915; re-en. Sec. 8, Ch. 3, of Ch. 172, L. 1917; re-en. Sec. 1628, R. C. M. 1921.

Collateral References

Highways↔95(2).
39 C.J.S. Highways §§ 158, 169.

32-311. (1629) Examination of supervisor's report—warrant for claims. The board of county commissioners, at the first monthly or quarterly meeting held after the filing of any supervisor's report, must examine the same and if found correct and the work reported to have been done was necessary and properly done, cause an order to be drawn on the county treasurer against the road fund for the amount due any road supervisor for his services; and upon the presentation of any certificate issued by road supervisors for labor performed by others, and the verification by the owners thereof, as in other cases of claims against the county, the board shall cause to be issued to the owner or holder of such claims a warrant for the amount thereof, drawn on the county treasurer against the road fund.

History: Ap. p. Sec. 4, p. 118, L. 1885; re-en. Sec. 1834, 5th Div. Comp. Stat. 1887; re-en. Sec. 2695, Pol. C. 1895; amd. Sec. 33, Ch. 44, L. 1903; re-en. Sec. 1367, Rev. C. 1907; amd. Sec. 9, Ch. 3, Ch. 72, L. 1913; re-en. Sec. 9, Ch. 3, Ch. 141, L. 1915; re-

en. Sec. 9, Ch. 3, Ch. 172, L. 1917; re-en. Sec. 1629, R. C. M. 1921.

Collateral References

Counties↔164.
20 C.J.S. Counties § 248.

32-312. (1630) Construction of drains and ditches—penalty for obstructions. The road supervisor, or other person designated by the board of county commissioners, has authority to open or construct drains and ditches for the making and preserving of roads and highways, doing as little injury as may be to the adjoining land, and any person stopping or obstructing the drains or ditches so made forfeits the sum of fifty dollars,

to be recovered by the supervisor or board of county commissioners in a civil action in any court of competent jurisdiction. If any person feels aggrieved by the act of any supervisor, or other person designated by the board of county commissioners, he may make complaint in writing to the board of county commissioners, who will allow just damages and pay the same out of the road fund.

History: Ap. p. Sec. 1801, 5th Div. Comp. Stat. 1887; re-en. Secs. 2700 and 2701, Pol. C. 1895; amd. Sec. 34, Ch. 44, L. 1903; re-en. Sec. 1370, Rev. C. 1907; amd. Sec. 10, Ch. 3, Ch. 72, L. 1913; re-en. Sec. 10, Ch. 3, Ch. 141, L. 1915; re-en. Sec. 10, Ch. 3, Ch. 172, L. 1917; re-en. Sec. 1630, R. C. M. 1921.

Operation and Effect

Held, that in determining whether county commissioners must employ the county surveyor to construct drains for

the preservation of highways, this section, a special statute, declaring that the road supervisor or some other person designated by the board has authority to construct drains, must prevail over section 16-3302, requiring the county surveyor to make all surveys and establish all grades. *Durand v. Prickett et al.*, 98 M 399, 408, 39 P 2d 652.

Collateral References

Highways—105(1), 161.
40 C.J.S. Highways §§ 177, 229.

32-313. (1631) Tools and implements for use of road supervisor. Upon the requisition of any road supervisor, the board of county commissioners shall, whenever necessary, furnish to said supervisor any plows, scrapers, or other tools and implements necessary for the use of his road district, and cause the same to be paid for out of the general road fund of the county. The supervisor must preserve such tools and implements, and must not allow the same to be used except on public highways; at the expiration of his term of office, or upon his removal therefrom, he must turn over all such tools and implements to his successor or to the board of county commissioners.

History: Ap. p. Secs. 2710-2711, Pol. C. 1895; amd. Sec. 35, Ch. 44, L. 1903; re-en. Sec. 1371, Rev. C. 1907; amd. Sec. 11, Ch. 3, Ch. 72, L. 1913; re-en. Sec. 11, Ch. 3, Ch. 172, L. 1917; re-en. Sec. 1631, R. C. M. 1921.

Collateral References

Highways—110.
40 C.J.S. Highways § 203.

32-314. (1632) Inspection of highways and construction work—compensation. The board of county commissioners may direct the county surveyor or some member or members of said board, to inspect the condition of any highway or highways or proposed highway or any work, contract or otherwise, under the direction, supervision or control of the county officials, being done or completed on any highway or bridge in the county during the progress of the work or before any work is commenced, or after completion and before payment therefor, and such person or persons making such inspection shall receive for making such inspection when so directed the sum of twelve dollars (\$12.00) per day and actual expense, which shall be audited and allowed in the same manner as other claims against the county.

History: Ap. p. Sec. 1805, 5th Div. Comp. Stat. 1887; amd. Secs. 2740-2741, Pol. C. 1895; amd. Secs. 51-52, Ch. 44, L. 1903; amd. Secs. 1-2, Ch. 76, L. 1905; re-en. Secs. 1387-1388, Rev. C. 1907; amd. Secs. 12-13, Ch. 3, Ch. 72, L. 1913; amd. Secs. 12-13, Ch. 3, Ch. 141, L. 1915; amd. Sec. 1, Ch. 106, L. 1917; amd. Sec. 12, Ch.

3, Ch. 172, L. 1917; amd. Sec. 4, Ch. 15, Ex. L. 1919; re-en. Sec. 1632, R. C. M. 1921; amd. Sec. 1, Ch. 176, L. 1929; amd. Sec. 1, Ch. 84, L. 1953.

NOTE.—This section, prior to 1929 amendment, held repealed by section 32-303 (1622.1) insofar as said section author-

ized the county commissioners to direct a member or members of the board to inspect highways or bridges or to employ deputies, men or teams for such work in counties of a registered vote of 15,000 or more and fix the compensation for such inspection or work. *Opinions of Attorney General*, Vol. 12, p. 75.

Compensation

As respects per diem, a commissioner may receive eight dollars per day for each day's attendance upon sessions of the board and for each day given to inspection of contract road work under order of the board, but shall receive no other compensation. *State v. Story*, 53 M 573, 583, 165 P 748. See also *Moore v. Industrial Accident Fund*, 80 M 136, 139, 259 P 825; *Fisher v. Stillwater County*, 81 M 31, 35, 261 P 607.

The fact that a county commissioner while supervising and inspecting road construction work at times performed manual labor to assist in the work does not deprive him of the right to charge the proper fee for supervision; hence an instruction in effect advising the jury that while defendant commissioner could collect fees for inspection and supervision, any fee collected for inspection while do-

ing manual labor was illegal, was erroneously prejudicial. *State v. Russell*, 84 M 61, 66, 274 P 148.

In an action by a county surveyor against county commissioners and their official bondsmen to recover the compensation he would have received for checking and making plans and specifications for a bridge under this section, but for the fact that another engineer was employed for that purpose, held that since that section was so amended as not to allow any compensation for such work by the county surveyor, the complaint did not state a cause of action. *Durland v. Prickett et al.*, 98 M 399, 410, 39 P 2d 652.

Title of Amendatory Act within Constitution

Title to Ch. 176, Laws 1929 held not to violate Art. V, Sec. 23 of the Constitution. *Durland v. Prickett et al.*, 98 M 399, 39 P 2d 652.

References

Hicks v. Stillwater County, 84 M 38, 45, 274 P 296.

Collateral References

Highways—105(1), 112.
40 C.J.S. Highways §§ 177, 201.

32-315. (1633) Law declared an emergency measure. This act is hereby declared to be an emergency law, and a law necessary for the immediate preservation of the public peace and safety.

History: En. Sec. 5, Ch. 15, Ex. L. 1919; re-en. Sec. 1633, R. C. M. 1921.

32-316. (1634) Minute entry of inspection. The county surveyor, or such member or members of said board, when they act jointly, if there be no prior board order so directing, must, at the next regular meeting of the board, make proper entries of such inspection.

History: Ap. p. Sec. 2742, Pol. C. 1895; amd. Sec. 53, Ch. 44, L. 1903; amd. Sec. 3, Ch. 76, L. 1905; re-en. Sec. 1389, Rev. C. 1907; amd. Sec. 14, Ch. 3, Ch. 72, L. 1913; re-en. Sec. 14, Ch. 3, Ch. 141, L. 1915; amd. Sec. 13, Ch. 3, Ch. 172, L. 1917; re-en. Sec. 1634, R. C. M. 1921.

CHAPTER 4

ESTABLISHING, ALTERING AND VACATING PUBLIC HIGHWAYS

- Section 32-401. Petition by freeholders to establish, change or discontinue.
32-402. Contents of petition.
32-403. Investigation of petitions for change in or discontinuance of public highways.
32-404. Minute entry of action on petition—notice to interested parties.
32-405. Opening of highway—survey of same—claims for damages.
32-406. Determination of damages.
32-407. Award of damages deemed rejected, when—proceeding to secure right of way—validity.
32-408. Fund out of which expenses are to be defrayed.
32-409. Record of opening or altering of highway.
32-410. Opening highway through or along growing crops.

- 32-411. Notice to district supervisor of opening of highway—award of contract—bond of contractor.
- 32-412. Recording deeds and judgments for right of way.
- 32-413. Crossing of railroad, canals and ditches.
- 32-414. Removal of fences—notice.
- 32-415. Highways to follow subdivision or section lines.
- 32-416. Change of highway upon petition of freeholders.
- 32-417. Defects in proceedings not to invalidate.

32-401. (1635) Petition by freeholders to establish, change or discontinue. Any ten, or a majority of the freeholders of a road district, taxable therein for road purposes, may petition in writing the board of county commissioners to establish, change, or discontinue any common or public highway therein. When such a highway is petitioned for upon the dividing line between two counties, the same course must be pursued as in other cases, except that a copy of the petition must be presented to the board of county commissioners of each county, who shall act jointly.

History: En. Sec. 2750, Pol. C. 1895; amd. Sec. 55, p. 35, L. 1901; amd. Sec. 54, Ch. 44, L. 1903; re-en. Sec. 1390, Rev. C. 1907; amd. Sec. 1, Ch. 4, Ch. 72, L. 1913; re-en. Sec. 1, Ch. 4, Ch. 141, L. 1915; amd. Sec. 1, Ch. 4, Ch. 172, L. 1917; re-en. Sec. 1635, R. C. M. 1921. Cal. Pol. C. Sec. 2681.

Cross-Reference

Cemeteries, highway not to be laid through, sec. 9-118.

Obstructing Alleged Public Road Over Indian Lands

Where in an action to enjoin the obstruction of an alleged public road over lands embraced in an Indian reservation it was agreed that no attempt had ever been made by legal authorities to open or lay out the road in question pursuant to sections 32-401 to 32-417, it was not such a public road as is recognized by federal authorities over Indian lands (Sec. 2, Ch. 161, 38 Stat. 1189) and court holding it was public road and directing removal of fences and gates committed error. *Peasley v. Trosper*, 103 M 401, 407, 63 P 2d 131.

Operation and Effect

In the absence of statutory provision, the commissioners are not required to state in their proceedings to open a road that the petitioners were citizens of the United States or the county. *Crowley v. Board of Commrs.*, 14 M 292, 297, 36 P 313.

In the absence of constitutional restrictions or prohibitory legislation, the people of a county can establish and construct as many highways, bridges, and ferries as they deem necessary, and by whatsoever method of procedure they may elect. The power of the county to establish a highway by any method of procedure it may elect, and to issue of bonds for that purpose after a valid election, is not taken away because the requisite number of freeholders may not petition therefor, or

because it may not be able to acquire rights of way, or because permission has not been obtained from congress to erect a bridge across a navigable stream, where permission has been obtained since the election. *Reid v. Lincoln County*, 46 M 31, 64, 125 P 429.

See *Flynn v. Beaverhead County*, 54 M 309, 170 P 13, construing similar sections of Revised Codes of 1907, relating to vacating, opening, laying out, or changing highways.

While the board of county commissioners, under section 32-508, is granted power to obtain a right of way of main highways by condemnation proceedings, and under sections 32-401 to 32-417, may upon petition signed by ten or a majority of the freeholders of a road district, proceed to the final establishment of common or public highway, including obtaining right of way therefor as provided by sections 32-405 and 32-407, there is no statutory provision authorizing it to procure a right of way for a state highway by condemnation proceedings after such highway has been approved, laid out and established by the state highway commission. *State ex rel. McMaster v. District Court*, 80 M 228, 234, 260 P 134.

A petition for the establishment of a highway will be held sufficient as against collateral attack by way of an action to quiet title to the land covered by the highway, on the ground that the signers of the petition were not qualified, if their qualifications appear either from the petition, from the record of the county commissioners proceedings or from the evidence adduced on a hearing before the board. *Warren v. Chouteau County*, 82 M 115, 265 P 676.

The power conferred upon the state highway commission to establish and construct highways does not include the power to vacate them that power being lodged in the board of county commis-

sioners on petition of the freeholders of the district. *State et al. v. Hoblitt et al.*, 87 M 403, 410, 288 P 181.

The legal prerequisite to the establishment of a right of way for proposed road is a petition by ten freeholders of the road district. *Park County v. Miller*, 117 M 157, 159, 159 P 2d 358.

References

Hicks v. Stillwater County, 84 M 38, 274 P 296; *State ex rel. State Highway Commission v. District Court*, 105 M 44, 49, 69 P 2d 112; *Park County v. Miller*, 117 M 157, 158, 159 P 2d 358; *State ex rel. Walker v. Board of Comms.*, 120 M 413, 187 P 2d 1013, 1014; *Sjostrum v. State Highway Commission*, 124 M 562, 228 P 2d 238.

Collateral References

Highways—29(1), 72(2), 77(2).

32-402. (1636) Contents of petition. The petition must set forth and describe particularly the highways to be abandoned, discontinued, altered, or constructed, and if the same are to be altered, laid out, or constructed, the general route thereof, over what lands, who are owners thereof, whether such of them as can be found consent thereto, and if not, the probable cost of the right of way, where consent is not had, the necessity for, and advantage of the proposed road.

History: En. Sec. 2751, Pol. C. 1895; amd. Sec. 56, p. 35, L. 1901; amd. Sec. 55, Ch. 44, L. 1903; re-en. Sec. 1391, Rev. C. 1907; amd. Sec. 2, Ch. 4, Ch. 72, L. 1913; re-en. Sec. 2, Ch. 4, Ch. 141, L. 1915; re-en. Sec. 2, Ch. 4, Ch. 172, L. 1917; re-en. Sec. 1636, R. C. M. 1921. Cal. Pol. C. Sec. 2682.

References

State ex rel. McMaster v. District Court,

32-403. (1637) Investigation of petitions for change in or discontinuance of public highways. When any petition is filed as authorized in the preceding section, the board of county commissioners shall, at their next regular or special meeting, or at some date within thirty days thereafter, proceed and cause an investigation to be made as to the feasibility, desirability, and cost of granting the prayer of said petition, causing such investigation to be had as may be necessary to properly determine the merits or demerits of the petition.

History: En. Sec. 3, Ch. 4 of Ch. 141, L. 1915; amd. Sec. 3, Ch. 4 of Ch. 172, L. 1917; amd. Sec. 1, Ch. 4, Ex. L. 1919; re-en. Sec. 1637, R. C. M. 1921.

References

State ex rel. McMaster v. District Court, 80 M 228, 234, 260 P 134; *Hicks v. Still-*

39 C.J.S. Highways §§ 48, 101, 118.
25 Am. Jur. Highways, p. 368, §§ 52 et seq.; p. 406, §§ 105 et seq.

Constitutionality and construction of statute relating to location or relocation of highways. 63 ALR 516.

What justifies discontinuance of highway. 68 ALR 794.

Personal liability of highway officers for damage to or trespass upon land in connection with construction or maintenance of highways. 90 ALR 1481.

Power and duty of highway officers as regards location or routes of roads to be constructed or improved. 91 ALR 242.

Effect of regulations as to subdivision maps or plats upon vacation of streets and highways. 11 ALR 2d 587-595.

80 M 228, 234, 260 P 134; *Hicks v. Stillwater County*, 84 M 38, 274 P 296; *Park County v. Miller*, 117 M 157, 158, 159 P 2d 358.

Collateral References

Highways—29(3), 72(2), 77(2).
39 C.J.S. Highways §§ 50, 101, 118.

water County, 84 M 38, 274 P 296; *Park County v. Miller*, 117 M 157, 158, 159 P 2d 358.

Collateral References

Highways—33, 72(4), 77(5).
39 C.J.S. Highways §§ 48, 105, 121.

32-404. (1638) Minute entry of action on petition—notice to interested parties. After the commissioners shall have considered the petition, provided that not more than one member of the board of county commissioners

and the county surveyor shall act as viewers in making the investigation, they shall make an entry on their minutes of their decision with reference thereto, and cause notice of their action on said petition to be sent by registered mail to the petitioners and to all land owners as disclosed by the last assessment rolls of the county, owning land abutting the roadway proposed to be established, changed or discontinued.

History: En. Sec. 4, Ch. 4 of Ch. 172, L. 1917; re-en. Sec. 1638, R. C. M. 1921; amd. Sec. 1, Ch. 107, L. 1935. Cal. Pol. C. Secs. 2685, 2686.

References

State ex rel. McMaster v. District Court,

80 M 228, 260 P 134; Hicks v. Stillwater County, 84 M 38, 274 P 296; Park County v. Miller, 117 M 157, 158, 159 P 2d 358.

Collateral References

Highways 53(1), 72(4), 77(5).
39 C.J.S. Highways §§ 70, 105, 121.

32-405. (1639) Opening of highway—survey of same—claims for damages. If the petition is for the opening of a highway, and the board grants the prayer of said petition and orders the same opened, they shall proceed at once to have the same opened to the public and declare it to be a public highway; and the board may order the county surveyor, or if the county surveyor is incompetent, some other competent surveyor designated by the board to survey the same and plat it and file his field notes with the county clerk and recorder, for which the surveyor shall receive seven dollars per day and actual traveling expenses.

The board of county commissioners, upon making each and every order establishing the location or alteration of any highway, must find the amount of damages sustained by each and every person owning or claiming lands, or any improvements thereon and affected thereby, such amounts to be paid to the proper owner or claimant, if known, upon their showing or establishing their right or title to such lands or improvements, and furnishing proper deeds and releases. If the awards are all accepted, the road must be declared a public highway and opened.

History: En. Sec. 5, Ch. 4, Ch. 172, L. 1917; re-en. Sec. 1639, R. C. M. 1921. Cal. Pol. C. Sec. 2689.

Operation and Effect

It is not essential that the compensation due a non-consenting landowner for land appropriated for a public highway be paid in money. The benefit which he might derive from the opening of the new road over a particular route might furnish consideration for the right of way over his land. Flynn v. Beaverhead County, 54 M 309, 313, 170 P 13.

When County Commissioners Must Order Surveying to be Done by County Surveyor

Where county commissioners order a survey of a road to be made under this section, and propose to award compensation for the survey, the board must order the work to be done by the county surveyor, unless he be incompetent; in such circumstances the public is entitled to have the work done by the officer of their selection, and the permissive word

"may" used in the section has the meaning of "must." Durland v. Prickett et al., 98 M 399, 407, 39 P 2d 652.

In an action by a county surveyor against county commissioners, for damages resulting to him by the employment of another surveyor to perform services which were a part of his lawful duties, held, that this section, by declaring that upon the filing of a petition for the opening of a highway, the board of county commissioners may order the county surveyor, or, if he be incompetent, some other surveyor to survey it, is permissive, not mandatory, where the highway is accurately described in the petition and accompanied by a sufficient plat; the law not requiring the doing of a useless thing. Durland v. Prickett et al., 98 M 399, 406, 39 P 2d 652.

References

State ex rel. McMaster v. District Court, 80 M 228, 260 P 134; Warren v. Chouteau County, 82 M 115, 265 P 676; Hicks v. Stillwater County, 84 M 38, 274 P 296; Park County v. Miller, 117 M 157, 158, 159 P 2d 358.

Collateral References

Highways \Rightarrow 50.
39 C.J.S. Highways § 68.

See generally, 18 Am. Jur. 621, Eminent Domain.

32-406. (1640) Determination of damages. The damage must be determined by ascertaining the benefits and damages accruing to any person by reason of altering, changing, or laying out such roads, and the sum estimated, as benefits must be deducted from the sum estimated as damages, and the remainder, if any, shall be the amount of damages awarded.

History: En. Sec. 2760, Pol. C. 1895; re-en. Sec. 65, p. 38, L. 1901; re-en. Sec. 63, Ch. 44, L. 1903; re-en. Sec. 1399, Rev. C. 1907; re-en. Sec. 8, Ch. 4, Ch. 72, L. 1913; re-en. Sec. 8, Ch. 4, Ch. 141, L. 1915; re-en. Sec. 6, Ch. 4, Ch. 172, L. 1917; re-en. Sec. 1640, R. C. M. 1921. Cal. Pol. C. Sec. 2688.

References

State ex rel. McMaster v. District Court, 80 M 228, 260 P 134; Hicks v. Stillwater County, 84 M 38, 274 P 296; Park County v. Miller, 117 M 157, 158, 159 P 2d 358.

Collateral References

Highways \Rightarrow 41(2).
39 C.J.S. Highways § 62.

32-407. (1641) Award of damages deemed rejected, when—proceeding to secure right of way—validity. If any award of damages is not accepted within twenty days from the day of the award, it shall be deemed rejected by the land owners. The board must, by order, direct proceedings to procure the right of way to be instituted by the county attorney of the county as provided by sections 93-9901 to 93-9926, against all non-accepting land owners. When the board of county commissioners direct the institution of such proceedings the failure of the board of county commissioners to give any notices, or to do any act or thing necessary to be done, as provided in the preceding sections of this chapter, shall in no manner affect or invalidate said proceedings to procure the right of way, nor shall such failure to give any notice as hereinbefore provided be considered by the court as a defense in any proceedings instituted for the purpose of procuring said right of way and such proceedings when instituted, shall be had and taken as separate and apart from any act of the board of county commissioners hereinbefore mentioned, provided that the fact that rights of way sought to be secured shall have been declared by resolution of the board of county commissioners as necessary and desirable for the construction of a public highway shall be made to appear.

History: Ap. p. Sec. 2761, Pol. C. 1895; amd. Sec. 66, p. 38, L. 1901; amd. Sec. 64, Ch. 44, L. 1903; re-en. Sec. 1400, Rev. C. 1907; amd. Sec. 9, Ch. 4, Ch. 72, L. 1913; re-en. Sec. 9, Ch. 4, Ch. 141, L. 1915; amd. Sec. 7, Ch. 4, Ch. 172, L. 1917; amd. Sec. 2, Ch. 4, Ex. L. 1919; re-en. Sec. 1641, R. C. M. 1921. Cal. Pol. C. Secs. 2689-2690.

Finding of "Necessary and Desirable" Required

The finding of the board of county commissioners that the rights of way for establishment of a highway were "feasable and desirable" did not authorize a con-

demnation proceeding under this section requiring a finding that the rights of way were "necessary and desirable." Park County v. Miller, 117 M 157, 160, 159 P 2d 358.

References

State ex rel. McMaster v. District Court, 80 M 228, 260 P 134; Hicks v. Stillwater County, 84 M 38, 274 P 296.

Collateral References

Eminent Domain \Rightarrow 166.
29 C.J.S. Eminent Domain § 209.

32-408. (1642) Fund out of which expenses are to be defrayed. All awards by agreement, ascertained by the board of county commissioners or by the proper court, and all expenses, including their own expenses and

per diem as is authorized by section 16-912, must be paid out of the general road fund on the order of the board of county commissioners.

History: Ap. p. Sec. 2762, Pol. C. 1895; re-en. Sec. 67, p. 38, L. 1901; amd. Sec. 65, Ch. 44, L. 1903; re-en. Sec. 1401, Rev. C. 1907; re-en. Sec. 10, Ch. 4, Ch. 72, L. 1913; re-en. Sec. 10, Ch. 4, Ch. 141, L. 1915; amd. Sec. 8, Ch. 4, Ch. 172, L. 1917; re-en. Sec. 1642, R. C. M. 1921. Cal. Pol. C. Sec. 2691.

80 M 228, 260 P 134; Hicks v. Stillwater County, 84 M 38, 274 P 296; Park County v. Miller, 117 M 157, 158, 159 P 2d 358.

Collateral References

Highways \approx 99¼.
40 C.J.S. Highways § 176.

References

State ex rel. McMaster v. District Court,

32-409. (1643) Record of opening or altering of highway. If a highway is opened or altered, the findings of the commissioners and the plat fieldnotes, and report of the surveyor must be recorded in the office of the county clerk in books kept for that purpose.

History: En. Sec. 2763, Pol. C. 1895; re-en. Sec. 68, p. 38, L. 1901; re-en. Sec. 66, Ch. 44, L. 1903; re-en. Sec. 1402, Rev. C. 1907; re-en. Sec. 11, Ch. 4, Ch. 72, L. 1913; re-en. Sec. 11, Ch. 4, Ch. 141, L. 1915; re-en. Sec. 9, Ch. 4, Ch. 172, L. 1917; re-en. Sec. 1643, R. C. M. 1921.

References

State ex rel. McMaster v. District Court, 80 M 228, 260 P 134; Hicks v. Stillwater County, 84 M 38, 274 P 296; Park County v. Miller, 117 M 157, 158, 159 P 2d 358.

Collateral References

Highways \approx 54, 70.
39 C.J.S. Highways §§ 69, 96.

32-410. (1644) Opening highway through or along growing crops. No highway must be ordered opened through fields of growing crops, or along the line where crops would thereby be exposed to stock, until the owner thereof has sufficient time to harvest and care for such crops.

History: En. Sec. 2765, Pol. C. 1895; re-en. Sec. 70, p. 38, L. 1901; re-en. Sec. 68, Ch. 44, L. 1903; re-en. Sec. 1404, Rev. C. 1907; re-en. Sec. 13, Ch. 4, Ch. 72, L. 1913; re-en. Sec. 13, Ch. 4, Ch. 141, L. 1915; re-en. Sec. 10, Ch. 4, Ch. 172, L. 1917; re-en. Sec. 1644, R. C. M. 1921.

80 M 228, 260 P 134; Hicks v. Stillwater County, 84 M 38, 274 P 296; Park County v. Miller, 117 M 157, 158, 159 P 2d 358.

Collateral References

Highways \approx 49.
39 C.J.S. Highways § 68.

References

State ex rel. McMaster v. District Court,

32-411. (1645) Notice to district supervisor of opening of highway—award of contract—bond of contractor. When a highway is to be opened, constructed, altered, or widened, the county clerk must notify the supervisor of the proper district and furnish him with a certified copy of the order of the county commissioners; provided, that when the estimated cost of opening, constructing, altering, or widening exceeds two hundred dollars, the work may, in the discretion of the county commissioners, be let by contract; and if such estimated cost exceeds the sum of five hundred dollars, such work may be let by contract unless the board shall find that such work may be otherwise done at less cost; but before any contract shall be let, as provided herein, the board of county commissioners shall advertise for bids therefor, at least once a week for two successive weeks, in a newspaper of general circulation in the county, and the contract shall then be awarded to the lowest responsible bidder, who shall, before entering upon the performance of the work, execute and deliver to the board of county commissioners an undertaking with two or more sureties, to be

approved by the board of county commissioners, in a sum not less than equal the amount for which the contract is awarded, and conditioned for the prompt, faithful, and efficient performance of such work; provided, however, the board of county commissioners may reserve the right to reject any and all bids.

History: Ap. p. Sec. 2766, Pol. C. 1895; amd. Sec. 69, Ch. 44, L. 1903; re-en. Sec. 1405, Rev. C. 1907; amd. Sec. 14, Ch. 4, Ch. 72, 1913; amd. Sec. 14, Ch. 4, Ch. 141, L. 1915; amd. Sec. 11, Ch. 4, Ch. 172, L. 1917; re-en. Sec. 1645, R. C. M. 1921.

References

State ex rel. McMaster v. District Court,

80 M 228, 260 P 134; Hicks v. Stillwater County, 84 M 38, 274 P 296; French v. County of Lewis and Clark, 87 M 448, 455, 288 P 455; Park County v. Miller, 117 M 157, 158, 159 P 2d 358.

Collateral References

Highways 101, 113(1, 5).
40 C.J.S. Highways §§ 192, 210.

32-412. (1646) Recording deeds and judgments for right of way. In all cases where consent to use the right of way for a highway is voluntarily given, purchased, or condemned and paid for, either an instrument in writing, conveying the right of way and incident thereto, signed and acknowledged by the party making it, or a certified copy of the judgment of the court condemning the same, must be made and filed and recorded in the office of the county clerk, in which the land so conveyed or condemned must be particularly described.

History: En. Sec. 2767, Pol. C. 1895; re-en. Sec. 72, p. 39, L. 1901; re-en. Sec. 70, Ch. 44, L. 1903; re-en. Sec. 1406, Rev. C. 1907; re-en. Sec. 15, Ch. 4, Ch. 72, L. 1913; re-en. Sec. 15, Ch. 4, Ch. 141, L. 1915; re-en. Sec. 12, Ch. 4, Ch. 172, L. 1917; re-en. Sec. 1646, R. C. M. 1921. Cal. Pol. C. Sec. 2693.

References

State ex rel. McMaster v. District

Court, 80 M 228, 260 P 134; Hicks v. Stillwater County, 84 M 38, 274 P 296; Park County v. Miller, 117 M 157, 158, 159 P 2d 358.

Collateral References

Highways 54.
39 C.J.S. Highways § 73.

32-413. (1647) Crossing of railroad, canals and ditches. Whenever highways are laid out across railroads, canals, or ditches, on public lands, the owners or corporations using the same must, at their own expense, so prepare their roads, canals, or ditches, that the public highway may cross the same without damage or delay; and when the right of way for a public highway is obtained through the judgment of any court over any railroad, canal, or ditch, no damage must be awarded for the simple right to cross the same.

History: En. Sec. 2768, Pol. C. 1895; re-en. Sec. 73, p. 39, L. 1901; re-en. Sec. 71, Ch. 44, L. 1903; re-en. Sec. 1407, Rev. C. 1907; re-en. Sec. 16, Ch. 4, Ch. 72, L. 1913; re-en. Sec. 16, Ch. 4, Ch. 141, L. 1915; re-en. Sec. 13, Ch. 4, Ch. 172, L. 1917; re-en. Sec. 1647, R. C. M. 1921. Cal. Pol. C. Sec. 2694.

Cross-References

Railroad crossings, regulations outside cities, secs. 72-701 to 72-712.

Railroad crossings, signals, secs. 72-164 to 72-168.

References

Knott v. Pepper, 74 M 236, 244, 239 P 1037; State ex rel. McMaster v. District Court, 80 M 228, 260 P 134; Hicks v. Stillwater County, 84 M 38, 274 P 296; Park County v. Miller, 117 M 157, 158, 159 P 2d 358.

Collateral References

Canals 17; Railroads 96.
12 C.J.S. Canals § 16; 74 C.J.S. Railroads § 156.

32-414. (1648) Removal of fences—notice. When the alteration of an old or the opening up of a new road makes it necessary to remove the

fences on land given, purchased, or condemned by order of the court for road or highway purposes, notice to remove the fence must be given by the road supervisor, or other person designated by the board of county commissioners, to the owner, the occupant, or agent, by registered mail, postage prepaid, to his or her address; and if the same is not done within ten days thereafter, or commenced and prosecuted with due diligence, the road supervisor or other person designated by the board of county commissioners must cause it to be removed at the expense of the owner and recover of him the cost of such removal, and the fence material may be sold to satisfy the judgment.

History: En. Sec. 2769, Pol. C. 1895; re-en. Sec. 74, p. 39, L. 1901; re-en. Sec. 72, Ch. 44, L. 1903; re-en. Sec. 1408, Rev. C. 1907; re-en. Sec. 17, Ch. 4, Ch. 72, L. 1913; amd. Sec. 17, Ch. 4, Ch. 141, L. 1915; re-en. Sec. 14, Ch. 4, Ch. 172, L. 1917; re-en. Sec. 1648, R. C. M. 1921. Cal. Pol. C. Sec. 2695.

References

State ex rel. McMaster v. District

Court, 80 M 228, 260 P 134; Hicks v. Stillwater County, 84 M 38, 274 P 296; Park County v. Miller, 117 M 157, 158, 159 P 2d 358.

Collateral References

Highways⇒102.
40 C.J.S. Highways § 181.

32-415. (1649) Highways to follow subdivision or section lines. Highways must be laid out and opened when practicable upon subdivision or section lines; provided, however, that this section shall not be construed to prevent roads being laid out on diagonal lines when public purposes shall be best subserved thereby.

History: En. Sec. 2770, Pol. C. 1895; re-en. Sec. 75, p. 40, L. 1901; re-en. Sec. 73, Ch. 44, L. 1903; re-en. Sec. 1409, Rev. C. 1907; re-en. Sec. 18, Ch. 4, Ch. 72, L. 1913; re-en. Sec. 18, Ch. 4 Ch. 141, L. 1915; re-en. Sec. 15, Ch. 4, Ch. 172, L. 1917; re-en. Sec. 1649, R. C. M. 1921.

80 M 228, 260 P 134; Hicks v. Stillwater County, 84 M 38, 274 P 296; Park County v. Miller, 117 M 157, 158, 159 P 2d 358.

Collateral References

Highways⇒103.
40 C.J.S. Highways § 179.

References

State ex rel. McMaster v. District Court,

32-416. (1650) Change of highway upon petition of freeholders. Upon petition signed by a majority of the freeholders or owners residing upon any common highway, or portion thereof, petitioning that such highway or a portion thereof be so changed as to run on subdivision or section lines, the board of county commissioners must proceed to investigate the same, to all intents and purposes as though it were a petition to establish, change, or discontinue any common highway, as such proceedings are provided for in this chapter, and after such investigation or hearing, may make such change; provided, it can be done without material damage, injury, or serious inconvenience to the public customarily using such highway or portion thereof; provided, further, that those petitioning for such change shall bear all or such portion of the cost and expense thereof as the county commissioners may order.

History: Ap. p. Sec. 2771, Pol. C. 1895; re-en. Sec. 76, p. 40, L. 1901; re-en. Sec. 74, Ch. 44, L. 1903; re-en. Sec. 1410, Rev. C. 1907; amd. Sec. 19, Ch. 4, Ch. 72, L. 1913; amd. Sec. 19, Ch. 4, Ch. 141, L. 1915; re-en.

Sec. 16, Ch. 4, Ch. 172, L. 1917; re-en. Sec. 1650, R. C. M. 1921.

References

State ex rel. McMaster v. District Court,

80 M 228, 260 P 134; Hicks v. Stillwater County, 84 M 38, 274 P 296; Park County v. Miller, 117 M 157, 158, 159 P 2d 358.

Collateral References

Highways—70-72.

39 C.J.S. Highways §§ 99, 112.

25 Am. Jur., Highways, p. 368, §§ 52 et seq.; p. 406, §§ 105 et seq.

Constitutionality and construction of

statute relating to location or relocation of highways. 63 ALR 516.

What justifies discontinuance of highway. 68 ALR 794.

Personal liability of highway officers for damage to or trespass upon land in connection with construction or maintenance of highways. 90 ALR 1481.

Power and duty of highway officers as regards location or routes of roads to be constructed or improved. 91 ALR 242.

32-417. (1651) Defects in proceedings not to invalidate. None of the proceedings authorized by this chapter shall be invalid by reason of any defect, informality, or irregularity therein which does not materially affect the interests of the county, or prejudice the substantial rights of property owners immediately concerned.

History: En. Sec. 20, Ch. 4 of Ch. 72, L. 1913; re-en. Sec. 20, Ch. 4 of Ch. 141, L. 1915; re-en. Sec. 17, Ch. 4 of Ch. 172, L. 1917; re-en. Sec. 1651, R. C. M. 1921.

References

State ex rel. McMaster v. District Court, 80 M 228, 260 P 134; Hicks v. Stillwater County, 84 M 38, 274 P 296; Peasley v.

Trosper et al., 103 M 401, 411, 63 P 2d 131; Park County v. Miller, 117 M 157, 158, 159 P 2d 358.

Collateral References

Highways—50, 72, 77, 79(1), 101, 105(1), 107.

39 C.J.S. Highways §§ 68, 100, 112, 117, 130; 40 C.J.S. Highways §§ 177, 192.

CHAPTER 5

LOCAL IMPROVEMENT DISTRICTS

- Section 32-501. Duty of county commissioners to construct main highways and levy assessments.
- 32-502. Resolution of public interest.
- 32-503. Petition for construction or improvement of highway.
- 32-504. Proceedings upon receipt of petition.
- 32-505. Duty of supervisors and county surveyor.
- 32-506. Formation and boundaries of district.
- 32-507. Report of county surveyor—order creating district.
- 32-508. Determination of amount of damages by condemnation proceedings.
- 32-509. Proportional share of costs to be stated in petition, when—order of board concerning.
- 32-510. Payment of county's share of expense.
- 32-511. Letting of contract—conditions of same.
- 32-512. Notice for bids—opening bids—forfeiture of deposit.
- 32-513. Appointment of inspector—compensation of inspector and supervisors—construction by county—lien on lands.
- 32-514. Apportionment of costs—assessment-roll, contents, notice and confirmation of—correction of errors.
- 32-515. Modes of payment—payments by instalment.
- 32-516. Immediate payment plan—notice to landowners—contents of notice.
- 32-517. Procedure upon adoption of instalment plan—county treasurer to collect annual instalments.
- 32-518. County commissioners must provide method of payment.
- 32-519. Order for issuance of bonds—form and contents.
- 32-520. Notice in case of payment by special bonds—contents—payment of assessment—redemption of land by payment of assessment.
- 32-521. Issuance of special bonds to contractor or sale of same.
- 32-522. Payment of interest on bonds—retirement of bonds.
- 32-523. Collection of assessments by suit of owner of bonds.
- 32-524. Auditing and payment of claims and accounts.
- 32-525. Disposition of residue of funds.
- 32-526. Completed road to be deemed a main highway.
- 32-527. Construction of chapter.

32-501. (1676) Duty of county commissioners to construct main highways and levy assessments. The board of county commissioners of any county in this state shall have power as hereinafter provided and it shall be its duty to cause to be constructed, laid out, and improved main highways within their respective counties and to levy and cause to be collected an assessment upon all lots, tracts and parcels of land specifically benefited by such improvements, laying out, or construction for paying the cost and expense thereof which assessment shall become a first lien upon the property liable for, prior and superior to all other liens and encumbrances, and to provide for the payment of such assessment either on the immediate payment plan or by instalments, and to issue local improvement district bonds and coupons for each instalment.

History: En. Sec. 1, Ch. 12 of Ch. 172,
L. 1917; re-en. Sec. 1676, R. C. M. 1921.

Collateral References

Highways 99, 105(1).
40 C.J.S. Highways §§ 177, 179.

References

State ex rel. McMaster v. District Court,
80 M 228, 231 et seq., 260 P 134.

32-502. (1677) Resolution of public interest. Upon presentation of a petition as provided in this act, the board of county commissioners shall pass a resolution that the public interest demands the improvement, laying out, or construction of such road, or part thereof, and described in such resolution, but such description shall not include any portion of a highway within the boundaries of any city or incorporated town.

History: En. Sec. 2, Ch. 12 of Ch. 172,
L. 1917; re-en. Sec. 1677, R. C. M. 1921.

Collateral References

Highways 101, 107(1).
40 C.J.S. Highways § 192.

References

State ex rel. McMaster v. District Court,
80 M 228, 231 et seq., 260 P 134.

32-503. (1678) Petition for construction or improvement of highway. The owners of two-thirds of the lineal feet of land fronting on such road or proposed road, or part thereof, sought to be laid out, constructed, or improved, may present to the board of county commissioners, a petition setting forth that the petitioners are such owners and that they desire such road to be opened, laid out, or constructed under the provisions of this act; the kind and nature of the improvement desired and the mode of payment of the assessments to be levied for defraying the cost thereof. If any such property stands in the name of a deceased person or any person for whom a guardian has been appointed, the signature of the executor, administrator or guardian, as the case may be, shall be deemed equivalent to the signature of the owner of the property.

History: En. Sec. 3, Ch. 12 of Ch. 172,
L. 1917; re-en. Sec. 1678, R. C. M. 1921.

References

State ex rel. McMaster v. District Court,
80 M 228, 231 et seq., 260 P 134.

32-504. (1679) Proceedings upon receipt of petition. On receipt of such petition the board shall make an order appointing a place in the vicinity of said road and fix the time when said petitioners and all owners of the land fronting upon said road or lands owned within two miles on either side of said road and upon whose lands special assessments will be levied to pay for such construction or improvements may meet with the

county surveyor or his duly appointed deputy and the county clerk shall immediately notify the said county surveyor of such meeting and shall cause a notice thereof to be given by publication in a newspaper printed and published in the vicinity of said road and nearest thereto, in said county, for three consecutive weeks next prior to the time of such meeting, which notice shall state the time and place of said meeting and in general terms the kind of construction and improvements petitioned for, the place of beginning, intermediate points and place of determination of said road or the portion thereof sought to be constructed and improved. At the said meeting the county surveyor or his deputy or in the absence of both some one of the said land owners present, shall preside, and said petitioners and said owners, as well as other owners of such land, shall proceed to elect three of their number as a committee of supervisors, at least one of whom shall be chosen from those who signed said petition. The majority of said owners present and voting at such meeting shall be sufficient to such election, and said presiding officer shall declare and certify to said board of county commissioners the names of such owners so elected as such committee of supervisors. The persons so elected shall qualify immediately by taking an oath that they are owners of lands benefited by said improvements and to be included within the local assessment district, and that they will fully, impartially, and faithfully perform their duties as supervisors to the best of their ability, which said oath may be administered by any one authorized to administer oaths, or by said county surveyor or his deputy, and are both hereby authorized to administer the same.

History: En. Sec. 4, Ch. 12 of Ch. 172,
L. 1917; re-en. Sec. 1679, R. C. M. 1921.

References

State ex rel. McMaster v. District Court,
80 M 228, 231 et seq., 260 P 134.

32-505. (1680) Duty of supervisors and county surveyor. It shall be the duty of said supervisors and county surveyor or his deputy, to forthwith proceed to view, examine and survey said road sought to be constructed or improved, that said surveyor make plans and specifications as well as possible and estimate the cost of such construction; to examine and determine the lands that will be specially benefited by such improvement or construction and should be included within the local district that is to be assessed to defray the cost and expense, and such improvements and benefits; to ascertain all if any damage or injury to the property; if any person or persons will be sustained by or in consequence of the making of such improvement or construction for the payment of which such local assessment district would be liable, and in so far as may be obtained without cost to the said assessment district the release in writing from each person or persons of their claim in such damage or injury or, in case of failure so to do, arrange in so far as may be, in such release to be given, upon the approval or consent, for such terms as to amount as may be deemed fair and reasonable, to be paid from the moneys collected upon the assessment of said district; and said surveyor shall without delay prepare such plan and specifications and an estimate of the cost of such improvement and construction enclosing therein all expenses incident thereto, and prepare a plat and description of such local assessment district and a description of several tracts or parcels of land included therein and

the valuation of said lands as the same appear upon the last annual assessment-roll of the county made for the purpose of levying general taxes thereon.

History: En. Sec. 5, Ch. 12 of Ch. 172, L. 1917; re-en. Sec. 1680, R. C. M. 1921.

Collateral References

Highways ~~39~~ 90, 103.

39 C.J.S. Highways § 145; 40 C.J.S. Highways § 179.

References

State ex rel. McMaster v. District Court, 80 M 228, 231 et seq., 260 P 134.

32-506. (1681) Formation and boundaries of district. The local assessment district shall be constituted and the boundaries thereof fixed as follows: The lands extending from the center of the road one-half mile on each side thereof, to-wit: a distance of one mile in width shall constitute "Part One" of said local assessment district; "Part Two" of said local assessment district shall be that portion of said lands embraced within an area one mile wide on each side of part one, and "Part Three" of said local assessment district shall be all lands lying within the area one mile wide extending along part two of said district; all of said division shall extend the full length of said proposed road and one mile beyond the terminus thereof, unless said local committee of supervisors shall otherwise provide. Each separate tract or parcel of land lying and being in part one of said district shall be assessed and be subject to a charge for a proportional part of forty-five per cent. of the whole cost of construction work or improvement payable by said district and said lands shall be subject to a lien therefor until said assessments shall be paid; each separate tract or parcel of land in said part two of said district shall be assessed and subject to a charge for a proportional part of thirty-five per cent. of said whole cost of expense of said construction work and improvements assessable against said entire district and be subject to a lien therefor until all of said assessments shall have been paid; each tract or parcel of land in said part three of said district shall be assessed and subject to a charge, a proportional part of twenty per cent. of said whole cost and expense of said construction work and improvements assessable to said district and all of said lands therein shall be subject to a lien for said assessment until all of said assessment has been paid. The charge upon the several tracts or parcels of land to each subdivision of said district shall be assessed ratable according to the front-foot plan; that is to say, one foot of longitude measured along the road constituting the center of such improvement district, and extending latitudinally across the subdivision shall be taken as the unit by which to determine the proportion of the assessment, so that a unit in each subdivision are not equal to each other the rates fixed for each subdivision will be eight hundred and eighty square feet to superficial area. If the area of said subdivision are not equal to each other the rates fixed for each subdivision shall be fixed on the basis that the benefit conferred on eight hundred and eighty square feet of land in subdivisions first, second, and third, are related to each other as are the numbers forty-five, thirty-five, and twenty, respectively.

History: En. Sec. 6, Ch. 12 of Ch. 172, L. 1917; re-en. Sec. 1681, R. C. M. 1921.

References

State ex rel. McMaster v. District Court, 80 M 228, 231 et seq., 260 P 134.

32-507. (1682) Report of county surveyor—order creating district.

When the county surveyor shall have completed the said work of making estimates and surveying the said road, he shall at the next annual meeting of the board of county commissioners render a detailed report to the board that the maps, descriptions, plans, specifications, and details and estimates of damages, costs and expenses, and if it should appear from such report that the whole amount of the damages, costs and expenses of such construction and improvements chargeable as a lien against the property specially benefited within the improvement district, does not exceed fifty per cent. of the total assessed valuation of the lots, tracts, and parcels of land contained in such improvement districts, as the same appears upon the last annual assessment-roll of the county, the said board shall make and enter upon the reports, an order that such improvements and construction be made, thus creating such local improvement district for the payment of such damages, costs, and expenses of making such improvements and construction by special assessment of the property in such district specially benefited; to be known and designated local improvement district No. in county, Montana, and such report shall be kept on file in the office of said board as well as in the office of the county surveyor.

History: En. Sec. 7, Ch. 12 of Ch. 172,
L. 1917; re-en. Sec. 1682, R. C. M. 1921.

References

State ex rel. McMaster v. District Court,
80 M 228, 231 et seq., 260 P 134.

32-508. (1683) Determination of amount of damages by condemnation proceedings. When the county surveyor and local supervisors are unable to agree with the owner of any lands upon the amount of damages sustained by the taking or injuring of his property by reason of making such improvements, they shall in said report to the board set forth such fact, with the statement of their reasons therefor, and such board of county commissioners shall cause the amount thereof to be ascertained and determined by condemnation proceedings and paid, in the same manner as damages are ascertained, determined, and paid when new roads are laid out and opened by the board; and such damages and the expenses incident to ascertain same shall be advanced on the order of the board, from the funds of the county, so that the progress of such work shall not be delayed, and said general fund may be thereafter reimbursed from the money collected for the local improvement district.

History: En. Sec. 8, Ch. 12 of Ch. 172,
L. 1917; re-en. Sec. 1683, R. C. M. 1921.

Collateral References

Eminent Domain \S 166.
29 C.J.S. Eminent Domain \S 209.

References

State ex rel. McMaster v. District Court,
80 M 228, 231 et seq., 260 P 134.

32-509. (1684) Proportional share of costs to be stated in petition, when—order of board concerning. When the local improvement district is being laid out and roads constructed and improved therein, the petitioners therefor, in the petition provided for in this act, shall state therein the proportional share of the costs and expenses of said work of improvements that the said local improvement district will agree to assume and pay; which said sum must not be less than thirty-five per cent. thereof and may be as much as seventy-five per cent. thereof.

Whenever an agreement has been made and entered into between the said proposed local district and the said board of county commissioners, specifying the amount that shall be paid by said local district and the amount that shall be paid from the county funds, the board shall make an order to that effect on the records of the proceedings of such county commissioners.

History: En. Sec. 9, Ch. 12 of Ch. 172, L. 1917; re-en. Sec. 1684, R. C. M. 1921.

Collateral References

Highways \Rightarrow 119.
40 C.J.S. Highways § 207.

References

State ex rel. McMaster v. District Court, 80 M 228, 231 et seq., 260 P 134.

32-510. (1685) Payment of county's share of expense. The board of county commissioners shall have the power and it shall be its duty to order paid from the county funds the share of the county for the construction or improvement of the main highway in said local improvement district as in this act provided, not to exceed, however, sixty-five per cent. of the cost of construction and laying out or improving of such highway and such amount so ordered shall be the proper charge against the county wherein the improvement or construction is made and the same shall be paid by the county treasurer of such county upon warrants duly drawn as ordered by the board of county commissioners.

History: En. Sec. 10, Ch. 12 of Ch. 172, L. 1917; re-en. Sec. 1685, R. C. M. 1921.

References

State ex rel. McMaster v. District Court, 80 M 228, 231 et seq., 260 P 134.

32-511. (1686) Letting of contract—conditions of same. After the board has made the order creating and establishing the local improvement district, the local committee of supervisors shall let the contract for furnishing the necessary materials and the performance of the work and labor necessary for the construction and completion of said road according to said plans and specifications and under the supervision of the county surveyor they shall advertise for bids for the construction, laying out or improving of such main highway, and fix the time for opening such bids at the office of the board of county commissioners and award such contract to the lowest responsible bidder, except that no contract shall be awarded at a greater sum than the estimate of cost of such work hereinbefore provided for. The said work may be let to one or more contractors or all of same may be let in one contract or in separate contracts in the discretion of said local supervisors. The committee of supervisors may reject any and all bids and before the execution of any contract they shall require a bond satisfactory to them that the contractor will furnish the required material and perform the required work upon the terms specified in the contract and within the time prescribed; and as a bond of indemnity against any direct or indirect damages that shall be suffered or claimed for injury of persons or property during the construction of said improvement and until the same is accepted.

Partial payments may be provided for in the contract, and paid in the manner herein provided when certified by the county surveyor and committee of supervisors to an amount not exceeding eighty per cent. of the value of the work done and the materials, provisions and supplies furnished

and the said contract shall provide that at least twenty per cent of the estimated amount shall be retained to secure the payment to laborers who have labored on such work and to those who have furnished materials, provisions and supplies for the prosecution of such work, and such laborers and those who have furnished materials, provisions and supplies shall have thirty days after the work has been completed or material, provisions and supplies furnished, for lien on such twenty per centum so reserved; providing, notice thereof in writing shall have been filed with the committee of supervisors within said thirty days, which lien shall be senior to all other liens, such as judgment, garnishment, or judgment liens, and no improvements or construction shall be deemed to be completed until the committee of supervisors have filed with the clerk of the board of county commissioners a statement signed by a majority of them, same to have been completed and that all labor, material, provisions and supply liens have been discharged. Such contract shall be executed in the name and on the behalf of the county by the board of county commissioners and attested with the seal thereof, for the use and benefit of said local improvement district; but such county shall not thereby be rendered subject to any claim or liability in a greater sum than that agreed upon with said proposed assessment district as provided in the order fixing the amount chargeable to said county.

History: En. Sec. 11, Ch. 12 of Ch. 172, L. 1917; re-en. Sec. 1686, R. C. M. 1921; amd. Sec. 1, Ch. 13, L. 1925.

References

State ex rel. McMaster v. District Court, 80 M 228, 231 et seq., 260 P 134.

Collateral References

Highways \Rightarrow 113.

40 C.J.S. Highways § 208.

25 Am Jur. 889, Highways, §§ 602 et seq.

32-512. (1687) Notice for bids—opening bids—forfeiture of deposit.

The notice for bids shall state generally the work to be done and refer to the plans and specifications and shall call for proposals for doing the same, and furnishing the materials and all bids shall be accompanied by the cash or certified check payable to the order of the board of county commissioners for a sum not less than five per cent. of the amount of the bid.

At the time and the place named, such bids shall then be opened and read and the committee of supervisors shall determine the lowest and best bidder and may let such contract to such bidder, if within the estimate, but if in their opinion all bids are too high, they may reject all of them and readvertise for bids.

If the bidder whose contract is accepted fails to enter into such contract, according to his bid, and according to plans and specifications, within ten days from the time he is notified that he is the successful bidder and to execute and file a bond, the said cash or check for the amount thereof shall be forfeited to the county for the use and benefit of that particular local improvement district.

History: En. Sec. 12, Ch. 12 of Ch. 172, L. 1917; re-en. Sec. 1687, R. C. M. 1921.

References

State ex rel. McMaster v. District Court, 80 M 228, 231 et seq., 260 P 134.

32-513. (1688) Appointment of inspector—compensation of inspector and supervisors—construction by county—lien on lands. The committee

of supervisors and county surveyor together shall appoint some suitable and competent person other than such committee as an inspector of such work as it progresses, whose duty it shall be to be upon the work at all times during its progress and to inspect the performance thereof and to report to and to be under the supervision of the county surveyor and to inform said surveyor and said committee of supervisors of any departure from the plans and specifications. He shall be paid for his services as such inspector at the rate of five dollars per day for the time he is actually engaged thereon. Each member of the committee of supervisors shall be paid for his services the sum of three dollars per day for the time said committee of supervisors is actually engaged in meeting and acting with said surveyor and in transacting as a committee the business of said local improvement district until the work shall have been fully completed and accepted, and said committee shall be paid no mileage or other expense save and except the three dollars herein provided for.

That when bids for the construction and improvement of said highways are rejected by the local committee of supervisors, then it shall be lawful for the said improvement district to contract with the board of county commissioners to construct or improve said highways. The said highways in said improvement districts may be constructed and improved in the first instance at the entire expense of said county and the county may, as far as practicable, take the place of a private contractor, provided for in this act; and said county shall, when it has paid for such construction or improvements, be recompensed for same by the local improvement district to the proportional part of said costs and expenses as shall have been agreed upon before said work was performed by said county; and, in case the said instalment plan was adopted, then, and in that event, the bonds issued for said improvement district shall become the property of said county, and the lien herein provided for on the lands in said improvement district, shall be as valid and existing as if the contract had been let to a private contractor as provided in this act.

History: En. Sec. 13, Ch. 12 of Ch. 172,
L. 1917; re-en. Sec. 1688, R. C. M. 1921.

References

State ex rel. McMaster v. District Court,
80 M 228, 231 et seq., 260 P 134.

Collateral References

Highways 112, 113.
40 C.J.S. Highways § 201.

32-514. (1689) Apportionment of costs—assessment-roll, contents, notice and confirmation of—correction of errors. When the final order for such improvement and construction shall have been made, the committee of supervisors, together with the county assessor, shall proceed to apportion the estimated cost and expenses of said improvement and construction upon the land embraced in said improvement district, according to the benefit derived therefrom, and within thirty days from the letting of the contract, the said county assessor shall report to and file with the board of county commissioners and the county treasurer an assessment-roll in duplicate, which assessment-roll shall contain the description of each lot and parcel of land to be assessed, the amount to be charged, levied, or assessed against each lot, parcel, or piece of land, in proportion to the benefit to be derived from said improvement or construction, and the name of the owner of

same, if known; but in no case shall a mistake in the name of the owner be fatal to the assessment when the description of the property is correct.

As soon as said assessment-roll shall have been so reported and filed, the county commissioners shall cause notice to be published for three consecutive weeks, which notice shall be published in the newspapers in which notice of invitations for bids for the contract was published, notifying all persons interested that such assessment-roll has been filed, and requiring them to appear at the office of said county commissioners at the county seat, at a time not less than fifteen days from the date of the last issue of said publication of said notice, and make objection thereto, if any they have. At the time fixed for objections, the county commissioners, together with the assessor of the county, shall meet, and if no objections have been filed to said assessment-roll, the commissioners shall make an order confirming the same; but if any objections in writing, properly verified, have been filed by any of the landowners affected thereby, the county commissioners shall proceed to hear such objections, and for that purpose shall hear any testimony that shall be offered by any party interested.

After such hearing the board shall make such corrections and charges, if any, which to them appear just and requisite to apportion the assessment to the benefit to be received from such improvement or construction, and said board shall then make and enter an order to approve and certify such assessment-roll, and with the aid of the county assessor shall levy and assess the amount thereof against each and all of the lots and parcels of land or parts thereof, respectively, included in said roll as provided, and said assessment so made shall become a first lien on the land described in the assessment-roll.

History: En. Sec. 14, Ch. 12 of Ch. 172,
L. 1917; re-en. Sec. 1689, R. C. M. 1921.

References

State ex rel. McMaster v. District Court,
80 M 228, 231 et seq., 260 P 134.

Collateral References

Highways⇒119, 132.
40 C.J.S. Highways §§ 207, 296.

32-515. (1690) Modes of payment—payments by instalment. There shall be two modes of making payment of such special assessment charged against the several tracts and parcels of land included in such local improvement district, namely, that of "immediate payment," and that of payments in instalments, and the mode of payment shall be that petitioned for by said landholders. The payment of instalments shall be in six equal instalments, in one, two, three, four, five, and six years, and such instalment payments shall be in the form of bonds that shall draw six per cent. interest per annum from the date until they are paid.

History: En. Sec. 15, Ch. 12 of Ch. 172,
L. 1917; re-en. Sec. 1690, R. C. M. 1921.

References

State ex rel. McMaster v. District Court,
80 M 228, 231 et seq., 260 P 134.

Collateral References

Highways⇒146.
40 C.J.S. Highways § 304.

32-516. (1691) Immediate payment plan—notice to landowners—contents of notice. In case the "immediate payment" plan is adopted the county commissioners, as soon as such assessment-roll has been proved and certified, shall deliver the same to the county clerk, who shall file one of

such duplicates thereof in his office, and shall immediately deliver the other of such duplicates to the county treasurer that the said treasurer may collect such assessment.

The county treasurer shall give notice by publication for two consecutive weeks in the newspapers in which the notice for bids was advertised, and shall mail copy of such notice to the owners of the property assessed, when the name of such owner and his postoffice address are known, but the failure to mail such notice shall not be fatal to such assessment when publication thereof is made in said newspapers. Said notice shall state that such assessment-roll has been certified to the treasurer for collection, and that unless payment is made within thirty days from the date of such notice, such assessment will become delinquent and shall bear interest at the rate of ten per cent. per annum, and if not paid before such assessment shall have become delinquent, a penalty of five per cent. shall be added to the sums delinquent, as well as the interest on the annual tax roll for the current year against each lot, tract, and parcel so delinquent, and that the interest and penalty collected, as other taxes are collected, together with such additional charges as are authorized to be charged and collected on other delinquent taxes, and that the same shall be sold for the amount of such special assessment with interest, penalty, and costs, in the manner and with the same authority as lands are sold for general taxes.

History: En. Sec. 16, Ch. 12 of Ch. 172,
L. 1917; re-en. Sec. 1691, R. C. M. 1921.

Collateral References

Highways ~~300~~ 147.

40 C.J.S. Highways § 304.

References

State ex rel. McMaster v. District Court,
80 M 228, 231 et seq., 260 P 134.

32-517. (1692) Procedure upon adoption of instalment plan—county treasurer to collect annual instalments. In case the mode of payment by instalment be adopted, the county commissioners and the committee of supervisors shall proceed, as nearly as may be, as in case the mode of immediate payment plan was adopted, to the approval and certifying of the assessment-roll; but the county commissioners and assessor, at the time of levying said assessment, and in their order naming such levy, shall provide and declare that the sum charged thereby against each of such tracts or parcels of land may be paid in equal annual instalments, with interest upon the whole sum charged at the rate of six per cent. per annum, specifying the number of such instalments, which shall be equal to the number of years for which the bonds may run; and each year thereafter the county treasurer shall collect one of said instalments, together with the interest due thereon and the interest on the instalments thereafter to become due, in the same manner and with the same added penalty and interest in case of delinquency, and by means of the same proceedings to enforce such payment by the sale of the land as hereinbefore provided for the collection of said assessment by the method of immediate payment.

History: En. Sec. 17, Ch. 12 of Ch. 172,
L. 1917; re-en. Sec. 1692, R. C. M. 1921.

References

State ex rel. McMaster v. District Court,
80 M 228, 231 et seq., 260 P 134.

32-518. (1693) County commissioners must provide method of payment. The county commissioners may, and, in all cases where improvement

is ordered upon a petition, specifying the method of payment of bonds, must provide that the payment of costs and expenses of such improvement or construction be made under the provisions of this act, by bonds as charged against the property of the local improvement district, issued to the contractors in payment of the contract price, or by the proceeds of such bonds to be issued and sold as hereinafter provided.

History: En. Sec. 18, Ch. 12 of Ch. 172,
L. 1917; re-en. Sec. 1693, R. C. M. 1921.

References

State ex rel. McMaster v. District Court,
80 M 228, 231 et seq., 260 P 134.

Collateral References

Counties⇒174.
20 C.J.S. Counties § 261.
Generally, 43 Am. Jur 261, Public Securities and Obligations.

32-519. (1694) Order for issuance of bonds—form and contents. The county commissioners shall make and enter an order authorizing and directing the issuance of said bonds, and the terms may be payable on same at a date not to exceed ten years from and after the date of their issuance, and payment of which shall not be demanded by the holder thereof until said bonds become due, and they shall bear interest at the rate of six per cent. per annum, payable annually, and each bond shall have attached thereto interest coupons for each interest payment. Such bonds and coupons shall bear the date of issuance and be made payable to bearers and all shall be signed by the chairman of the board of county commissioners and attested by the county clerk and the seal of such board shall be affixed to each bond but not to the coupon. Said bonds shall be in denominations of not less than one hundred dollars nor more than one thousand dollars, and they shall refer to the improvement district for which the same shall be issued and to the order and record thereof authorizing the same and that it is payable out of the local improvement funds, created by special assessment for the payment of the costs and expenses of such improvement and construction, and not otherwise, and shall bear upon its face the designation of the local improvement district "Local Improvement District No. in county, Montana." Said bonds shall not be issued in excess of the costs and expenses of the improvements and construction.

History: En. Sec. 19, Ch. 12 of Ch. 172,
L. 1917; re-en. Sec. 1694, R. C. M. 1921.

References

State ex rel. McMaster v. District Court,
80 M 228, 231 et seq., 260 P 134.

Collateral References

Counties⇒183(2).
20 C.J.S. Counties § 268.

32-520. (1695) Notice in case of payment by special bonds—contents—payment of assessment—redemption of land by payment of assessment. In case of payment by such special bonds, the county treasurer shall give notice by publication for two consecutive weeks, and shall mail a copy of such notice to the owner of the property assessed in the manner and with the same qualifications as to the giving of such notice provided in this act with regard to immediate payment, which notice shall state that such assessment-roll has been certified to him for collection, and that unless payment of the whole amount of such assessment is made within thirty days from the date of such notice, special bonds shall be issued against said property for the payment of said assessment, and thereafter the same

will be payable in annual instalments, with interest thereon at the rate provided for in said bonds. At any time within such thirty days, any owner of lands within such local improvement district may pay the said assessment chargeable against his said lands, and release and discharge the same therefrom, and from the operation and effect of such bonds; and no bonds shall be issued until twenty days after the expiration of such thirty days, nor for any amounts of such assessment so paid in full within such thirty days. The owner of any such lands may redeem the same from all liability for such assessment at any time after said thirty days, by paying the entire instalments of said assessment remaining unpaid and charged against such lands at the time of such payment, with interest, and all charged thereon to the date of the maturity of the instalment next falling due. In all cases where any assessment or any instalment thereof is paid as herein provided, the same shall be paid to the county treasurer, and all sums so paid shall be applied solely to the payment of the cost and expenses of such improvement, or to the redemption of such bonds issued therefor if paid after such bonds are issued.

History: En. Sec. 20, Ch. 12 of Ch. 172,
L. 1917; re-en. Sec. 1695, R. C. M. 1921.

References

State ex rel. McMaster v. District Court,
80 M 228, 231 et seq., 260 P 134.

Collateral References

Counties \hookrightarrow 180; Highways \hookrightarrow 146.
20 C.J.S. Counties § 262; 40 C.J.S.
Highways § 304.

32-521. (1696) Issuance of special bonds to contractor or sale of same.

The special bonds issued under the provisions of this act, or such portion thereof as may remain unsold, if the same are ordered sold by the county commissioners, may be issued to the contractor constructing the improvement in payment therefor, or the order of the board of county commissioners directing the issuance of such bonds may provide that the same may be sold by the county treasurer, in the manner prescribed in such order, at not less than their par value and accrued interest; and the proceeds of such bonds shall be applied in payment of the cost and expenses of such improvement.

History: En. Sec. 21, Ch. 12 of Ch. 172,
L. 1917; re-en. Sec. 1696, R. C. M. 1921.

References

State ex rel. McMaster v. District Court,
80 M 228, 231 et seq., 260 P 134.

Collateral References

Counties \hookrightarrow 182; Highways \hookrightarrow 113(4).
20 C.J.S. Counties § 275; 40 C.J.S.
Highways § 209.

32-522. (1697) Payment of interest on bonds—retirement of bonds.

The county treasurer shall pay the interest on the bonds authorized to be issued by this act out of the funds of the local improvement district collected on assessments on account of which said bonds are issued. Whenever there shall be sufficient money in such local improvement fund against which such bonds have been issued under the provisions of this act, over and above sufficient for the payment of interest on all unpaid bonds, to pay the principal of one or more of such bonds, he shall call in and pay such bonds in their numerical order. Such call shall be made by publication in the county official newspaper on the day following the maturity date of the instalment of assessment, or as soon thereafter as practicable, and shall state that special bonds No. (giving the serial number or numbers of

said bonds called) of such local improvement district will be paid on the day the next interest coupons of said bonds shall become due, and interest upon said bonds thus called shall cease upon said date.

History: En. Sec. 22, Ch. 12 of Ch. 172, L. 1917; re-en. Sec. 1697, R. C. M. 1921.

References

State ex rel. McMaster v. District Court, 80 M 228, 231 et seq., 260 P 134.

Collateral References

Counties⇒187.

20 C.J.S. Counties § 276.

Constitutionality of statutory provisions as to political corporations or divisions which shall bear cost of maintaining highways. 2 ALR 746.

Taxation for street or highway purposes as within constitutional provisions prohibiting legislature from imposing for town, county, city or corporate purposes, or providing that legislature may invest power to levy such taxes in local authorities. 46 ALR 710.

32-523. (1698) Collection of assessments by suit of owner of bonds.

If the county treasurer shall fail, neglect, or refuse to pay said bonds issued under the provisions of this act, or to collect promptly any such assessments when due, the owner of any such bonds may proceed in his own name to collect such assessments, and to foreclose the lien thereof in any court of competent jurisdiction, and shall recover, in addition to the amount of such warrants and interest thereon, five per centum, together with the costs of such suit. Any number of holders of such bonds for any single improvement district may join as plaintiffs, and any number of owners of the property on which the same are a lien may be joined as defendants in such suit. Neither the holder nor any owner of any such bond issued under the authority of this act shall have any claim therefor against the county through the instrumentality of which the same is issued, except from the special assessment made for the improvement for which such bond was issued, but his remedy in case of non-payment shall be confined to the enforcement of such assessments. A copy of this section shall be plainly written, printed, or engraved on each bond so issued.

History: En. Sec. 23, Ch. 12 of Ch. 172, L. 1917; re-en. Sec. 1698, R. C. M. 1921.

References

State ex rel. McMaster v. District Court, 80 M 228, 231 et seq., 260 P 134.

Collateral References

Highways⇒147.

40 C.J.S. Highways § 304.

32-524. (1699) Auditing and payment of claims and accounts.

It shall be the duty of the county auditor, in counties where there are auditors, and in counties where there are no auditors, it shall be the duty of the county clerk, to audit all claims and accounts for services and every kind of expense payable from funds of the local improvement district, when the same shall have been first approved and certified by the committee of supervisors; and when so approved and audited, the county auditor, or county clerk, as the case may be, shall issue to the county treasurer an order in favor of the person to whom such claim or account is payable, to pay the same, and upon the presentation of such order by the person to whom it was issued, or his assignee, the county treasurer shall pay the same from the funds of such local improvement district provided for the payment of the cost and expenses of such improvement, and not otherwise. Estimates for work done under the contract for the construction and completion of such improvement shall be made by the county surveyor

with the approval of the committee of supervisors, and the same shall be likewise audited by the county auditor in counties where there are auditors, or by the county clerk, as the case may be, and, when so made, approved, and audited, the same shall be likewise paid by the county treasurer upon the order of the county auditor, or clerk, to an amount, however, not exceeding eighty per centum of such estimate during the progress of the work. In case of said assessment being made payable by instalments, the county treasurer shall pay such order only from such assessments as shall have been collected prior to the issue of such special local improvement bonds, and from the proceeds of the sales of such bonds after the issue thereof; but in case it has been arranged with the contractor for the work, and ordered by the board of county commissioners, that such contractor shall receive such bonds to pay the contract price of the work, such order of the county auditor, or in counties where there are no auditors, such order of the county clerk upon such approved estimates shall call for such bonds instead of money, and shall be paid in such bonds by the county treasurer, with whom the same shall be deposited for that purpose, and in that case such bonds shall not be given a date prior to the time of their delivery to such contractor upon such order, which date shall be then written in such bonds by the county treasurer, and be deemed to be the date of their issue, from which interest shall begin to run and the time at or after which their payment may be demanded by the holder shall be computed. The amounts collected upon the instalment payments of such assessments shall be reserved and disbursed by said county treasurer for the payment of the principal and interest on and for the redemption of such bonds. The proceeds from the sale of such bonds shall be disbursed by such county treasurer in payment of the cost and expenses of such construction and improvement of such county road, upon the orders of such county auditor, or in counties where there are no auditors, upon the orders of the county clerk, as hereinabove provided.

History: En. Sec. 24, Ch. 12 of Ch. 172, L. 1917; re-en. Sec. 1699, R. C. M. 1921.

References

State ex rel. McMaster v. District Court, 80 M 228, 231 et seq., 260 P 134.

Collateral References

Counties⇒183(1), 187, 204(2); Highways⇒113(4), 146, 149.
20 C.J.S. Counties §§ 269, 276, 307; 40 C.J.S. Highways §§ 209, 304, 305.

32-525. (1700) Disposition of residue of funds. Any money remaining in the county treasury belonging to the funds of such local improvement district, after the payment of the whole cost and expense of such construction or improvement, in excess of the total sum required to defray all expenditures on account thereof, including the reimbursement of the county for any advancements, shall be refunded, on demand, to the amount of such overpayment; and if there shall be such an excess in the assessment of any person who shall not have paid his assessment in full, a rebate shall, on demand, be allowed to such person to the amount of such overassessment; provided, such demand hereinabove provided for be made within two years from the date upon which the assessment for such local improvement district became due. Any such funds remaining in the county treasury after the expiration of two years for which no demand has been made as herein provided, belonging to any local improvement district, after the

payment of the whole cost and expense of such improvement, shall go into the general funds.

History: En. Sec. 25, Ch. 12 of Ch. 172,
L. 1917; re-en. Sec. 1700, R. C. M. 1921.

Collateral References

Highways \S 149.
40 C.J.S. Highways \S 305.

References

State ex rel. McMaster v. District Court,
80 M 228, 231 et seq., 260 P 134.

32-526. (1701) Completed road to be deemed a main highway. When a road has been completed under the provisions of this act, it shall be deemed to be a main highway, as now defined by law, and thereafter be maintained as such in the same manner as other highways are maintained.

History: En. Sec. 26, Ch. 12 of Ch. 172,
L. 1917; re-en. Sec. 1701, R. C. M. 1921.

Collateral References

Highways \S 18.
39 C.J.S. Highways \S 1.

References

State ex rel. McMaster v. District Court,
80 M 228, 231 et seq., 260 P 134.

32-527. (1702) Construction of chapter. Nothing in this act provided shall be construed as repealing or modifying any existing law for the creation, laying out, planning, construction, or improvement of any public highway, but shall be construed as an additional power and method for the improvement of county roads, and as extending to owners of rural lands an opportunity to secure better highways by charging a part of the costs thereof upon the lands especially benefited thereby, and this act shall be construed as co-operating and concurrent with the laws provided for the improvement of public highways under the laws of the state of Montana and of the United States.

History: En. Sec. 27, Ch. 12 of Ch. 172,
L. 1917; re-en. Sec. 1702, R. C. M. 1921.

References

State ex rel. McMaster v. District Court,
80 M 228, 231 et seq., 260 P 134.

CHAPTER 6

SPECIAL ROAD DISTRICTS, ABOLISHMENT

Section 32-601. Special road districts abolished.

32-602. Property of road districts transferred to county.

32-601. Special road districts abolished. All special road districts are hereby dissolved, disincorporated, and abolished.

History: En. Sec. 1, Ch. 35, L. 1939.

32-602. Property of road districts transferred to county. All property—funds or accruing funds—shall become the property of the county, and all funds shall be transferred to the county general road fund; and all legal liabilities of said special road district shall become the liability of the county.

History: En. Sec. 2, Ch. 35, L. 1939.

CHAPTER 7

PUBLIC BRIDGES

- Section 32-701. County to maintain public bridges.
 32-702. Bridge tax—levy and collection.
 32-703. Construction or repair of bridge costing more than two hundred dollars.
 32-704. Letting of contract.
 32-705. Bridges in cities and towns over streams.
 32-706. Suburban railway to pay county for use of bridge.
 32-707. Duty of city or town with respect to maintenance of bridge and approaches.
 32-708. Special tax for construction and maintenance.
 32-709. Election to determine question of construction—bonds—special levy.
 32-710. Construction of bridges crossing county lines.
 32-711. Bridges to be under control and management of county commissioners—police regulations.
 32-712. Construction of act as respects cities and towns.

32-701. (1703) County to maintain public bridges. All public bridges are maintained by the county at large under the management and control of the board of county commissioners; the expense of construction, maintaining, and repairing the same, are provided for in this act.

History: En. Sec. 2810, Pol. C. 1895; re-en. Sec. 75, Ch. 44, L. 1903; re-en. Sec. 1411, Rev. C. 1907; re-en. Sec. 1, Ch. 5, Ch. 72, L. 1913; re-en. Sec. 1, Ch. 5, Ch. 141, L. 1915; re-en. Sec. 1703, R. C. M. 1921. Cal. Pol. C. Sec. 2711.

References

Cited in *Sjostrom v. State Highway Commission*, 124 M 562, 228 P 2d 238, 240.

Collateral References

Bridges  21(1).

11 C.J.S. Bridges § 35.

32-702. (1704) Bridge tax—levy and collection. The board of county commissioners may levy a special tax not to exceed three (3) mills on the dollar of the taxable property of the county for the purpose of constructing, maintaining and repairing free public bridges; provided, however, that an additional levy for such bridge purposes may be made under conditions as follows: In counties where the total linear feet of bridges or bridge construction is in excess of four thousand (4000) feet and the taxable value of property in said county is four million dollars (\$4,000,000.00) or less, the county commissioners may, if they find such to be necessary, levy one (1) mill in addition to the three (3) mills before herein provided for; in counties where the total linear feet of bridges or bridge construction is in excess of six thousand (6000) feet and the taxable value of property in said county is not less than four million dollars (\$4,000,000.00), nor more than twelve million dollars (\$12,000,000.00), the county commissioners may, if they find such to be necessary, levy two (2) mills in addition to the three (3) mills before herein provided for; provided, however, that a free public bridge is hereby defined to mean any drainage structure located on, over or through any road or highway. Such taxes must be levied and collected in the same manner as other taxes, and the money, when collected and paid into the county treasury, must be kept as a special bridge fund, subject to the order of the board of county commissioners, to be used in the construction, maintaining and repairing at such places as said board directs; provided such additional special bridge fund herein provided for shall not be transferable to any other fund.

History En. Sec. 2811, Pol. C. 1895; re-en. Sec. 76, Ch. 44, L. 1903; re-en. Sec. 1412, Rev. C. 1907; amd. Sec. 2, Ch. 5, Ch. 72, L. 1913; re-en. Sec. 2, Ch. 5, Ch. 141, L. 1915; re-en. Sec. 1704, R. C. M. 1921; amd. Sec. 1, Ch. 144, L. 1931; amd. Sec. 1, Ch. 144, L. 1947; amd. Sec. 1, Ch. 25, L. 1951. Cal. Pol. C. Sec. 2712.

References

State ex rel. Case v. Bolles et al.; 74 M 54, 65, 238 P 586; Sjostrum v. State Highway Commission, 124 M 562, 228 P 2d 238, 240.

Collateral References

Bridges⇒12.
11 C.J.S. Bridges § 16.

32-703. (1705) Construction or repair of bridge costing more than two hundred dollars. No bridge, the cost of construction or repairs of which exceeds two hundred dollars, shall be constructed or repaired except on the order of the board of county commissioners; and when ordered to be constructed or repaired it may be done by contract; provided, that such construction shall be done according to the standard plans and specifications adopted and established by the state highway commission, and copies of which shall be on file at all times in the office of the county clerk in each county of the state; provided, however, that whenever such plans so furnished cannot be applied, the county commissioners shall have prepared such necessary plans and specifications which shall be on file in the office of the county clerk thirty days prior to the letting of any such contract.

History: Ap. p. Sec. 2812, Pol. C. 1895; amd. Sec. 77, Ch. 44, L. 1903; re-en. Sec. 1413, Rev. C. 1907; amd. Sec. 1, Ch. 9, L. 1909; amd. Sec. 3, Ch. 5, Ch. 72, L. 1913; amd. Sec. 3, Ch. 5, Ch. 141, L. 1915; re-en. Sec. 1705, R. C. M. 1921. Cal. Pol. C. Sec. 2713.

Collateral References

Bridges⇒20(1, 2), 21(1, 2).
11 C.J.S. Bridges §§ 19, 35.

32-704. (1706) Letting of contract. All bids must be sealed, opened at the time specified in the notices, and a contract awarded to the lowest bidder. The board of county commissioners may, however, reject any and all bids; provided, however, that if the state highway commission shall have adopted or established a standard plan and specification, the bids must be submitted upon such standard plan so adopted and established. The contract and bond for its performance must be entered into and approved by the said board, except in cases of great emergency, and by the unanimous consent of all its members. The said board may proceed at once to construct, replace, and repair any and all structures of whatever nature without notice.

History: Ap. p. Sec. 2813, Pol. C. 1895; amd. Sec. 78, Ch. 44, L. 1903; re-en. Sec. 1415, Rev. C. 1907; re-en. Sec. 5, Ch. 5, Ch. 72, L. 1913; re-en. Sec. 4, Ch. 5, Ch. 141, L. 1915; re-en. Sec. 1706, R. C. M. 1921. Cal. Pol. C. Sec. 2713.

Collateral References

25 Am. Jur. 368, Highways, §§ 52 et seq.

Personal liability of highway officers for damage to or trespass upon land in connection with construction or maintenance of highway. 90 ALR 1481.

32-705. (1707) Bridges in cities and towns over streams. Every bridge necessary to be constructed and maintained in any city or town as part of a main highway, in any county leading over a natural stream from one part to another of such county, shall be constructed and maintained by the county at large, and be under the direction and control of the board of county commissioners.

History: En. Sec. 1, Ch. 63, L. 1917;
re-en. Sec. 1707, R. C. M. 1921.

Collateral References
Bridges↔9(1), 21(2).
11 C.J.S. Bridges §§ 15, 35.

32-706. (1708) Suburban railway to pay county for use of bridge. Before any bridge referred to in the preceding section shall be used as a part of any street or suburban railway, the owner of such railway shall pay into the county treasury, for the use of the county bridge fund, such sum as the board of county commissioners shall determine, but not less than one-fourth nor more than one-half of the cost of construction of such bridge; and the owner of such railway shall also be obligated to pay such portion of the cost of maintaining such bridge, not less than one-fourth nor more than one-half, as the board of county commissioners shall determine, during such time as such bridge shall be used by said railway.

History: En. Sec. 2, Ch. 63, L. 1917;
re-en. Sec. 1708, R. C. M. 1921.

Collateral References
Street Railroads↔31.
83 C.J.S. Street Railroads § 85.

32-707. (1709) Duty of city or town with respect to maintenance of bridge and approaches. The city or town in which any bridge referred to in the two preceding sections is situated shall be obligated to pay the whole or such part, not less than one half, to be determined by the board of county commissioners, of the cost of planking, re-planking, paving, or re-paving such bridge from time to time; and such city or town shall be obligated to construct and maintain and keep in good repair the approaches to such bridge.

History: En. Sec. 3, Ch. 63, L. 1917;
re-en. Sec. 1709, R. C. M. 1921.

Collateral References
Bridges↔21(4).
11 C.J.S. Bridges § 36.

32-708. (1710) Special tax for construction and maintenance. The board of county commissioners may levy a special tax of not to exceed five mills on the dollar of the taxable property of the county to defray the cost of constructing and maintaining any bridge referred to in the preceding section.

History: En. Sec. 4, Ch. 63, L. 1917;
re-en. Sec. 1710, R. C. M. 1921.

32-709. (1711) Election to determine question of construction—bonds—special levy. Before the construction of any bridge referred to in the preceding section, the cost of which shall exceed ten thousand dollars, shall be undertaken, the board of county commissioners shall submit to the qualified electors of a county, at a general or special election, the question of whether such bridge shall be constructed, and the cost thereof paid by the county; and if the electors at such election shall vote in favor of the construction of such bridge, the board of county commissioners may, if they deem it necessary and advisable to do so, issue and sell the bonds of said county to the amount authorized for the purpose of constructing such bridge, under such regulations as other bonds of the county are issued and sold, and with such funds construct said bridge; or, if the cost of such bridge shall not exceed the amount authorized to be raised by a special levy, a special levy may be made for the purpose of raising the moneys

necessary to defray the cost of constructing such bridge, as provided in the preceding section.

History: En. Sec. 5, Ch. 63, L. 1917; 11 C.J.S. Bridges § 16; 20 C.J.S. Counties re-en. Sec. 1711, R. C. M. 1921. §§ 226, 261.

Collateral References

Bridges↪12; Counties↪151, 174.

32-710. (1712) Construction of bridges crossing county lines. Bridges crossing the line between counties must be constructed by the counties into which said bridges reach, and each of the counties must pay such portion of the cost as has been previously agreed upon by the board of county commissioners of the respective counties.

History: En. Sec. 2814, Pol. C. 1895; re-en. Sec. 79, Ch. 44, L. 1903; re-en. Sec. 1415, Rev. C. 1907; re-en. Sec. 5, Ch. 5, Ch. 72, L. 1913; re-en. Sec. 5, Ch. 5, Ch. 141, L. 1915; re-en. Sec. 1712, R. C. M. 1921.

References

Cited in *Sjostrum v. State Highway Commission*, 124 M 562, 228 P 2d 238, 240.

Collateral References

Bridges↪10(2).
11 C.J.S. Bridges § 17.

32-711. (1713) Bridges to be under control and management of county commissioners—police regulations. All bridges referred to in the foregoing sections shall be under the management and control of the board of county commissioners of the county in which such bridge is situated, and all repairs to and planking and re-planking, paving, and re-paving thereof shall be done as and when directed by the board of county commissioners; provided, that such bridges and all persons thereon shall be subject to the reasonable police regulations of the city or town in which any such bridge is situated.

History: En. Sec. 6, Ch. 63, L. 1917; re-en. Sec. 1713, R. C. M. 1921.

Collateral References

Bridges↪21(1).
11 C.J.S. Bridges § 35.

32-712. (1714) Construction of act as respects cities and towns. Nothing in this act contained shall be deemed to deprive cities or towns of any of the powers conferred upon them by existing laws in respect to the construction and maintenance of bridges within their corporate limits, and any such city or town is hereby empowered to exercise such powers in aid of the construction or maintenance of any bridge referred to in this act, situated in any such city or town, to any extent the corporate authorities of such city or town may deem necessary or just.

History: En. Sec. 7, Ch. 63, L. 1917; re-en. Sec. 1714, R. C. M. 1921.

Collateral References

Bridges↪5.
11 C.J.S. Bridges § 8.

CHAPTER 8

GUIDE-BOARDS

- Section 32-801. Erection and maintenance of guide-boards along highway.
- 32-802. Size and fastening of guide-board.
- 32-803. Maliciously removing or injuring guide-boards.
- 32-804. Erection of sign boards—destruction prohibited.
- 32-805. Misleading signs forbidden—regulation of advertising signs.
- 32-806. Penalty for violation of act.

32-801. (1715) Erection and maintenance of guide-boards along highway. The several boards of county commissioners in the state of Montana shall erect, or cause to be erected, within six months after the passage of this act, and maintain at the expense of the county, suitable guide-boards at or within one hundred feet from forks of all public highways, within their respective counties. Said guide-boards shall contain a suitable inscription, indicating the way and naming the approximate or true distance to one or more of the nearest cities, towns, villages, or other known points situated on said road; provided, however, that not more than four guide-boards shall be placed within any one incorporated town or village of any county of this state. They must be of suitable size to contain the inscription, the background of which must be white. The letters contained in the inscription thereon shall be black, at least two inches in height, and legible.

History: En. Sec. 1, Ch. 7, Ch. 141, L. 1915; re-en. Sec. 1715, R. C. M. 1921.

40 C.J.S. Highways § 182.

NOTE.—The following three sections were enacted as chapter 128, Laws of 1907; sections 1417 to 1419, Revised Codes 1907; re-enacted as chapter 7, chapter 72, Laws of 1913 and chapter 7, chapter 141, Laws of 1915.

Liability for injury due to signal guide-post or "silent policeman" in street. 12 ALR 333.

Right to place monument or marker in highway. 16 ALR 927.

Right of private citizen to complain of rerouting of highway or removal or change of route or directional signs. 97 ALR 192.

Collateral References

Highways 105(1).

32-802. (1716) Size and fastening of guide-board. Said guide-boards shall be securely fastened to posts at least six inches in diameter at the butt, and at least eight feet in length, and planted in the ground so that said post shall be, when erected, at least six feet high above the ground.

History: En. Sec. 2, Ch. 7, Ch. 141, L. 1915; re-en. Sec. 1716, R. C. M. 1921.

32-803. (1717) Maliciously removing or injuring guide-boards. Every person who maliciously removes or injures any guide-board, erected upon any highway, or any inscription on such, or defaces the same in writing, or in any other manner, is guilty of a misdemeanor, and shall, upon conviction thereof, be fined in any sum not less than ten dollars nor more than twenty-five dollars, and costs of suit. Said fine, when collected, shall be paid into the county treasury for road purposes.

History: En. Sec. 3, Ch. 7, Ch. 141, L. 1915; re-en. Sec. 1717, R. C. M. 1921.

Collateral References

Highways 186.

40 C.J.S. Highways § 247.

32-804. (1718) Erection of sign boards—destruction prohibited. All signs and direction boards erected along the highways of this state, by organizations or associations formed for the purpose of promoting good roads for tourists' travel, or both, shall become the property of the county in which placed, and it shall be unlawful for any person or persons to alter, deface, or destroy any such signs or direction boards; provided, however, that this section shall not be construed to prevent the organizations or associations erecting such signs or boards from altering or correcting the same when deemed necessary or advisable.

History: En. Sec. 1, Ch. 142, L. 1921; re-en. Sec. 1718, R. C. M. 1921.

32-805. (1719) Misleading signs forbidden—regulation of advertising signs. It shall be unlawful for any person, or persons, corporations, or associations to place, or cause to be placed, any misleading sign or direction board along the highways of this state, or to place any advertising sign not of value as a direction board within one hundred fifty feet of the intersection of a public highway with a railroad grade crossing without the written consent of the county commissioners of the county in which said direction or advertising board or boards is erected or to use as an advertising sign any sign similar or having the appearance of any sign or direction board provided for in the preceding section, and provided that this act shall not effect direction or advertising boards erected inside the limits of incorporated cities, towns or their environs; provided, that county commissioners have the power to remove any or all signs on county highways at their discretion.

History: En. Sec. 2, Ch. 142, L. 1921;
re-en. Sec. 1719, R. C. M. 1921.

Collateral References

Highways⇒166.
40 C.J.S. Highways § 232.

32-806. (1720) Penalty for violation of act. Any person, or persons, violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than ten dollars, nor more than one hundred dollars, or by imprisonment in the county jail not less than ten days nor more than sixty days, or by both such fine and imprisonment.

History: En. Sec. 3, Ch. 142, L. 1921;
re-en. Sec. 1720, R. C. M. 1921.

Collateral References

Highways⇒186.
40 C.J.S. Highways § 247.

CHAPTER 9

CORRUGATED IRON CULVERTS

- Section 32-901. Corrugated iron culverts—sale to state or municipal corporations—analysis.
32-902. Penalty for failure to file analysis.
32-903. Analyses to be kept by secretary of state.
32-904. Penalty for delivering inferior corrugated culverts.
32-905. Duty of county attorneys to prosecute.

32-901. (1721) Corrugated iron culverts—sale to state or municipal corporations—analysis. No bid or proposal for the sale of corrugated culverts to any county, city, town, municipal or other public corporation, or to the state of Montana, or any department, board, bureau, commission or officer thereof shall be valid, and no contract for the purchase of corrugated culverts by any county, city, town, municipal or other public corporation, or by the state of Montana, or any department, board, bureau, commission or officer thereof, shall be entered into, unless there shall have been filed by such bidder or seller with the secretary of state, prior to the making of such bid or the letting of such contract, as the case may be, an accurate and complete analysis of the metal used in the manufacture of such corrugated culverts, showing the percentage each of pure iron, copper, carbon, silicon, manganese, sulphur, phosphorus and other substances con-

tained therein, together with the weight of galvanizing per square foot, sworn to by the manufacturer of such metal, and a copy of such affidavit, together with a specification showing gauge of the metal used in the various diameters of such culvert, the number, size and spacing of the rivets and fastenings, and the length of lap of the longitudinal and circumferential seams, and the type of connection to be furnished for connecting together the various sections of such corrugated culverts, signed by the seller thereof, or bidder, as the case may be, shall be incorporated in such bid or in such contract, as the case may be.

History: En. Sec. 1, Ch. 143, L. 1919;
re-en. Sec. 1721, R. C. M. 1921.

Collateral References

Highways 113(3).
40 C.J.S. Highways § 208.

32-902. (1722) Penalty for failure to file analysis. The failure to file such analysis with the secretary of state, or the failure to incorporate such copy, together with such specification, shall render such bid or contract null, void, and of no effect, and no warrant or order for the payment of any public moneys for the purchase of corrugated culverts shall be valid unless the provisions of this act shall have been fully complied with.

History: En. Sec. 2, Ch. 143, L. 1919;
re-en. Sec. 1722, R. C. M. 1921.

32-903. (1723) Analyses to be kept by secretary of state. It shall be the duty of the secretary of state to file all such sworn analyses and keep a complete index thereof, and they shall thereupon become public records.

History: En. Sec. 3, Ch. 143, L. 1919;
re-en. Sec. 1723, R. C. M. 1921.

32-904. (1724) Penalty for delivering inferior corrugated culverts. Any person, firm or corporation who, as principal or agent, shall intentionally sell or deliver for sale to any county, city, town, municipal or other public corporation, or the state of Montana, or any department, board, bureau, commission or officer thereof, any corrugated culvert which is inferior in grade, quality, weight, character, kind or brand to that specified in his bid, analysis, specification or contract, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than five hundred dollars, or greater than one thousand dollars, or by imprisonment in the county jail for not more than thirty days, or by both such fine and imprisonment; and upon a second conviction for such offense he shall be punished by a fine of not less than one thousand dollars, or more than fifteen hundred dollars, or by imprisonment in the county jail for not less than thirty days nor more than sixty days, or by both such fine and imprisonment.

History: En. Sec. 4, Ch. 143, L. 1919;
re-en. Sec. 1724, R. C. M. 1921.

Collateral References

Highways 113(4).
40 C.J.S. Highways § 211.

32-905. (1725) Duty of county attorneys to prosecute. It shall be the duty of the county attorneys in this state to diligently prosecute any and all persons violating any of the provisions of, and otherwise to enforce, this act in their respective places (counties or districts) upon complaint of any citizen or taxpayer of any violation of this act.

History: En. Sec. 5, Ch. 143, L. 1919;
re-en. Sec. 1725, R. C. M. 1921.

27 C.J.S. District and Prosecuting At-
torneys § 14.

Collateral References

District and Prosecuting Attorneys 8.

CHAPTER 10

OBSTRUCTIONS AND ENCROACHMENTS

- Section 32-1001. Construction of sidewalks—damage to sidewalk by team.
32-1002. Fences and buildings encroaching upon highway.
32-1003. Notice to remove encroachment.
32-1004. Penalty for failure to remove encroachment promptly.
32-1005. Action to remove or abate—costs and damages.
32-1006. Removal of encroachment at expense of owner.
32-1007. Liability for permitting water to overflow highway.
32-1008. Excavations across highway—permit and bridges.
32-1009. Duty of person finding obstruction upon highway.
32-1010. Removal of tree falling upon highway.
32-1011. Posting speed limit upon bridges.
32-1012. Malicious injury to shade or ornamental trees.
32-1013. Penalty for obstructing or injuring highway—notice to county attorney.
32-1014. Dumping garbage upon or near highway.
32-1015. Depositing glass, nails or other dangerous articles in highway.
32-1016. Prosecution of offenses by county attorney.
32-1017. Penalty for defacing signs or barriers on roads closed to traffic.
32-1018. Grazing livestock on highway unlawful.
32-1019. Parts of highways excluded from preceding section.
32-1020. Penalty for violating act.

32-1001. (1726) Construction of sidewalks—damage to sidewalk by team. Any owner or occupant of land may construct a sidewalk on the highway along the line of his land, subject, however, to the authority conferred by law on the board of county commissioners, and the road supervisors; and any person using said sidewalk with mule, horse, or team, without permission of the owner, is liable to such owner or occupant in the sum of five dollars for each trespass, and for all damages suffered thereby.

History: En. Sec. 2621, Pol. C. 1895;
re-en. Sec. 7, Ch. 44, L. 1903; re-en. Sec.
1343, Rev. C. 1907; re-en. Sec. 1, Ch. 6,
Ch. 72, L. 1913; re-en. Sec. 1, Ch. 6, Ch.
141, L. 1915; re-en. Sec. 1726, R. C. M.
1921.

Cross-Reference

Construction of telegraph, telephone and
electric lines along highway, sec. 70-301.

Collateral References

Highways 86.

39 C.J.S. Highways § 141.

32-1002. (1727) Fences and buildings encroaching upon highway. If any highway duly laid out or erected is encroached upon by fences, buildings, or otherwise, the road supervisor of the district must give notices, orally or in writing, requiring the encroachment to be removed from the highway.

History: En. Sec. 2, Ch. 6, Ch. 141, L.
1915; re-en. Sec. 1727, R. C. M. 1921. Cal.
Pol. C. Sec. 2731. See also history Sec.
32-1001.

Collateral References

Highways 157.

40 C.J.S. Highways § 224.

Right of one whose access by means of
a right of way or branch road to a high-
way is interfered with by an obstruction
in the latter, 5 ALR 200.

Contractor's right as to barricading or
obstructing street, 7 ALR 1203.

Liability for injury due to signal guide-
post or "silent policeman" in street, 12
ALR 333.

Monument or marker in highway. 16 ALR 927.

Employment of independent contractor as affecting liability for impeding public in use of highways. 23 ALR 1008.

Liability because of conditions which obstruct view at intersection of highways. 42 ALR 573.

Overhead wires across street or highway as nuisance. 54 ALR 483.

Power of highway officer in respect of billboards or other conditions on adjoin-

ing property which are deemed dangerous to travel or offensive esthetically to travelers. 81 ALR 1547.

Personal liability of highway officers for damage to or trespass upon land in connection with construction or maintenance of highways. 90 ALR 1481.

Liability of governmental unit for injury to traveler from collision with privately owned pole standing within highway boundaries. 3 ALR 2d 6.

32-1003. (1728) Notice to remove encroachment. Notice must be given to the occupant or owner of the land or person causing or owning the encroachment or left at his place of residence, if he be known to the person giving such notice and resides in the county; if not, it must be posted on the encroachment, specifying the breadth of the highway, the place and extent of the encroachment, and requiring him to remove the same forthwith.

History: En. Sec. 3, Ch. 6, Ch. 141, L. 1915; re-en. Sec. 1728, R. C. M. 1921. Cal. Pol. C. Sec. 2732. See also history Sec. 32-1001.

Collateral References

Highways—157.
40 C.J.S. Highways § 224.

32-1004. (1729) Penalty for failure to remove encroachment promptly. If the encroachment is not removed forthwith, or commenced to be removed forthwith, and the removal is not diligently prosecuted, the one who caused, owns, or controls the encroachment forfeits ten dollars for each day the same continues unremoved. If the encroachment is such as to effectually obstruct and prevent the use of the highway for vehicles, the road supervisor must forthwith remove the same.

History: En. Sec. 4, Ch. 6, Ch. 141, L. 1915; re-en. Sec. 1729, R. C. M. 1921. Cal. Pol. C. Sec. 2733. See also history Sec. 32-1001.

Collateral References

Highways—161.
40 C.J.S. Highways § 229.
25 Am. Jur. 622, Highways, § 326.

32-1005. (1730) Action to remove or abate—costs and damages. If the encroachment is denied, and the owner, occupant, or person controlling the matter or thing charged with being an encroachment, refuses either to remove or permit the removal thereof, the road supervisor must commence in the proper court an action to abate the same as a nuisance; and if he recovers judgment, he may, in addition to having the same abated, recover ten dollars for every day such nuisance remained after such notice, and also his costs in said action. The board of county commissioners may at any time order the supervisor to forthwith remove any encroachment without commencing an action.

History: En. Sec. 5, Ch. 6, Ch. 141, L. 1915; re-en. Sec. 1730, R. C. M. 1921. Cal. Pol. C. Sec. 2734. See also history Sec. 32-1001.

Collateral References

Highways—158.
40 C.J.S. Highways § 225.

32-1006. (1731) Removal of encroachment at expense of owner. If this encroachment is not denied, but is not removed for five days after the notice is complete, the road supervisor may remove the same at the expense of the owner, occupant, or person controlling the same, and recover his

costs and expenses, and also, for each day the same remained after notice was complete, the sum of ten dollars in an action for that purpose.

History: En. Sec. 6, Ch. 6, Ch. 141, L. 1915; re-en. Sec. 1731, R. C. M. 1921. Cal. Pol. C. Sec. 2735. See also history Sec. 32-1001.

32-1007. (1732) Liability for permitting water to overflow highway.

Any person storing or distributing water for any purpose, who permits the water to overflow any highway to the injury thereof, must, upon notification by the board of county commissioners, or the road supervisor of the district where such overflow occurred, repair the damages occasioned by overflow; and should such repairs not be made within a reasonable time by such person, the road supervisors must make such repairs and recover the expense thereof from such person in an action at law.

History: En. Sec. 7, Ch. 6, Ch. 141, L. 1915; re-en. Sec. 1732, R. C. M. 1921. Cal. Pol. C. Sec. 2737. See also history Sec. 32-1001.

NOTE.—Related sections: 32-1013, 94-3565.

Collateral References

Waters and Water Courses—119(5).
67 C.J. Waters § 305.

32-1008. (1733) Excavations across highway—permit and bridges.

All persons contemplating the excavation of irrigating, mining, drainage, or other ditches across the public highways, are required to obtain a permit in writing from the board of county commissioners, or the supervisor of said district, before beginning such excavations, and to bridge such irrigation, mining, drainage, or other ditches at once, substantially and in accordance with the plans and specifications furnished by the board of county commissioners; and thereafter said bridges shall be maintained by the county. And on failure or neglect to bridge as in this section provided, the supervisor of the road district must immediately remove any obstruction placed there, and refill such ditch, if necessary for the convenience of the traveling public.

History: En. Sec. 8, Ch. 6, Ch. 141, L. 1915; re-en. Sec. 1733, R. C. M. 1921. Cal. Pol. C. Sec. 2737. See also history Sec. 32-1001.

Collateral References

Highways—153.
40 C.J.S. Highways § 218.

32-1009. (1734) Duty of person finding obstruction upon highway.

It shall be the duty of any person finding any obstruction upon any highway of this state to forthwith notify the road supervisor of such obstruction.

History: En. Sec. 9, Ch. 6, Ch. 141, L. 1915; re-en. Sec. 1734, R. C. M. 1921. See also history Sec. 32-1001.

32-1010. (1735) Removal of tree falling upon highway.

Whoever cuts down a tree so that it falls into any highway must forthwith remove the same, and is liable to a penalty of ten dollars for every day the same remains in such highway.

History: En. Sec. 10, Ch. 6, Ch. 141, L. 1915; re-en. Sec. 1735, R. C. M. 1921. Cal. Pol. C. Sec. 2740. See also history Sec. 32-1001.

Liability of owner or occupant of abutting property for damage caused by fall of tree into highway. 11 ALR 2d 626.

Liability of municipality for damage caused by fall of tree or limb. 14 ALR 2d 186.

Collateral References

Highways—161.
40 C.J.S. Highways § 229.

32-1011. (1736) Posting speed limit upon bridges. Road supervisors must, when ordered by the board of county commissioners so to do, put upon bridges under their charge notices that there is "Five Dollars Fine for Riding or Driving on This Bridge Faster than a Walk." Whoever thereafter rides or drives faster than a walk on such bridge is liable to pay five dollars fine for each offense.

History: En. Sec. 11, Ch. 6, Ch. 141, L. 1915; re-en. Sec. 1736, R. C. M. 1921. Cal. Pol. C. Sec. 2741. See also history Sec. 32-1001.

Collateral References

Bridges⇒47.
11 C.J.S. Bridges § 53.

32-1012. (1737) Malicious injury to shade or ornamental trees. Whoever digs up, cuts down, or otherwise maliciously injures or destroys any shade or ornamental tree on any highway, unless the same is deemed an obstruction by the board of county commissioners and removed under their direction, forfeits one hundred dollars for each tree.

History: En. Sec. 12, Ch. 6, Ch. 141, L. 1915; re-en. Sec. 1737, R. C. M. 1921. Cal. Pol. C. Sec. 2742. See also history Sec. 32-1001.

Cross-Reference

Injuring trees on highways, treble damages, sec. 93-6103.

32-1013. (1738) Penalty for obstructing or injuring highway—notice to county attorney. Whoever obstructs or injures, or causes to be obstructed or injured, any highway, or diverts or causes to be diverted any water-courses thereon, or drains or causes to be drained any water from his land upon any highway, to the injury thereof, is liable to a penalty of ten dollars for each day such obstruction or injury remains, and must be punished as provided in section 94-3201. It shall be the duty of the road supervisor to notify the county attorney of any and all violations of this act.

History: En. Sec. 13, Ch. 6, Ch. 141, L. 1915; re-en. Sec. 1738, R. C. M. 1921. See also history Sec. 32-1001.

ical Code, before amendment, in State v. Auchard, 22 M 14, 55 P 361.

Collateral References

Highways⇒161.
40 C.J.S. Highways § 229.
25 Am. Jur., Highways, p. 565, §§ 272 et seq.; p. 622, § 326.

NOTE.—Related sections: 32-1007, 94-3565.

References

Cited or applied as section 2726, Polit-

32-1014. (1739) Dumping garbage upon or near highway. It shall be unlawful for any person or persons to dump or leave any garbage or dead animal in or upon any public highway, road, or alley of this state, or within two hundred yards of such public highway, road, or alley. Any person found guilty of a violation of this section shall be fined in a sum not exceeding twenty-five dollars, or imprisoned in the county jail for a period not exceeding thirty days, or be punished by both such fine and imprisonment, in the discretion of the court.

History: En. Sec. 90, Ch. 44, L. 1903; re-en. Sec. 1434, Rev. C. 1907; re-en. Sec. 14, Ch. 6, Ch. 72, L. 1913; re-en. Sec. 14, Ch. 6, Ch. 141, L. 1915; re-en. Sec. 1739, R. C. M. 1921. Cal. Pol. C. Sec. 2737.

NOTE.—Related sections: 69-712, 69-1309, 94-3542.

Collateral References

Highways⇒163(1).
40 C.J.S. Highways § 230.

32-1015. (1740) Depositing glass, nails or other dangerous articles in highway. It shall be unlawful for any person or persons to deposit any

crockery or glass, nails, tacks, or any other article that would tend to injure horses' feet or automobile tires in or upon any highways, road, or alley in this state. Any persons guilty of a violation of this section shall be fined in a sum not exceeding fifty dollars, or be imprisoned in the county jail for a period not exceeding sixty days, or be punished by both such fine and imprisonment, in the discretion of the court.

History: En. Sec. 15, Ch. 6, Ch. 72, L. 1915; re-en. Sec. 1740, R. C. M. 1921. Cal. 1913; re-en. Sec. 15, Ch. 6, Ch. 141, L. Pol. C. Sec. 2737.

32-1016. (1741) Prosecution of offenses by county attorney. The county attorneys, upon complaint of the road supervisor or any other person, must prosecute all actions under the provisions of this act by a suit in the name of the state, and all penalties and forfeitures must be paid into the general fund of the county.

History: En. Sec. 2734, Pol. C. 1895; re-en. Sec. 50, Ch. 44, L. 1903; re-en. Sec. 1386, Rev. C. 1907; re-en. Sec. 16, Ch. 6, Ch. 72, L. 1913; re-en. Sec. 16, Ch. 6, Ch. 141, L. 1915; re-en. Sec. 1741, R. C. M. 1921. Cal. Pol. C. Sec. 2743.

Collateral References

District and Prosecuting Attorneys⇒8.
27 C.J.S. District and Prosecuting Attorneys § 14.

32-1017. (1741.1) Penalty for defacing signs or barriers on roads closed to traffic. It shall be unlawful for any person to remove, destroy, or deface any barrier, or sign, erected by proper authority, indicating that a road, street, bridge, or highway is closed to traffic or to pass over a road or bridge that is marked, signed, or barricaded to indicate that it is closed to traffic. It shall also be unlawful for any person to extinguish, remove or destroy any lantern, torch, or reflector from any barricade or warning sign so erected.

Any violation of this law shall be punishable by a fine of not less than ten dollars (\$10.00) nor more than one hundred dollars (\$100.00).

History: En. Sec. 1, Ch. 74, L. 1929.

Collateral References

Highways⇒194.
40 C.J.S. Highways § 262.

32-1018. Grazing livestock on highway unlawful. It shall be unlawful wilfully to occupy any part of the right of way of any United States highway or state highway, as the latter term is defined in section 32-104, as a place for grazing or running any livestock when such part of such right of way is fenced on each side by a fence not more than three hundred feet distant from the center line of such highway; provided this act shall not apply to livestock on such highway in transit or in charge of one or more herders; and provided further, such use of the highway shall not be deemed wilful with respect to any particular animal unless the owner of, or the person having the control of such animal, has been given at least twenty-four hours' notice in writing of the presence of such animal on the highway by a highway patrolman or other peace officer, or unless the person charged habitually permits such use of such highway by livestock owned by him or under his control.

History: En. Sec. 1, Ch. 95, L. 1951.

32-1019. Parts of highways excluded from preceding section. This act shall not apply to such parts of highways as the state highway patrol shall

designate and mark by proper signs, as being impracticable to exclude livestock, nor to such parts of fenced highways adjacent to open range where no highway device has been installed to exclude range livestock therefrom.

History: En. Sec. 2, Ch. 95, L. 1951.

32-1020. Penalty for violating act. Any person violating the terms of this act shall be guilty of a misdemeanor and upon conviction shall be subject to a fine of not less than five dollars (\$5.00), nor more than one hundred dollars (\$100.00), for each offense.

History: En. Sec. 3, Ch. 95, L. 1951.

CHAPTER 11

SPEED AND TRAFFIC REGULATIONS

- Section 32-1101. Speed regulations.
 32-1102. Traffic regulation.
 32-1103. Vehicles carrying explosives or passengers for hire to stop at railroad crossings.
 32-1104. Rules upon meeting vehicles.
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 32-1109. Additional penalties.
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 32-1119. Moving heavy machinery or loads.
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 32-1121. Penalty for violation of two preceding sections.
 32-1122. Regulation of size and weight of vehicles on public highways.
 32-1123. Standards of maximum dimensions, weights, speeds, etc.
 32-1124. Violation of act a misdemeanor.
 32-1125. Penalties.
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 32-1127. Permits for excess size and weight.
 32-1128. When state or local road authorities may restrict right to use highways.
 32-1129. Restrictions as to tire equipment.
 32-1130. Penalties for misdemeanor.
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 32-1133. Penalties for violation of act—reporting convictions—duty of officers.
 32-1134. Driving on highways under construction and on closed detours prohibited.
 32-1135. State highway commission to define character of signs.
 32-1136. Through routes may be designated—signs—destruction of signs—penalties.
 32-1137. Parking on bridges or obstructing highways unlawful.
 32-1138. Concealing identity after accident unlawful.
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 32-1140. Lights required on rear of vehicles.
 32-1141. Lights required when load protrudes from vehicles.
 32-1142. Penalty.

- 32-1143. Use of white colored canes restricted to blind.
 32-1144. Duty of pedestrian or driver approaching blind person carrying white cane.
 32-1145. Canes—regulation of carrying—penalty.
 32-1146. Right of way of motorized fire equipment.

32-1101. (1742) Speed regulations. Every person operating or driving a vehicle of any character on a public highway of this state shall drive the same in a careful and prudent manner, and at a rate of speed no greater than is reasonable and proper under the conditions existing at the point of operation, taking into account amount and character of traffic, condition of brakes, weight of vehicle, grade and width of highway, condition of surface, and freedom of obstruction to view ahead, and so as not to unduly or unreasonably endanger the life, limb, property, or other rights of any person entitled to the use of the street or highway; provided, however, that cities and towns may, by ordinance, regulate speed and traffic upon the streets within the incorporated limits.

History: En. Sec. 7, Ch. 75, L. 1917; re-en. Sec. 1742, R. C. M. 1921.

Cross-Reference

Speed regulations, sec. 31-107.

Conflict Between Statutes and Ordinances

Where a city or town has in pursuance of this section, delegating the power to cities and towns by ordinance to regulate the speed of automobiles upon the streets within corporate limits, enacted an ordinance on the subject, it has the force of statute, and in case of conflict between it and the state statute, the ordinance controls so long as the legislative delegation of authority remains unrepealed; otherwise the statute controls. *Carey v. Guest*, 78 M 415, 432, 258 P 236.

In an action for damages arising out of an automobile accident which is grounded on a violation of a city ordinance relating to the speed at which vehicles may be driven on its streets, the court should not instruct the jury on the law of the state on the same subject. *Marinkovich v. Tierney et al.*, 93 M 72, 87, 89, 90, 17 P 2d 93.

Disregard of Danger Signals

Evidence that there were danger signs which the defendant did not see but could have seen; that defendant saw many smaller holes and tried to avoid them but did not slow down when approaching them but continued at a rate of speed not substantially less than his usual speed on good roads, held sufficient to take the question of his gross negligence to the jury. *Baatz v. Noble*, 105 M 59, 67, 69 P 2d 579.

Rights of Pedestrians and Automobilists in Use of Streets

Pedestrians and automobilists have

equal rights in the use of streets or highways in the exercise of which pedestrians are required to use ordinary care for their own safety, and the driver of an automobile must operate it in a careful and prudent manner and at a rate of speed no greater than is reasonable and proper under existing traffic and road conditions and the requirements of city ordinances. *McKeon v. Kilduff*, 85 M 562, 568, 281 P 345. See also *Green v. Bohm*, 65 M 399, 211 P 320.

Statutory Limit of Speed

The only restriction or limit placed on the rate of speed at which automobiles shall travel on state highways is that prescribed by this section, the import of which is that the speed, whatever it may have been should not have been so excessive as to have affected the driver's control over his car under the conditions which existed at the particular time and place or as they reasonably appeared to him to have existed. *Cowden et al. v. Crippen*, 101 M 187, 203, 53 P 2d 98.

Travel on Wrong Side of Road

A person driving an automobile on the wrong side of the road is *prima facie* liable for a violation of this section for failing to exercise the precaution necessary to avoid frightening animals being driven on the road, and thus imperiling the safety of the drivers of such animals. *Savage v. Boyce*, 53 M 470, 473, 164 P 887.

What Constitutes Excessive Speed

Where the rate of speed is alleged as an element of negligence, the pertinent question is whether the rate of speed was so excessive as to affect defendant's control over the car under the conditions which actually existed at the time and place or as they reasonably appeared to

him to exist, this being the import of this section relating to the matter of speed regulations on public highways. The mere happening of an accident is not proof of negligence. *Baatz v. Noble*, 105 M 59, 67, 69 P 2d 579.

References

State v. Pepper, 70 M 596, 226 P 1108; *Barney v. Board of Railroad Commrs.*, 93 M 115, 17 P 2d 82; *Harrington v. H. D. Lee Mercantile Co.*, 97 M 40, 61, 33 P 2d 553; *Boepple v. Mohalt*, 101 M 417, 434, 54 P 2d 857.

Collateral References

Automobiles 168(1).
60 C.J.S. *Motor Vehicles* § 290.
5 Am. Jur. 538, *Automobiles*, §§ 37 et seq.

Criminal or penal responsibility of public officer or employee for violating speed regulations. 9 ALR 367.

Ambulances as subject to speed regulations. 9 ALR 368.

Violation of speed law as affecting violator's right to recover for negligence. 12 ALR 463.

Public officials or employees as subject to speed regulations. 19 ALR 459.

Conflict between statutes and local regulations as to speed. 21 ALR 1187.

Indefiniteness of automobile speed regulations as affecting validity. 26 ALR 897.

Violation of speed regulations as affecting right to recover for injuries due to collision with street car. 28 ALR 228.

Excuse for exceeding speed limit for automobiles. 29 ALR 883.

Validity of statute or ordinance giving right of way in streets or highways to certain classes of vehicles. 38 ALR 24.

Driving at illegal speed as reckless driving within statute making reckless driving a criminal offense. 86 ALR 1281.

Indictment or information which charges offense as to speed in language of statute. 115 ALR 357.

Expert or opinion evidence of speed not based upon view of vehicle. 156 ALR 382.

32-1102. (1743) Traffic regulation. Every person operating or driving a vehicle of any character upon a public street or highway of this state must observe the following traffic regulations:

1. Traffic must everywhere and at all times keep to the right. Vehicles moving in opposite directions must pass each other by turning to the right. Vehicles moving in the same direction must pass by turning to the left on the part of the one passing, and turning to the right on the part of the one being passed. At all (turns) curves, corners, and crossings, and particularly where the view is in any manner obstructed both in cities and towns and in the country, vehicles must slow down and be under complete control and must keep to the right, so that if the width of the road permits, there is room on their left for the passing vehicle that may at any time suddenly or unexpectedly appear.

2. In cities, towns or villages where traffic is heavy, slow moving traffic must keep as near as possible to the curb. Vehicles turning corners to the right must keep close to the right-hand curb; in turning to the left, vehicles must keep to the right and swing full around the intersection of the center lines of the street. The operator or driver of any vehicle desiring for any reason, either at or between street crossings, to turn to the left, must warn all following by extending his arm full from the shoulder for a period of not less than two seconds, and sufficiently in advance of turning to enable any one following to stop or make the necessary change in course. Provided, however, that if the motor vehicle operated and driven be equipped in the rear with a signal lamp with direction indicators which will indicate clearly and positively the direction the operator or driver desires for any reason to turn, whether to the right or to the left, either at or between street crossings, and warning is given all following by means of such signal lamp for a period of not less than two seconds, and sufficiently in advance of turning to enable any one following to stop or make the necessary change in course it shall not be necessary to extend the

arm and the foregoing provision relating thereto shall be of no force or effect during the period between one hour after sunset and one hour before sunrise.

3. The operator or driver of any vehicle upon a public highway, upon being overtaken by another vehicle and receiving a signal or notice from the operator or driver of the vehicle in the rear that he desires to pass must, without unnecessary delay make every reasonable effort to permit him to do so.

4. No motor vehicle operating upon a public street or highway of this state shall pass on either side thereof a street-car which has stopped to receive or discharge passengers at a less distance than eight feet, nor at a speed greater than six miles per hour.

History: En. Sec. 8, Ch. 75, L. 1917; re-en. Sec. 1743, R. C. M. 1921; amd. Sec. 1, Ch. 80, L. 1927.

Cross-Reference

Stops at railroad crossings required, sec. 72-164.

Crossing

The word "crossing" as used in this section, with relation of the duty of drivers at crossings, held to refer to the intersection of a highway and a railroad or of two highways, and therefore an instruction based upon that section offered by defendant, through whose negligence in driving on a private way across the highway with the intention of entering a gate on the opposite side, plaintiff was injured, was properly refused as not applicable. *Knott v. Pepper*, 74 M 236, 243, 239 P 1037.

Held, in an action for personal injuries sustained in an automobile accident on a city street in which it appeared that plaintiff was struck while attempting to cross a business street between crossings, that the court erred in refusing defendant's offered instruction to the effect that greater caution is required of a pedestrian where he crosses between crossings than at crossings, and that automobiles must be more cautious at crossings than between crossings, although ordinary caution must be observed by drivers and pedestrians at and between crossings, such instruction having been in harmony with the law declared by subdivision 1 of this section, and applicable to the conditions presented. *Carey v. Guest*, 78 M 415, 429, 258 P 236.

Curves

As against the contention that there was error in giving instruction that the law (this section) is that the driver of an automobile must slow down at curves and have his car under complete control, in that there was no evidence that defendant knew or should have known there

was a curve at the point of collision, held, that a person is presumed to see, and therefore know, that which he could see by keeping a lookout. *McNair v. Berger*, 92 M 441, 460, 15 P 2d 834.

Passing

Plaintiff riding a motorcycle in a city street was endeavoring to pass a truck going in the same direction to the left and sounded the horn; the driver of the truck suddenly turned to the left without giving the warning required by this section, causing a collision. There was no evidence that plaintiff had time to stop or change his course. Held, that plaintiff was not guilty of contributory negligence as a matter of law. *Haney v. Mutual Creamery Co.*, 67 M 278, 283, 215 P 656.

Under this section, automobile traffic must at all times keep to the right and where two vehicles are moving in the same direction, the one passing must turn to the left and the one being passed must turn to the right; the one passing is negligent if he so carelessly manages his automobile that a collision results, or attempts to pass at a time or under conditions which are not reasonably safe, as where he attempts to pass when another vehicle is approaching. *McDonough v. Smith*, 86 M 545, 550, 284 P 542.

Id. Ordinarily, the driver of a car overtaking and passing another must keep to the left and not turn to the right until entirely clear of the other car and is in duty bound to look out for the car ahead.

Id. Driving an automobile at a rapid rate of speed so close to a car ahead that, if the driver of the latter slows down, it becomes necessary for the driver of the first to turn to the left to avoid striking it, is negligence, particularly when in doing so he must turn in front of a car coming from the opposite direction.

There is no duty resting upon a motorist to slow down his speed when he becomes aware of the fact that another car desires to pass him from the rear, the only re-

quirement being the provisions of this section declaring that he must without unnecessary delay, make every reasonable effort to permit him to do so. *Cowden et al. v. Crippen*, 101 M 187, 205, 53 P 2d 98.

Id. The driver of an automobile while proceeding in a lawful manner on the proper side of the highway, has the right to assume that one attempting to pass him from the rear, will proceed in a lawful manner and on his own side of the road, as required by this section.

Street-cars

Held, that as between the statute providing that motor vehicles shall not pass a standing street-car at a less distance than eight feet nor at a speed greater than six miles an hour, and a city ordinance providing that on business streets automobiles must not be driven faster than twelve miles an hour and that when passing a standing street-car on the side on which passengers are discharged and received, they must stop, the ordinance was controlling, and under it defendant was not required to stop when driving on the opposite side of a standing street-car nor to clear it by a space of eight feet. *Carey v. Guest*, 78 M 415, 431 et seq., 258 P 236.

Turning Corners

In an action by a pedestrian against the driver of an automobile for personal injuries sustained at a street crossing, an instruction based upon subdivisions 1 and 2 of this section, requiring the latter in turning corners to keep close to the curb, held prejudicially erroneous where the presence of a telephone pole in the highway about six feet from the curb near the point of the accident rendered it impossible for the driver to obey the mandate of the statute, its provisions being elastic, not rigid, to be applied in the light of physical conditions existing in the avenues of traffic. *McGregor v. Weinstein*, 70 M 340, 343, 225 P 615.

The driver of a motor vehicle who, in violation of statute and city ordinance, cuts a corner at a street intersection and enters the wrong side of the street whereby a traveler is injured, is guilty of negligence per se. *March v. Ayers*, 80 M 401, 410, 260 P 702.

Held, that this section, imposing the duty upon drivers of motor vehicles of slowing down at curves and having their cars under complete control is not invalid as imposing an unreasonable obligation upon drivers and, therefore, unenforceable. *McNair v. Berger*, 92 M 441, 15 P 2d 834.

Wrong Side of Road

In an action for damages for injuries sustained in a collision between plaintiff's motorcycle and defendant's automobile, the allegation in the complaint that defendant was on the left side of the road at the time of the accident, in disregard of the provision of the statute that vehicles must keep to the right, made out a prima facie charge of negligence. *McGinnis v. Phillips*, 62 M 223, 205 P 215.

The fact that a motorist sought to be held liable in damages for injuries to his guest, resulting in death, at the time of the accident was driving on the left side of the road was not alone sufficient to show negligence on his part, since where the road is open and free from traffic, the entire road is free for his use. *Harrington v. H. D. Lee Mercantile Co.*, 97 M 40, 62, 33 P 2d 553.

Subd. 1.

Where Question of Negligence for Jury

Under the evidence presented, held that it was a jury question as to whether defendant acted as a reasonably prudent person would have acted under all the circumstances in traveling at the point of collision at the speed of 18 or 20 miles per hour, as she admitted, even though the street-car had not come to a full stop when defendant met it. Whether, in the exercise of reasonable care, she should have seen plaintiff in time to avoid the collision, was for the jury. *Hill v. Haller*, 108 M 251, 261, 90 P 2d 977.

Subd. 4.

What Sufficient to Establish Negligence

Under this subdivision, where defendant motorist admitted that she was driving from 18 to 20 miles per hour, such statement was sufficient to establish negligence, even though the testimony of plaintiff that she was driving 40 miles may have been open to question. *Hill v. Haller*, 108 M 251, 259, 90 P 2d 977.

References

Green v. Bohm, 65 M 399, 211 P 320;
Barney v. Board of Railroad Commrs. et al., 93 M 115, 17 P 2d 82; *Flynn v. Helena Cab & Bus Co.*, 94 M 204, 215, 21 P 2d 1105; *Boepple v. Mohalt*, 101 M 417, 434, 54 P 2d 857.

Collateral References

Automobiles ⇨ 147.
60 C.J.S. Motor Vehicles § 248.

Sudden or unsigned stop or slowing of motor vehicle as negligence. 29 ALR 2d 5.

32-1103. (1743.1) Vehicles carrying explosives or passengers for hire to stop at railroad crossings. The driver of any motor truck carrying ex-

plosive substances or inflammable liquids, as a cargo or part of a cargo, or any motor bus carrying passengers for hire, before crossing at grade any track or tracks of a railway, shall stop such vehicle not less than ten feet or more than fifty feet from the nearest rail of such track, and while so stopped shall both look and listen in both directions along such track for approaching railway trains or cars before traversing such crossing. The provisions of this act shall not be deemed to apply at the crossing of a street or highway and street railway tracks, or to railway tracks where traffic control signals are in operation and give indication to approaching vehicular traffic to proceed.

History: En. Sec. 1, Ch. 33, L. 1933; amd. Sec. 1, Ch. 70, L. 1949.

Cross-References

Motor vehicles to stop at railroad crossing, sec. 72-164.

School busses, provisions concerning operation and stopping, secs. 75-3308 to 75-3311.

Collateral References

Automobiles↔147.

60 C.J.S. Motor Vehicles § 248.

5 Am. Jur. 544, Automobiles, §§ 46 et seq.

Failure to look for or discover automobile approaching on wrong side of road as negligence or contributory negligence. 145 ALR 536.

32-1104. (1744) Rules upon meeting vehicles. When vehicles meet, the driver of each must turn reasonably to the right of the center of the highway or road, so as to pass without interference, under the penalty of twenty-five dollars, for every neglect, to be recovered by the party injured. Where the whole breadth of the roadway is not worked, the center of the worked part is the center of the highway. In times of snow where there is a beaten track, the center of that is the center of the highway or road. But this section does not apply to vehicles meeting cars running on rails or grooved tracks.

History: En. Sec. 81, Ch. 44, L. 1903; re-en. Sec. 1420, Rev. C. 1907; re-en. Sec. 1, Ch. 8, Ch. 72, L. 1913; re-en. Sec. 1, Ch. 8, Ch. 141, L. 1915; re-en. Sec. 1744, R. C. M. 1921. Cal. Pol. C. Sec. 2931.

Operation and Effect

Under this section, the driver of an automobile, who failed to turn to the right of the way sufficiently to permit a vehicle, coming from the opposite direction, to pass in safety, was at fault, and liable for damages for injury resulting

therefrom. *Savage v. Boyce*, 53 M 470, 473, 164 P 887.

References

State v. Pepper, 70 M 596, 600, 226 P 1108; *Barney v. Board of Railroad Comrs.*, 93 M 115, 128, 17 P 2d 82.

Collateral References

Automobiles↔170(2).

60 C.J.S. Motor Vehicles § 306.

5 Am. Jur. 661, Automobiles, §§ 286 et seq.

32-1105. (1745) Drunkards not to be employed as drivers. No person must employ to drive any vehicle for the conveyance of passengers upon any public highway or road a person addicted to drunkenness, under penalty of five dollars for every day such person is in his employ.

History: En. Sec. 82, Ch. 44, L. 1903; re-en. Sec. 1421, Rev. C. 1907; re-en. Sec. 2, Ch. 8, Ch. 72, L. 1913; re-en. Sec. 2, Ch. 8, Ch. 141, L. 1915; re-en. Sec. 1745, R. C. M. 1921. Cal. Pol. C. Sec. 2932.

Cross-Reference

Drunken driving, penalty, secs. 31-108, 31-109.

References

State v. Pepper, 70 M 596, 600, 226 P 1108; *Barney v. Board of Railroad Comms.*, 93 M 115, 128, 17 P 2d 82.

Collateral References

Master and Servant↔10.

56 C.J.S. Master and Servant § 14.

32-1106. (1746) Intoxicated drivers to be discharged. If any person, while actually employed in driving any vehicle, is intoxicated to such a degree as to endanger the safety of his passengers, the owner, on receiving from any passenger a written notice of the fact, verified by his oath, must forthwith discharge such driver, and if he have such driver in his service within six months after such notice, he incurs a like penalty.

History: En. Sec. 83, Ch. 44, L. 1903; re-en. Sec. 1422, Rev. C. 1907; re-en. Sec. 3, Ch. 8, Ch. 72, L. 1913; re-en. Sec. 3, Ch. 8, Ch. 141, L. 1915; re-en. Sec. 1746, R. C. M. 1921. Cal. Pol. C. Sec. 2933.

References

State v. Pepper, 70 M 596, 600, 226 P 1108; Barney v. Board of Railroad Comms., 93 M 115, 128, 17 P 2d 82.

32-1107. (1746.1) Drunken driving prohibited. It shall be unlawful for any person while in an intoxicated condition or under the influence of intoxicating liquor or any drug or narcotic to drive, operate or run upon or over any highway or street or public thoroughfare within the state of Montana, whether within or without a municipality, any automobile, truck, motorcycle or any other motor vehicle.

History: En. Sec. 1, Ch. 166, L. 1929; amd. Sec. 1, Ch. 198, L. 1943.

Erroneous Name of Offense Cured by Specific Averment

Where a complaint charged defendant with driving an automobile upon the public highways and thoroughfares of a certain county while intoxicated, but thereafter specifically alleging how, when and where defendant drove the vehicle while "under the influence of intoxicating liquor," the latter allegation was controlling and sufficient to charge the offense under this section; where general allegations are followed by specific averments, the issues are narrowed to the latter. State v. Schnell, 107 M 579, 585, 88 P 2d 19.

Not Impliedly Repealed

Held, that this section, making it an offense to drive a motor vehicle over any highway, street or public thoroughfare in the state while in an intoxicated condition or under the influence of intoxicating liquor, or drug or narcotic, was not impliedly repealed by section 1741.7, R. C. M. 1935 (since repealed), which applies to driving a motor vehicle outside of incorporated cities and towns, while intoxicated; the courts recognize a distinction between one who is intoxicated and one who is under the influence of intoxicating liquor, and there is no irreconcilable conflict between the two statutes. State v. Schnell, 107 M 579, 583, 88 P 2d 19.

Opinion Evidence—Evidence of Accident

Opinion evidence of witnesses for the state, who had observed defendant, to the effect that he was under the influence of liquor while driving an automobile,

held to have been properly admitted, together with evidence that an accident occurred at the time he was so driving, showing the circumstances under which the offense was committed. State v. Schnell, 107 M 579, 587, 88 P 2d 19.

Statute Under Which Prosecution Must Be Had

A prosecution for driving a motor vehicle over any highway or street within or without a municipality while under the influence of intoxicating liquor or any drug or narcotic, must be based upon this section, penalty for which is prescribed in section 32-1108, and one for driving such a vehicle outside of incorporated cities and towns while intoxicated must be brought under section 1741.7, R. C. M. 1935 (since repealed). State v. Schnell, 107 M 579, 583, 88 P 2d 19.

Collateral References

Automobiles—332.

61 C.J.S. Motor Vehicles § 625.

5 Am. Jur. 916, Automobiles, §§ 767 et seq.

Driving automobile while intoxicated as a substantive criminal offense. 42 ALR 1498.

Constitutionality and effect of statute relating to civil liability of person driving automobile while under influence of liquor. 56 ALR 327.

Driving while intoxicated as reckless driving, where driving while intoxicated is made a separate offense. 86 ALR 1274.

Criminal liability based on permitting unlicensed person to operate automobile under statute forbidding driving while intoxicated. 137 ALR 477.

32-1108. (1746.2) Penalty for drunken driving—revocation of license.

Any person driving, operating or running any such motor vehicle upon or over any highway, street or public thoroughfare of the state of Montana, whether within or without a municipality while in an intoxicated condition or under the influence of intoxicating liquor or of any drug or narcotic shall upon conviction thereof be punished by a fine of not less than fifty dollars (\$50.00) nor more than three hundred dollars (\$300.00), or shall be imprisoned in the county jail not less than thirty days nor more than six months, or by both such fine and imprisonment. Such fine or imprisonment shall be assessed against any such person so convicted regardless of whether or not his act or acts or omission have resulted in any damage to a person or property of any person, firm or corporation. Such conviction shall of itself forthwith operate as revocation of such driver's license to operate any motor vehicle and shall of itself render such license null and void and the person so convicted and punished shall not be eligible to apply for or receive a license to operate any motor vehicle, nor shall he be permitted to drive, run or operate any such motor vehicle, for thirty days from the date of such conviction; if that person whose license has been revoked by his conviction of a violation of this act aforesaid shall thereafter drive, run or operate upon any highway, street or public thoroughfare within this state, whether within or without a municipality any motor vehicle within the time for which his said license has been suspended or revoked, he shall upon conviction thereof be punished by a fine of not less than fifty dollars (\$50.00) or more than five hundred dollars (\$500.00) or by imprisonment in the county jail not less than thirty days nor more than six months, or by both such fine and imprisonment.

History: En. Sec. 3, Ch. 166, L. 1929; amd. Sec. 2, Ch. 198, L. 1943.

When Violation of This Section Proximate Cause of Death—Homicide

To warrant conviction of the crime of involuntary manslaughter by reason of the commission of an unlawful act (violation of this section) it must appear that

the doing of the unlawful act contributed to or was the proximate cause of the death. *State v. Darchuck*, 117 M 15, 17, 156 P 2d 173.

References

State v. Schnell, 107 M 579, 583, 88 P 2d 19.

32-1109. (1746.3) Additional penalties. In addition to the penalties heretofore provided, any person convicted of a violation of this act shall be subject to the following penalties:

(1) For the first offense the motor vehicle being driven in such violation, if owned by the convicted person, shall not be used by such person for a period not less than thirty days, nor more than six months; provided, however, that nothing in this section shall prevent any member of his family or other person from operating or driving such motor vehicle.

(2) For the second offense the motor vehicle driven in committing such second offense, if owned by the convicted person, shall not be used by himself or any member of his family or by any person for any purpose whatsoever, for not less than six months, nor more than one year; provided, however, that the court may within its discretion permit other members of the family of such convicted person or any other person to operate or drive such motor vehicle.

(3) Where the foregoing additional penalties of this section are imposed by judgment of any court it shall be the duty of the court imposing such penalty to give notice to the registrar of motor vehicles of the entry of such judgment.

History: En. Sec. 4, Ch. 166, L. 1929.

Collateral References

Automobiles—359.

61 C.J.S. Motor Vehicles § 636.

32-1110. (1746.4) Licensee as prima facie owner of vehicle. Licensee of motor vehicle shall prima facie be deemed owner thereof. For the purpose of this act the person appearing on the public records as licensee of any motor vehicle shall prima facie be deemed the owner thereof.

History: En. Sec. 5, Ch. 166, L. 1929.

Collateral References

Automobiles—332.

61 C.J.S. Motor Vehicles § 625.

32-1111. (1747) Duty of driver to guard against runaways. The driver of any vehicle used to convey passengers must not leave the horses attached thereto while passengers remain in the same, without first fastening the horses or placing the lines in the hands of some other person, so as to prevent their running, under a penalty of twenty dollars for each offense.

History: En. Sec. 84, Ch. 44, L. 1903; P 1108; Barney v. Board of Railroad Commrs., 93 M 115, 128, 17 P 2d 82.
re-en. Sec. 1423, Rev. C. 1907; re-en. Sec. 4, Ch. 8, Ch. 72, L. 1913; re-en. Sec. 4, Ch. 8, Ch. 141, L. 1915; re-en. Sec. 1747, R. C. M. 1921. Cal. Pol. C. Sec. 2934.

Collateral References

Highways—180.

40 C.J.S. Highways § 244.

References

State v. Pepper, 70 M 596, 600, 226

32-1112. (1748) Liability of owner for negligence of driver. The owner of every vehicle running or traveling upon any highway or road for the conveyance of passengers is liable for all damage to person or property done by any person in his employment as a driver while driving such vehicle, whether done wilfully or negligently, or otherwise, in the same manner as such driver would be liable.

History: En. Sec. 5, Ch. 8, Ch. 72, L. 1913; re-en. Sec. 5, Ch. 8, Ch. 141, L. 1915; re-en. Sec. 1748, R. C. M. 1921. Cal. Pol. C. Sec. 2936.

employment. Rohan v. Sherman & Reed et al., 61 M 519, 523, 202 P 749.

References

State v. Pepper, 70 M 596, 600, 226 P 1108; Barney v. Board of Railroad Commrs., 93 M 115, 128, 17 P. 2d 82.

Collateral References

Automobiles—193(1-17)

60 C.J.S. Motor Vehicles § 435.

Operation and Effect

Under this section, the owner of a vehicle employed for the conveyance of passengers is liable for all damages done by a driver in his employ to person or property while acting within the scope of his

32-1113. (1748.1) Owner or operator of vehicle released from responsibility for injuries of guest, when. The owner or operator of a motor vehicle shall not be liable for any damages or injuries to any passenger or person riding in said motor vehicle as a guest or by invitation and not for hire, nor for any damages to such passenger's or person's parent or guardian, unless damage or injury is caused directly and proximately by the grossly negligent and reckless operation by him of such motor vehicle.

History: En. Sec. 1, Ch. 195, L. 1931.

Automobile Guest Law—Recovery

Under this and other sections of the

automobile guest act, before a guest of a motorist can recover for injuries sustained while riding in his host's car, he must prove that they were caused directly and proximately by defendant's grossly negligent and reckless operation of the car, either alone or in concurrence with the wrongful acts of another. *Cowden et al. v. Crippen*, 101 M 187, 201, 53 P 2d 98.

Contributory Negligence

A gratuitous passenger should not be held guilty of contributory negligence unless he in some way actively participated in the negligence of the driver, or was aware of the latter's incompetence or carelessness, or, knowing that the driver was not taking proper precautions while approaching a place of danger, failed to warn or admonish him. *Baatz v. Noble*, 105 M 59, 68, 69 P 2d 579.

Operation and Effect

By the enactment of this act, in 1931, owners and operators of automobiles are relieved from liability for injuries to their guests proximately caused by the driver's ordinary negligence in their operation; if the negligence was gross or the operation of the car reckless, the owner or operator is liable for the consequent injuries to the guest. *Nangle v. Northern Pacific Ry. Co. et al.*, 96 M 512, 520, 32 P 2d 11.

Id. Irrespective of the meaning attributable to the terms "grossly negligent" or "reckless operation" of an automobile within the meaning of this act, where the conduct of the driver resulting in injury to his guest was something more than ordinary negligence, i.e., absence of ordinary and reasonable care,—liability attaches.

Id. In an action for damages for the death of a guest of the driver of an automobile occurring at a railway crossing in the dark hours of a winter morning, evidence showing *inter alia*, that the driver was proceeding on an oiled road at a speed of from 35 to 40 miles an hour and approaching a sharp curve just before reaching the crossing; the driver according to his own statement "knew the road like a book"; a number of warning signs along the highway were clearly visible for a considerable distance but the driver did not slacken his speed until he had rounded the curve, when he felt the car skid on the ice with the result that the car was overturned on the crossing and struck by a train. Held, that the trial court did not err in denying a motion for nonsuit and in permitting the jury to pass upon the question whether the driver was or was not grossly negligent.

In an action for personal injuries sustained by one riding in an automobile as the guest of the motorist, plaintiff must,

under this and the following two sections, show that the injuries were caused by the grossly negligent and reckless operation of the car by the defendant, else he cannot recover, a question for the jury, unless reasonable men can come to only one conclusion, when it becomes a question of law for the court; held, where driver after several attempts to pass a truck which wouldn't give him the right of way, drove his car on the soft shoulder and overturned, one for the jury. *Blinn v. Hatton*, 112 M 219, 221, 114 P 2d 518.

In automobile guests' action against their driver for injuries sustained in a collision, the burden was on the guests to show the driver's gross negligence or reckless operation of the automobile because, as guests, they assumed the ordinary negligence of the driver. *Westergard v. Peterson*, 117 M 550, 552, 159 P 2d 518.

Id. In automobile guests' action against the driver of an automobile in which they were riding for injuries sustained in colliding with an overtaken vehicle, evidence of such driver's gross negligence in driving at an excessive speed was sufficient for the jury.

Proof by Circumstantial Evidence

Under the rule that facts constituting negligence may be established by circumstantial evidence if such evidence tends more strongly to establish plaintiff's theory than an inconsistent one, held, in an action brought under the automobile guest law to recover damages for death of two passengers where there was no direct evidence other than that driver without reason turned toward the left at angle of 45 degrees thus hitting a tree, court did not err in submitting the issues as to gross negligence and reckless operation to jury. *Doheny v. Coverdale*, 104 M 534, 546, 68 P 2d 142.

Submission of Gross Negligence to Jury

If the record contains substantial evidence tending to prove that the injuries complained of were caused directly and proximately by the gross negligence and reckless operation of the car by the defendant, submission of the case to the jury on the issue of defendant's gross negligence is justified. *Baatz v. Noble*, 105 M 59, 67, 69 P 2d 579.

Where Occupant Paying \$1.50 Per Day as Her Part of Expenses, Held Guest

In action by occupant of automobile for injuries sustained in Montana where plaintiff's own evidence showed she had accepted an invitation to make trip with husband and wife, and subsequently she had agreed to pay \$1.50 a day as her part of expenses, and there was no evidence as to the actual cost of meals and lodging, or

that any part of sum to be paid was to be applied to cost of gas and oil or that there would be any overplus to be so applied, plaintiff was a "guest" and refusal to so instruct jury on appropriate degree of care reversible error, and alleged gross negligence of hosts and contributory negligence of guest were for jury. *Copp v. Van Hise*, 119 F 2d 691, 694.

Where Partnership Held Liable

In an action against both members of a partnership to recover damages for death of two girls permitted by one partner to ride in his personal car as guests to supervise unloading of road machinery, held under section 7997, R. C. M. 1935 (since repealed), the partnership liable even though second partner was absent and ignorant of the invitation, liability based on negligent driving of the car by a partnership employee on the return trip made in the course of partnership business. *Doheny v. Coverdale*, 104 M 534, 548, 68 P 2d 142.

References

McNair v. Berger, 92 M 441, 454, 15 P 2d 834.

32-1114. (1748.2) Assumption of risk by guest in motor vehicle, when. Any person riding in a motor vehicle as a guest or by invitation and not for hire, assumes as between owner and guest the ordinary negligence of the owner or operator of such motor vehicle.

History: En. Sec. 2, Ch. 195, L. 1931.

References

Westergard v. Peterson, 117 M 550, 552, 159 P 2d 518.

32-1115. (1748.3) Imputation of ordinary negligence to guest. The ordinary negligence of the owner or operator of a motor vehicle as between owner and guest is imputed to any person riding in such vehicle as a guest or by invitation and not for hire.

History: En. Sec. 3, Ch. 195, L. 1931.

References

Westergard v. Peterson, 117 M 550, 552, 159 P 2d 518.

32-1116. (1748.4) Act not applicable to common carriers or demonstrators. This act shall not relieve a public carrier or any owner or operator of a motor vehicle while the same is being demonstrated to the prospective purchaser of responsibility for any injury sustained by the passenger being transported by such public carrier or by such owner or operator.

History: En. Sec. 4, Ch. 195, L. 1931.

Collateral References

Carriers ⇐ 280(1); Automobiles ⇐ 181 (2).

Collateral References

Automobiles ⇐ 181(1).
60 C.J.S. Motor Vehicles § 399.
5 Am. Jur. 632, Automobiles, §§ 237-243.

Liability of owner or operator of automobile for injury to guest. 20 ALR 1014.
What constitutes gross negligence or the like, within statute limiting liability of owner or operator of automobile for injury to guest. 74 ALR 1198.

Who is a guest within contemplation of statute regarding liability of owner or operator of motor vehicle for injury to guest. 82 ALR 1365.

Infant as guest within automobile guest statutes. 16 ALR 2d 1304.

Driving motor vehicle without lights or with improper lights as gross negligence or the like warranting recovery by guest statute or similar common-law rule. 21 ALR 2d 209.

Collateral References

Automobiles ⇐ 181(1).
60 C.J.S. Motor Vehicles § 399.

Collateral References

Negligence ⇐ 93.
65 C.J.S. Negligence § 168.

13 C.J.S. Carriers §§ 676-678; 60 C.J.S. Motor Vehicles § 399.

Duty and liability of carrier of passengers for hire by automobile. 4 ALR 1499.

32-1117. (1748.5) Regulation of sale and use of sleighs. On and after the first day of January, 1924, it shall be unlawful for any person, firm or

corporation in this state to sell any new or first hand draft sleigh, to any person or persons residing in this state for use herein, unless the runners of such sleigh shall measure from center to center four feet and six inches or wider. And on and after January 1st, 1928, it shall be unlawful for any person or persons to use upon any of the public highways of this state any sleigh, unless the runners shall measure from center to center four feet and six inches, or wider.

History: En. Sec. 1, Ch. 101, L. 1923.

Collateral References

Highways 168.

40 C.J.S. Highways § 234.

32-1118. (1748.6.) Penalty. Any person, firm or corporation violating any of the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than ten dollars (\$10.00) nor more than twenty-five dollars (\$25.00).

History: En. Sec. 2, Ch. 101, L. 1923.

Collateral References

Highways 186.

40 C.J.S. Highways § 247.

32-1119. (1749) Moving heavy machinery or loads. All persons owning, controlling, operating or managing threshing machines, steam engines, saw mills, or any heavy loads whatever kind or nature, are required in moving the same over public highways, to lay down planks, not less than one foot wide, three inches in thickness, and of sufficient length on the floors of all bridges and culverts situated on the public highways, while crossing the same, for the wheels of said threshing machines, steam engines, saw mills, or other vehicles carrying heavy loads of any kind to run on; provided, that this section shall not apply to any threshing machines, saw mill, steam engine, or other vehicle carrying heavy loads not exceeding six tons in weight; provided further, that owners and operators of trucks carrying a net load over and above the weight of the truck itself of more than six tons, are hereby made personally liable for breakage or damage done to bridges or culverts, when same have not been planked in accordance with the provisions of this section.

History: En. Sec. 87, Ch. 44, L. 1903; re-en. Sec. 1426, Rev. C. 1907; re-en. Sec. 6, Ch. 8, Ch. 72, L. 1913; re-en. Sec. 6, Ch. 8, Ch. 141, L. 1915; re-en. Sec. 1749, R. C. M. 1921; amd. Sec. 1, Ch. 164, L. 1925.

1108; Barney v. Board of Railroad Commrs., 93 M 115, 128, 17 P 2d 82.

Collateral References

Bridges 27, 32.

11 C.J.S. Bridges §§ 50, 99.

References

State v. Pepper, 70 M 596, 600, 226 P

32-1120. (1750) Moving steam-engines and the like along highways. All persons owning, controlling, operating, or managing threshing-machines, sawmills, or steam-engines of any kind, are required in moving the same along the public highways, or meeting any person or persons on horses or mules, or in vehicles drawn by horses or mules, to shut off the steam and halt until such horses or mules shall have safely passed.

History: En. Sec. 88, Ch. 44, L. 1903; re-en. Sec. 1427, Rev. C. 1907; re-en. Sec. 7, Ch. 8, Ch. 72, L. 1913; re-en. Sec. 7, Ch. 8, Ch. 141, L. 1915; re-en. Sec. 1750, R. C. M. 1921.

References

State v. Pepper, 70 M 596, 600, 226 P 1108; Barney v. Board of Railroad Commrs., 93 M 115, 128, 17 P 2d 82.

Collateral ReferencesHighways[Ⓒ]181.

40 C.J.S. Highways § 243.

32-1121. (1751) Penalty for violation of two preceding sections. Any person or persons violating the provisions of the two preceding sections shall be guilty of a misdemeanor, and shall, on conviction thereof, be fined in a sum not less than five dollars nor more than one hundred fifty dollars.

History: En. Sec. 89, Ch. 44, L. 1903; re-en. Sec. 1428, Rev. C. 1907; re-en. Sec. 8, Ch. 8, Ch. 72, L. 1913; re-en. Sec. 8, Ch. 8, Ch. 141, L. 1915; re-en. Sec. 1751, R. C. M. 1921.

P 1108; Barney v. Board of Railroad Commrs., 93 M 115, 128, 17 P 2d 82.

Collateral ReferencesBridges[Ⓒ]47; Highways[Ⓒ]186.

11 C.J.S. Bridges § 53; 40 C.J.S. Highways § 247.

References

State v. Pepper, 70 M 596, 600, 226

32-1122. (1751.1) Regulation of size and weight of vehicles on public highways. It shall be unlawful and constitute a misdemeanor for any person to drive or move, or for the owner to cause or knowingly permit to be driven or moved, on any public highway any vehicle or vehicles of a size or weight exceeding the limitations stated in this act, or any vehicle or vehicles which are not so constructed or equipped as required in this act or the rules and regulations of the state highway commission, and the maximum size and weight of vehicles herein specified shall be lawful throughout this state, and local authorities shall have no power or authority to alter said limitations or substitute any other limitations or requirements except as express authority may be granted in this act.

History: En. Sec. 1, Ch. 171, L. 1931; amd. Sec. 1, Ch. 123, L. 1947.

Liability for damaging highway or bridge by nature or weight of vehicles or loads transported over it. 5 ALR 768.

Collateral ReferencesHighways[Ⓒ]168.

40 C.J.S. Highways § 234.

25 Am. Jur. 561, Highways, §§ 268, 269.

Power to limit weight of vehicle or load thereon with respect to use of highways. 26 ALR 747.

32-1123. Standards of maximum dimensions, weights, speeds, etc. The following standards are hereby made applicable to, and shall govern the maximum dimensions, weights and speeds of motor vehicles, and other characteristics and factors thereof, operating over the highways of, and in the state of Montana, to the exclusion of any other standards or any other requirements respecting the subject matter:

(1) Width—No vehicle, unladen or with load, shall have a total outside width in excess of 96 inches.

(2) Height—No vehicle, unladen or with load, shall exceed a height of 13 feet, 6 inches.

(3) Length—(a) No single truck, unladen or with load, shall have an overall length, inclusive of front and rear bumpers, in excess of 35 feet.

(b) No single bus, unladen or with load, shall have an overall length, inclusive of front and rear bumpers, in excess of 40 feet.

(c) No combination of truck-tractor and semitrailer, unladen or with load, shall have an overall length, inclusive of front and rear bumpers, in excess of 60 feet.

(d) No other combination of vehicles shall consist of more than two units, and no such combination of vehicles, unladen or with load, shall

have an overall length, inclusive of front and rear bumpers, in excess of 60 feet.

(4) Speed—(a) Minimum speed. No motor vehicle shall be unnecessarily driven at such slow speed as to impede or block the normal and reasonable movement of traffic. Exception to this requirement shall be recognized when reduced speed is necessary for safe operation or when a vehicle or combination of vehicles is necessarily or in compliance with law or police direction proceeding at reduced speed.

(b) Maximum speed. No truck shall be operated at a speed greater than 45 miles per hour. Passenger vehicles may be operated at such speeds as shall be consistent at all times with safety and the proper use of the roads.

(c) Vehicles equipped with solid rubber on cushion tires shall be operated at a speed not in excess of 10 miles per hour.

(5) Permissible Loads—(a) No axle shall carry a load in excess of 18,000 lbs. An axle load shall be defined as the total load transmitted to the road by all wheels whose centers may be included between two parallel transverse vertical planes 40 inches apart, extending across the full width of the vehicle.

(b) The gross weight of any group of axles of any vehicles or combination of vehicles, when the distance between the first and last axles of any group of axles is 18 feet or less, and the gross weight of any vehicle when the distance between the first and last axles of all the axles of the vehicle is 18 feet or less, shall not exceed that set forth in the following table of weights:

Distance in feet between the first and last axles of any group of axles of any vehicle or combination of vehicles, or between the first and last axles of all of the axles of any vehicle	Maximum gross weight, in pounds, of any group of axles of any vehicle or combination of vehicles, or of any vehicle
4	32,000
5	32,000
6	32,200
7	32,900
8	33,600
9	34,300
10	35,000
11	35,700
12	36,400
13	37,100
14	43,200
15	44,000
16	44,800
17	45,600
18	46,400

(c) The gross weight of any vehicle or combination of vehicles, where the distance between the first and last axles of the vehicle or combination

of vehicles is more than 18 feet, shall not exceed that set forth in the following table of weights:

Distance in feet between the first and last axles of all of the axles of a vehicle or combination of vehicles	Maximum gross weight, in pounds, of any vehicle or combination of vehicles
18	46,400
19	47,200
20	48,000
21	48,800
22	49,600
23	50,400
24	51,200
25	55,250
26	56,100
27	56,950
28	57,800
29	58,650
30	59,500
31	60,350
32	61,200
33	62,050
34	62,900
35	63,750
36	64,600
37	65,450
38	66,300
39	67,150
40	68,000
41	68,000
42	68,000
43	68,000
44	68,000
45	68,000
46	68,800
47	69,600
48	70,400
49	71,200
50	72,000
51	72,800
52	73,600
53	74,400
54	75,200
55	76,000
56	76,400
57	76,800

(d) The distance between axles shall be measured to the nearest foot. When a fractional measurement is exactly one-half foot the next larger whole number shall be used.

(e) The maximum axle and axle group loads stated in paragraphs (a), (b) and (c) of clause (5) above are subject to reasonable reduction in the discretion of the state highway commission during periods when road subgrades have been weakened by water saturation or other cause; provided that the maximum limitations expressed in paragraphs (a), (b) and (c) of clause (5) shall not apply to the incidental and occasional use of such highways by vehicles not usually, or ordinarily engaged in highway use and employed primarily in agricultural or industrial uses other than on such highways.

(f) The operation of vehicles or combinations of vehicles having dimensions or weights in excess of the maximum limits herein recommended shall be permitted only if and when authorized by special permit issued by the state highway commission or its officers, supervisors or agents acting pursuant to duly delegated authority from said commission, including the state highway patrol.

History: En. Sec. 2, Ch. 123, L. 1947; amd. Sec. 1, Ch. 73, L. 1953.

Operation and Effect

Where a prosecution was instituted for the alleged overweight of a truck driven by the defendant and the defendant offered evidence which showed that he had been weighed by a state police weighing station a few hours earlier and was found to be within the legal limit, it was reversible error for the court to direct the jury to return a verdict of guilty. *State v. Baillarger*, 126 M 310, 249 P 2d 799, 801.

Collateral References

Automobiles 5(1), 6.
60 C.J.S. Motor Vehicles § 32.
5 Am. Jur. 547, Automobiles, §§ 51 et seq.

Construction and application of statute or ordinance designed to prevent use of vehicles or equipment thereof injurious to the highway. 134 ALR 550.

Interstate commerce clause or federal legislation thereunder as affecting state regulations as to size, dimensions and weight of motor vehicle carriers. 135 ALR 1362.

32-1124. Violation of act a misdemeanor. It shall be unlawful and constitute a misdemeanor for any person, firm or corporation to violate any of the provisions of this act.

History: En. Sec. 3(a), Ch. 123, L. 1947.

References

Cited or applied in *State v. Baillarger*, 126 M 310, 249 P 2d 799, 801.

32-1125. Penalties. Any person, firm or corporation convicted of a misdemeanor for a violation of any of the provisions of this act shall, for a first conviction thereof be punished by a fine of not less than ten dollars (\$10.00) nor more than fifty dollars (\$50.00), or by imprisonment in the county or municipal jail for not less than five (5) days nor more than twenty-five (25) days; for a second such conviction within one (1) year thereafter such person, firm or corporation shall be punished by a fine of not less than fifty dollars (\$50.00), nor more than two hundred dollars (\$200.00) or by imprisonment in the county or municipal jail for not less than twenty-five (25) days nor more than one hundred (100) days, or by both such fine and imprisonment; upon a third or subsequent conviction within one (1) year after the first conviction such person, firm or corporation shall be punished by a fine of not less than two hundred dollars (\$200.00), nor more than five hundred dollars (\$500.00), or by imprisonment in the county or municipal jail for not less than one hundred (100) days nor more than six (6) months, or by both such fine and imprisonment.

History: En. Sec. 3(b), Ch. 123, L. 1947.

Instructions

In a prosecution for the overweight of a truck in violation of section 32-1123 it was reversible error for the judge to instruct the jury that they could fix the fine at not less than \$10 nor more than

\$50, or could leave the fixing of the fine to the court, since it did not state the law correctly; the penalty prescribed is fine or imprisonment and that is what the jury should have been informed. *State v. Baillarger*, 126 M 310, 249 P 2d 799, 801.

32-1126. (1751.5) Officers may weigh vehicles and require removal of excessive loads. Any peace officer, officer of the Montana highway patrol, or employees of the maintenance department of the Montana highway commission having reason to believe that the weight of a vehicle and load is unlawful are authorized and empowered to weigh the same, either by means of portable or stationary scales, and may require that such vehicle be driven to the nearest scales in the event such scales are within two (2) miles. The peace officer, officer of the Montana highway patrol, employees of the maintenance department of the Montana highway commission may then require the driver to unload immediately such portion of the load as may be necessary to decrease the weight of such vehicle to conform to the maximum allowable weights specified in this act.

History: En. Sec. 5, Ch. 171, L. 1931; amd. Sec. 4, Ch. 184, L. 1939.

32-1127. (1751.6) Permits for excess size and weight. The state highway commission, and local authorities in their respective jurisdiction, may, in their discretion, upon application in writing and good cause being shown therefor, issue a special permit in writing, authorizing the applicant to operate or move a vehicle of a size or weight exceeding the maximum specified in this act upon any highway under the jurisdiction of and for the maintenance of which the body granting the permit is responsible; provided, however, that no permits are to be issued for the moving of loads for any considerable distances over such highways when the loads in question are of such excess width that all traffic lanes upon the highway concerned would be blocked to the serious inconvenience of normal traffic; and further provided that no permits are to be granted for the moving of loads of such excess width that a hazard to traffic would be involved for any considerable distances over the highways concerned except to those applicants who carry public liability and property damage insurance for the protection of the traveling public as a whole. No permit shall be issued for a period of more than nine (9) months and every such permit shall designate the routes to be traversed and may contain any other restrictions or conditions deemed necessary by the body granting such permit, and may be cancelled at any time by such body for cause. Every such permit or a true copy thereof shall be carried in the vehicle to which it refers and shall be open to inspection by any peace officer, officer of the Montana highway patrol, or employees of the maintenance department of the Montana highway commission and it shall be a misdemeanor for any person, firm or corporation to violate any of the terms or conditions of such permit.

History: En. Sec. 6, Ch. 171, L. 1931; amd. Sec. 2, Ch. 147, L. 1933; amd. Sec. 5, Ch. 184, L. 1939.

References

Pilgeram v. Haas, 118 M 431, 167 P 2d 339, 348.

32-1128. (1751.7) When state or local road authorities may restrict right to use highways. State or local road authorities may by ordinance or resolution prohibit the operation of vehicles upon any public highway under their respective jurisdictions or impose restrictions as to the weight of vehicle when operated upon any public highway under the jurisdiction of and for the maintenance of which such authorities are responsible, whenever any said highway by reason of deterioration, rain, snow or other climatic conditions will be seriously damaged or destroyed unless the use of vehicles thereon are prohibited or the permissible weights thereof reduced. Such authorities enacting any such ordinance or resolution shall erect or cause to be erected signs designating the provisions of the ordinance or resolution at each end of that portion of any highway affected thereby, and the ordinance or resolution shall not be effective until or unless such signs are erected. Such authorities may also, by ordinance or resolution, prohibit the operation of trucks or other commercial vehicles, or impose limitations as to the weight thereof on designated highways, which prohibitions and limitations shall be designated by appropriate signs placed on such highways.

History: En. Sec. 7, Ch. 171, L. 1931; 40 C.J.S. Highways § 234; 60 C.J.S. amd. Sec. 6, Ch. 184, L. 1939. Motor Vehicles § 32.

Collateral References

Automobiles↔6; Highways↔168.

32-1129. (1751.8) Restrictions as to tire equipment. (a) Every solid rubber tire on a vehicle moved on any highway shall have rubber on its entire traction surface at least one (1) inch thick above the edge of the flange of the entire periphery.

(b) No tire on a vehicle moved on a highway shall have on its periphery any block, stud, flange, cleat, or spike, or any other protuberances of any material other than rubber which projects beyond the tread of the traction surface of the tire, except that it shall be permissible to use tire chains of reasonable proportions upon any vehicle when required for safety because of snow, ice or other conditions tending to cause a vehicle to slide or skid.

(c) The state highway commission and local authorities in their respective jurisdictions may in their discretion, issue special permits authorizing the operation upon a highway of traction engines or tractors having movable tracks, with transverse corrugations upon the periphery of such movable tracks on farm tractors or other farm machinery.

History: En. Sec. 8, Ch. 171, L. 1931.

32-1130. (1751.9) Penalties for misdemeanor. (a) It shall be unlawful and constitute a misdemeanor for any person, firm or corporation to violate any of the provisions of this act unless such violation is by this act or other law of this state declared to be a felony.

(b) Any person, firm or corporation first convicted of a misdemeanor for a violation of any of the provisions of this act for which another penalty is not provided shall for a conviction thereof be punished by a fine of not less than ten dollars (\$10.00) nor more than fifty dollars (\$50.00), or by imprisonment in the county or municipal jail for not less

than five (5) days nor more than twenty-five (25) days; for a second such conviction within one (1) year thereafter such person, firm or corporation shall be punished by a fine of not less than fifty dollars (\$50.00), nor more than two hundred dollars (\$200.00) or by imprisonment in the county or municipal jail for not less than twenty-five (25) days nor more than one hundred (100) days, or by both such fine and imprisonment; upon a third or subsequent conviction within one (1) year after the first conviction such person, firm or corporation shall be punished by a fine of not less than two hundred dollars (\$200.00), nor more than five hundred dollars (\$500.00), or by imprisonment in the county or municipal jail for not less than one hundred (100) days nor more than six (6) months, or by both such fine and imprisonment.

History: En. Sec. 9, Ch. 171, L. 1931;
amd. Sec. 7, Ch. 184, L. 1939.

Collateral References

Highways↔186.
40 C.J.S. Highways § 247.

References

Pilgeram v. Haas, 118 M 431, 167 P 2d
339, 348.

32-1131. (1752) Disposition of fines. Any and all fines collected for the violation of any of the provisions of this act shall belong to the general road fund of the county, and shall, immediately after their collection, be paid over by the court or magistrate collecting the same to the county treasurer for the use and benefit of that fund.

History: En. Sec. 1, Ch. 10, Ch. 72, L.
1913; re-en. Sec. 1, Ch. 10, Ch. 141, L. 1915;
re-en. Sec. 1752, R. C. M. 1921.

Collateral References

Fines↔20; Highways↔99¼.
36 C.J.S. Fines § 19; 40 C.J.S. Highways
§ 176.

References

State v. Pepper, 70 M 596, 600, 226
P 1108; Barney v. Board of Railroad
Commrs., 93 M 115, 128, 17 P 2d 82.

32-1132. (1753) Accessories required upon motor vehicles. Every motor vehicle operated or driven upon the public highways of this state shall be provided with the following accessories:

1. Two sets of independently operated brakes in good working order either one of which sets must be sufficient to stop the drive-wheels of the car and prevent them from turning while the car is in motion.

2. A horn or other device for signaling sufficient under all reasonable conditions to give timely warning of the approach of the motor vehicles.

3. During the period between one hour after sunset and one hour before sunrise, every motor vehicle of the three or four wheeled type shall display two white lights in front (one on each side), and one light in the rear. Every motor vehicle of the motorcycle or two-wheeled type shall display one white light in front, and one light in the rear, which said rear lights in both classes of motor vehicles shall display red rays visible to the rear, and shall throw white light upon the number plate carried on the rear of such vehicle, and illuminate the same so that the number will be clearly visible at a distance of one hundred feet. The light of the front lamps shall be visible at least two hundred feet in the direction which the motor vehicle is proceeding. The front lights of all motor vehicles shall be equipped with some style of non-glare dimmers by which the

intensity of such lights is diminished; and it shall be unlawful for the driver of any motor vehicle in the state of Montana to display on the front of such vehicle lights of such a degree of brightness as tends to confuse drivers of vehicles coming in contact with or moving in an opposite direction from such motor vehicles.

History: En. Sec. 9, Ch. 75, L. 1917; amd. Sec. 1, Ch. 110, L. 1919; re-en. Sec. 1753, R. C. M. 1921.

NOTE.—In order to arrange the laws according to their subject-matter it was necessary to detach the above section from other portions of the original act. The term "motor vehicles" as used in this section is defined by section 53-133.

Headlights

In an action for damages for personal injuries sustained in a collision after dark between plaintiff's automobile, the lights of which were burning, and that of the defendant without lights, in which the negligence alleged was defendant's driving without lights when a reasonably prudent man would have had them burning, an instruction that if the accident occurred before the hour fixed by this section, for having lights, the absence of lights could not be deemed negligence, was properly refused, the hour fixed by statute being immaterial if the conditions were such as to require the display of lights. *Knott v. Pepper*, 74 M 236, 239 P 1037.

While violation of this section, requiring headlights on automobiles between one hour after sunset and one hour before sunrise, constitutes negligence, in consid-

ering whether or not such negligence contributed to an accident or barred recovery, courts must take into consideration the conditions existing at the time and place of the accident. *Simpson v. Miller*, 97 M 328, 337, 34 P 2d 528.

A violation of this statute constitutes negligence, and a traveler on the highway is entitled to assume that a truck standing upon the highway at night would display lights both upon the front and rear thereof. *Ashley v. Safeway Stores, Inc.*, 100 M 312, 326, 47 P 2d 53.

References

State v. Pepper, 70 M 596, 600, 226 P 1108; *Barney v. Board of Railroad Commrs.*, 93 M 115, 128, 17 P 2d 82.

Collateral References

Automobiles ⇨ 327.
61 C.J.S. *Motor Vehicles* § 588.
5 Am. Jur. 641, *Automobiles*, §§ 251 et seq.

Validity and construction of regulations as to lights. 11 ALR 1226.

Violation of regulations as to lights, as affecting right of operator or owner of automobile to recover for negligence. 14 ALR 794.

32-1133. (1754) Penalties for violation of act—reporting convictions—duty of officers. 1. The violation of any of the provisions of this act shall constitute a misdemeanor, punishable by a fine of not exceeding one hundred dollars. The third or subsequent conviction for violation of the provisions of this act, by a licensed and registered chauffeur, may be punishable by the suspension of the right to operate a motor vehicle as a registered and licensed chauffeur under the provisions of this act, for a period of not more than six months; and the registrar of motor vehicles, upon the recommendation of the trial court, shall forthwith revoke the license of the person convicted, and no new license shall be issued to such person for at least six months after the date of such conviction, nor thereafter, except in the discretion of the registrar of motor vehicles. Nothing herein contained shall prevent the indictment of a person so violating for an offense committed under any other law.

2. Reporting conviction to registrar of motor vehicles. Upon the conviction of any person for a violation of any of the provisions of this act, the magistrate or other judicial officer before whom the proceedings are held, shall immediately certify the fact of the case, including the name and address of the offender, the character of the punishment and the amount of any fine imposed and paid, to the registrar of motor vehicles,

who shall enter the same either in the book or index of licensed chauffeurs, as the case may be, opposite the name of the person convicted, and, in the case of any other person, in a book or index of offenders to be kept for such purposes, in alphabetical order. If any such conviction shall be so reversed upon appeal therefrom, the person whose conviction has been so reversed may serve on the registrar of motor vehicles a certified copy of the order of reversal, whereupon the registrar of motor vehicles shall enter the same in the proper book or index in connection with the record of such conviction.

3. It is hereby made mandatory upon all peace and police officers of the state, of the counties of the state and of towns, cities and villages, to carry out the provisions of this act and arrest the drivers or owners of any motor vehicle being used or driven in violation of any of the provisions of this act.

History: En. Sec. 11, Ch. 75, L. 1917;
re-en. Sec. 1754, R. C. M. 1921.

References

McGinnis v. Phillips, 62 M 223, 228,
205 P 215; State v. Pepper, 70 M 596,
600, 226 P 1108; Barney v. Board of Rail-
road Comms., 93 M 115, 128, 17 P 2d 82.

Collateral References

Automobiles 144, 359.
60 C.J.S. Motor Vehicles § 160; 61
C.J.S. Motor Vehicles § 594.

32-1134. (1754.1) Driving on highways under construction and on closed detours prohibited. It shall be unlawful for any person, or persons to operate, drive or propel any vehicle upon any highway, detour, or road, in the state of Montana in the course of construction, or repair, or being constructed and repaired, when the state highway commission or any person, firm, or corporation employed by it, or the federal government shall have erected or caused to be placed any detour, barrier, sign, or warning signal in any manner or at all indicating that the traffic along or across such highway, detour, or road, is closed, or is not to be carried on.

History: En. Sec. 1, Ch. 134, L. 1931.

Collateral References

Highways 168.
40 C.J.S. Highways § 233.

32-1135. (1754.2) State highway commission to define character of signs. For the purpose of defining what shall be a proper or legal detour sign, barrier, or warning signal the state highway commission of the state of Montana is hereby authorized and empowered to promulgate fixed rules and regulations defining what character of detour sign, barrier, or warning signals shall be erected for given classes or kinds of repair or construction work, and where and when such detour sign, barrier, or warning signal shall be placed.

History: En. Sec. 2, Ch. 134, L. 1931.

32-1136. (1754.3) Through routes may be designated—signs—destruction of signs—penalties. The state highway commission of the state of Montana is hereby authorized to designate any state highway or portion of a state highway as a through route, and to erect stop signs at any or all intersecting public roads. Any person, or persons, who shall drive upon any highway, detour, or road, or any part thereof where there are signs or barriers indicating that traffic along or across such highway, detour or

road, is closed and not to be carried on, or contra to any detour sign, barrier, or warning signal which has been erected and placed in accordance with the rules and regulations of the state highway commission shall be held to be unlawfully upon said highway, detour, or road, unless reasonably safe detours have been provided. Any person, or persons so unlawfully on such highway, detour or road, or who removes, destroys or defaces any detour sign, barrier, or warning signal erected under the authority of this act, or pursuant to directions of the state highway commission, or the federal bureau of public roads, or who extinguishes, removes, or destroys any lantern, torch or reflector from any barrier or warning signal so erected shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than \$10.00, nor more than \$300.00, or imprisonment in the county jail not to exceed 60 days, or by both such fine and imprisonment.

History: En. Sec. 3, Ch. 134, L. 1931.

Collateral References

Highways 165, 186.

40 C.J.S. Highways §§ 232, 247.

32-1137. (1754.4) Parking on bridges or obstructing highways unlawful. It shall be unlawful for any vehicle to be parked upon any bridge or its approaches. It shall be unlawful for any vehicle to be parked on any highway in such a manner as to obstruct traffic.

History: En. Sec. 4, Ch. 134, L. 1931.

11 C.J.S. Bridges § 53; 40 C.J.S. Highways § 240; 61 C.J.S. Motor Vehicles § 684.

Collateral References

Bridges 47; Automobiles 333; Highways 179.

32-1138. (1754.5) Concealing identity after accident unlawful. It shall be unlawful for the driver of an automobile, motor truck, motorcycle, or any other motor vehicle, or any person in said automobile who has or assumes authority over said driver which shall collide with or injure any human being, or shall injure any person or property by colliding with another vehicle while operating such vehicle on the highways of this state, to conceal or attempt to conceal his identity by flight, or to alter, conceal or destroy the license tags or other means of identification of such vehicle, or shall fail to report the accident, with the intention of concealing his identity.

History: En. Sec. 1, Ch. 70, L. 1933.

Collateral References

Automobile 336.

61 C.J.S. Motor Vehicles § 674.

32-1139. (1754.7) Penalties. Any person violating any of the provisions of this act shall be punished by a fine not exceeding one thousand (\$1,000.00) dollars or by imprisonment in the county jail for a period not exceeding one (1) year, or by both such fine and imprisonment, or may be punished by imprisonment in the state penitentiary for a period not exceeding twenty (20) years.

History: En. Sec. 3, Ch. 70, L. 1933.

Collateral References

Automobiles 359.

61 C.J.S. Motor Vehicles § 594.

32-1140. (1754.8) Lights required on rear of vehicles. Trucks, trailers and automobiles, which are of greater width than eighty (80)

inches, upon any state highway of this state, shall be equipped with and display on each side of the body thereof a white, yellow or green light or reflector facing the front and on each side of the rear of such vehicle, a red light or reflector facing the rear.

History: En. Sec. 1, Ch. 81, L. 1933.

Collateral References

Automobiles 149.

60 C.J.S. Motor Vehicles § 263.

32-1141. (1754.9) Lights required when load protrudes from vehicles.

Whenever any trucks, trailers and automobiles upon a state highway shall be loaded with any material in such a manner that any portion of such load extends towards the rear three (3) feet or more beyond the rear of the body or bed of such vehicle there shall be displayed at the extreme rear end of the load, during the period between sunset and sunrise, a light or reflector plainly visible under normal atmospheric conditions at least two hundred (200) feet from the rear, and at all other times while such vehicle is upon a state highway, a red flag or cloth not less than sixteen (16) inches square shall be displayed at the extreme rear of said load as a warning signal to persons operating vehicles approaching from the rear.

History: En. Sec. 2, Ch. 81, L. 1933.

32-1142. (1754.10) Penalty. Each violation of this act, shall constitute a misdemeanor punishable upon conviction by a fine not exceeding one hundred dollars (\$100.00), or imprisonment in the county jail not to exceed thirty (30) days, or both.

History: En. Sec. 3, Ch. 81, L. 1933.

32-1143. Use of white colored canes restricted to blind. No person, except those wholly or partially blind, shall carry or use on any street, highway or in any other public place, a cane or walking stick which is white in color, or white tipped with red.

History: En. Sec. 1, Ch. 7, L. 1941.

32-1144. Duty of pedestrian or driver approaching blind person carrying white cane. Any pedestrian who is not wholly or partially blind, or any driver of a vehicle who approaches or comes in contact with a person wholly or partially blind carrying a cane or walking stick white in color, or white tipped with red, shall immediately come to a full stop and take such precautions before proceeding as may be necessary to avoid accident or injury to the person wholly or partially blind.

History: En. Sec. 2, Ch. 7, L. 1941.

32-1145. Canes—regulation of carrying—penalty. Any person other than a person wholly or partilly blind who shall carry a cane or walking stick such as is described in this act, contrary to the provisions of this act, or who shall fail to heed the approach of a person carrying such a cane as is described by this act, or who shall fail to come to a full stop when approaching or coming in contact with a person so carrying such a cane or walking stick, or who shall fail to take precaution against accidents or injury to such person after coming to a stop, as provided for herein is guilty of a misdemeanor, punishable by a fine not to exceed twenty-five dollars (\$25.00).

History: En. Sec. 3, Ch. 7, L. 1941.

32-1146. Right of way of motorized fire equipment. The motorized equipment of fire departments and of fire companies shall have right of way over all other vehicles.

History: En. Sec. 1, Ch. 96, L. 1947.

CHAPTER 12

UNIFORM ACCIDENT REPORTING ACT

Section 32-1201.	Definitions.
32-1202.	Accidents involving death or personal injuries.
32-1203.	Accident involving damage to vehicle.
32-1204.	Duty to give information and render aid.
32-1205.	Duty upon striking unattended vehicle.
32-1206.	Duty upon striking fixtures upon a highway.
32-1207.	Immediate reports of accidents.
32-1208.	Written reports of accidents.
32-1209.	When driver unable to report.
32-1210.	Accident report forms.
32-1211.	Coroners to report.
32-1212.	Garages to report.
32-1213.	Accident reports confidential.
32-1214.	Supervisor to tabulate and analyze accident reports.
32-1215.	Any incorporated city may require accident reports.
32-1216.	Uniformity of interpretation.
32-1217.	Short title.

32-1201. Definitions. The following words and phrases used in this act shall, for the purpose of this act, have the meanings respectively ascribed to them in this article.

(a) Registrar. The registrar of motor vehicles of this state.

(b) Supervisor. The Montana highway patrol board, its duly appointed supervisor and patrolmen.

History: En. Secs. 1, 2, Ch. 210, L. 1939.

Cross-Reference

Financial requirements imposed following accident, secs. 53-418 to 53-458.

32-1202. Accidents involving death or personal injuries. (a) The driver of any vehicle involved in an accident resulting in injury to or death of any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible, but shall then forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled the requirements of section 32-1204. Every such stop shall be made without obstructing traffic more than is necessary.

(b) Any person failing to stop or to comply with said requirements under such circumstances shall upon conviction be punished by imprisonment for not less than thirty (30) days nor more than one (1) year, or by fine of not less than one hundred dollars (\$100.00) nor more than five thousand dollars (\$5,000.00), or by both such fine and imprisonment.

(c) The registrar shall revoke the operator's or chauffeur's license of the person so convicted for a period of three (3) years from and after such conviction.

History: En. Sec. 3, Ch. 210, L. 1939;
Subd. (c) amd. Sec. 1, Ch. 212, L. 1947.

Collateral References

Automobiles \Rightarrow 336.
61 C.J.S. Motor Vehicles § 674.

5 Am. Jur. 920, Automobiles, §§ 780 et seq.

Construction and effect of statute in relation to conduct of driver of automobile after happening of an accident. 16 ALR 1425.

Sufficiency of indictment or information charging failure to stop after accident, give name, etc., or to render assistance. 115 ALR 361.

32-1203. Accident involving damage to vehicle. The driver of any vehicle involved in an accident resulting only in damage to a vehicle which is driven or attended by any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible and shall forthwith return to and in every event shall remain at the scene of such accident until he has fulfilled the requirements of section 32-1204. Every such stop shall be made without obstructing traffic more than is necessary. Any person failing to stop, or comply with said requirements under such circumstances shall be guilty of a misdemeanor.

History: En. Sec. 4, Ch. 210, L. 1939.

32-1204. Duty to give information and render aid. The driver of any vehicle involved in an accident resulting in injury to or death of any person or damage to any vehicle which is driven or attended by any person shall give his name, address, and the registration number of the vehicle he is driving and shall upon request and if available exhibit his operator's or chauffeur's license to the person struck or the driver or occupant of or person attending any vehicle collided with and shall render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person.

History: En. Sec. 5, Ch. 210, L. 1939.

32-1205. Duty upon striking unattended vehicle. The driver of any vehicle which collides with any vehicle which is unattended shall immediately stop and shall then and there either locate and notify the operator or owner of such vehicle of the name and address of the driver and owner of the vehicle striking the unattended vehicle or shall leave in a conspicuous place in the vehicle struck, a written notice giving the name and address of the driver and of the owner of the vehicle doing the striking and a statement of the circumstances thereof.

History: En. Sec. 6, Ch. 210, L. 1939.

32-1206. Duty upon striking fixtures upon a highway. The driver of any vehicle involved in an accident resulting only in damage to fixtures legally upon or adjacent to a highway shall take reasonable steps to locate and notify the owner or person in charge of such property of such fact and of his name and address and of the registration number of the vehicle he is driving and shall upon request and if available exhibit his operator's or chauffeur's license and shall make report of such accident when and as required in section 32-1208.

History: En. Sec. 7, Ch. 210 L. 1939.

32-1207. Immediate reports of accidents. (a) The driver of a vehicle involved in an accident resulting in injury to or death of any person shall immediately by the quickest means of communication give notice of such accident to the local police department if such accident occurs within a municipality, otherwise to the office of the county sheriff or the nearest office of the supervisor.

(b) Every coroner or other official performing like functions upon learning of the death of a person in his jurisdiction as the result of a traffic accident shall immediately notify the nearest office of the supervisor.

History: En. Sec. 8, Ch. 210, L. 1939.

32-1208. Written reports of accidents. (a) The driver of a vehicle involved in an accident resulting in injury to or death of any person or total property damage to an apparent extent of twenty-five dollars (\$25.00) or more shall, within twenty-four (24) hours after such accident, forward a written report of such accident to the supervisor.

(b) The supervisor may require any driver of a vehicle involved in an accident, of which report must be made as provided in this section, to file supplemental reports whenever the original report is insufficient, and may require witnesses of accidents to render reports.

(c) Every law enforcement officer who in the regular course of duty, investigates a motor vehicle accident, of which report must be made as required in this section, either at the time of and at the scene of the accident or thereafter by interviewing participants or witnesses shall, within twenty-four (24) hours after completing such investigation, forward a written report of such accident to the supervisor.

History: En. Sec. 9, Ch. 210, L. 1939.

Cross-Reference

Report required to be made to highway patrol supervisor, sec. 53-421.

32-1209. When driver unable to report. Whenever the driver of a vehicle is physically incapable of making an immediate or a written report of an accident as required in sections 32-1207 and 32-1208, and there was another occupant in the vehicle at the time of the accident capable of making such report, such occupant shall make or cause to be made the report not made by the driver.

History: En. Sec. 10, Ch. 210, L. 1939.

32-1210. Accident report forms. (a) The supervisor shall prepare and upon request supply to police departments, coroners, sheriffs, garages and other suitable agencies or individuals, forms for accident reports required hereunder, appropriate with respect to the persons required to make such reports and the purposes to be served. The written reports to be made by persons involved in accidents and by investigating officers shall call for sufficiently detailed information to disclose with reference to a traffic accident the causes, conditions then existing, and the persons and vehicles involved.

(b) Every accident report required to be made in writing shall be made on the appropriate form approved by the supervisor and shall contain all of the information required therein unless not available.

History: En. Sec. 11, Ch. 210, L. 1939.

32-1211. Coroners to report. Every coroner, or other official performing like functions, shall on or before the 10th day of each month report in writing to the supervisor the death of any person within his jurisdiction during the preceding calendar month as the result of an accident involving a motor vehicle and the circumstances of such accident.

History: En. Sec. 12, Ch. 210, L. 1939.

Collateral References

Coroners \hookrightarrow 8.

18 C.J.S. Coroners § 12.

32-1212. Garages to report. The person in charge of any garage or repair shop to which is brought any motor vehicle which shows evidence of having been involved in an accident of which report must be made as provided in section 32-1208, or struck by any bullet, shall report to the supervisor within twenty-four hours after such motor vehicle is received, giving the engine number, registration number and the name and address of the owner or operator of such vehicle.

History: En. Sec. 13, Ch. 210, L. 1939.

Collateral References

Automobiles \hookrightarrow 336.

61 C.J.S. Motor Vehicles § 674.

32-1213. Accident reports confidential. All required accident reports and supplemental reports shall be without prejudice to the individual so reporting and shall be for the confidential use of the supervisor or other state agencies having use for the records for accident prevention purposes, except that the supervisor may disclose the identity of a person involved in an accident when such identity is not otherwise known or when such person denies his presence at such accident. No such report shall be used as evidence in any trial, civil or criminal, arising out of an accident, except that the supervisor shall furnish upon demand of any person who has, or claims to have, made such a report or, upon demand of any court, a certificate showing that a specified accident report has or has not been made to the supervisor solely to prove a compliance or a failure to comply with the requirement that such a report be made to the supervisor.

History: En. Sec. 14, Ch. 210, L. 1939.

32-1214. Supervisor to tabulate and analyze accident reports. The supervisor shall tabulate and may analyze all accident reports and shall publish annually or at more frequent intervals statistical information based thereon as to the number and circumstances of traffic accidents.

History: En. Sec. 15, Ch. 210, L. 1939.

32-1215. Any incorporated city may require accident reports. Any incorporated city, town, village, or other municipality may by ordinance require that the driver of a vehicle involved in an accident shall also file with a designated city department a report of such accident or a copy of any report herein required to be filed with the supervisor. All such reports shall be for the confidential use of the city department and subject to the provisions of section 32-1213.

History: En. Sec. 16, Ch. 210, L. 1939.

32-1216. Uniformity of interpretation. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

History: En. Sec. 17, Ch. 210, L. 1939.

32-1217. Short title. This act will be cited as the uniform accident reporting act.

History: En. Sec. 18, Ch. 210, L. 1939.

CHAPTER 13

GOOD ROADS DAY

Section 32-1301. Proclamation by governor.

32-1301. (1764) Proclamation by governor. The third Tuesday in June in each year is hereby designated "Good Roads Day," and the governor shall annually, on or before the first day of June, by public proclamation, request the people of the state to contribute labor, material, or money towards the improvement of public highways in their respective communities upon that day.

History: En. Sec. 1, Ch. 20, L. 1915;
re-en. Sec. 1764, R. C. M. 1921.

Collateral References

Highways ~~§~~ 97¾.
40 C.J.S. Highways § 175.

CHAPTER 14

PRIVATE ROADS, HOW ESTABLISHED

Section 32-1401. How established.

32-1401. (1765) How established. Private roads may be established in the manner provided in sections 93-9901 to 93-9926. But in every case the necessity of the road and the amount of all damage to be sustained by the opening thereof must be first determined by a jury, and such amount together with the expenses of the proceeding, must be paid by the person to be benefited.

History: En. Sec. 2780, Pol. C. 1895;
re-en. Sec. 1435, Rev. C. 1907; re-en. Sec.
1765, R. C. M. 1921. Cal. Pol. C. Sec. 2692.

Expenses of Action

Attorney's fees are not allowed as an expense of a proceeding in condemnation for a private road of necessity under this section or section 93-9923. Section 93-9922 adopts sections 93-8601 and 93-8618 to the proceedings. Attorney's fees in condemnation proceedings are not enumerated in 93-8601 nor is it allowed under 93-8618 as a cost or disbursement unless specifically authorized by law or is according to the course and custom of the court. In Montana it is not customary to include attorney's fees as a cost; and in this section and 93-9923, "expense" is synonymous with the term "cost." *Tomten v. Thomas*, 125 M 159, 232 P 2d 723, 725, 26 ALR 2d 1285.

Operation and effect

Under this section and section 93-9923, authorizing the establishment of a private road, the appointment of commissioners to determine the damages occasioned thereby, etc., is not necessary, the matters ordinarily determined by commissioners in eminent domain proceedings being determinable in such a case by the jury. *Komposh v. Powers et al.*, 75 M 493, 500 et seq., 244 P 298.

The provision for an award of expenses of the proceeding to defendant in action to open a private road applies only where the plaintiff is successful. *Kendrick v. Powell*, 119 M 623, 178 P 2d 859.

Collateral References

Private Roads ~~§~~ 2(1-7).
72 C.J.S. Private Roads § 5 et seq.

Right of owner of easement of way to make improvements or repairs thereon.
112 ALR 1303.

CHAPTER 15

FERRIES

- Section 32-1501. Ferries between counties.
 32-1502. Notice of application.
 32-1503. Application for leave and notice.
 32-1504. The hearing.
 32-1505. Duty of board of commissioners.
 32-1506. Report of owner or keeper of ferry.
 32-1507. Power and duty of commissioners in regard to ferry.
 32-1508. All passengers must be accommodated.
 32-1509. Penalties recovered, how disposed of.
 32-1510. Bond to be given.
 32-1511. License tax of ferry connecting two counties, how paid.
 32-1512. Interested commissioner must not act.
 32-1513. Ferry within one mile of another, when.
 32-1514. Owner of land preferred.
 32-1515. How land acquired for use of ferry.
 32-1516. Must post rates of toll.
 32-1517. Keep banks in repair.

32-1501. (1766) Ferries between counties. When authority to erect and keep ferry over waters dividing two counties is desired, application must be made to the board of commissioners of that county situated on the left bank descending such river, creek, or slough.

History: En. Sec. 2820, Pol. C. 1895;
 re-en. Sec. 1457, Rev. C. 1907; re-en. Sec.
 1766, R. C. M. 1921. Cal. Pol. C. Sec. 2843.

References

State ex rel. Rankin v. Martin, 68
 M 392, 397, 219 P 632.

Collateral References

Ferries—11.
 36 C.J.S. Ferries § 28.
 22 Am. Jur. 554, Ferries, §§ 3 et seq.

Power of municipal corporation to purchase or charter a boat or barge. 39 ALR 1332.

32-1502. (1767) Notice of application. The board of commissioners must not grant authority to erect a toll ferry until the notice of such intended application has been given as required in this article.

History: En. Sec. 2821, Pol. C. 1895;
 re-en. Sec. 1458, Rev. C. 1907; re-en. Sec.
 1767, R. C. M. 1921. Cal. Pol. C. Sec. 2844.

References

State ex rel. Rankin v. Martin, 68 M
 392, 397, 219 P 632.

Collateral References

Ferries—14.
 36 C.J.S. Ferries § 11.

32-1503. (1768) Application for leave and notice. Every applicant for authority to erect and take tolls on a public ferry must publish notice in at least one newspaper in each county in which the ferry is or touches, or if there is no newspaper published therein, then in one published in an adjoining county, and by posting three notices in three public places in the township for four successive weeks, specifying the location and the time and place when and where the application will be made. After notice is given application must be made in writing, under oath, to the board of commissioners of the proper county, the landings of the proposed ferry must be described, and the names of the owners thereof given, if known; and if the applicant is not the owner of the land, that notice of the application has been served on the owner thereof at least ten days prior to the application.

History: En. Sec. 2822, Pol. C. 1895; re-en. Sec. 1459, Rev. C. 1907; re-en. Sec. 1768, R. C. M. 1921. Cal. Pol. C. Sec. 2892.

References

State ex rel. Rankin v. Martin, 68 M 392, 397, 219 P 632.

32-1504. (1769) The hearing. At the hearing, proof of giving the notice, required by the preceding section, must be made, and any person may appear and contest the application. If the board finds that the ferry is either a public necessity or convenience, and that the applicant is a suitable person, and by reason of the ownership of the landing, or failure of the owner thereof to apply is entitled thereto, authority to erect and take tolls on the ferry may be granted to him for the term of ten years.

History: En. Sec. 2823, Pol. C. 1895; re-en. Sec. 1460, Rev. C. 1907; re-en. Sec. 1769, R. C. M. 1921. Cal. Pol. C. Sec. 2893.

References

State ex rel. Rankin v. Martin, 68 M 392, 397, 219 P 632.

32-1505. (1770) Duty of board of commissioners. The board of commissioners granting authority to keep a public ferry must at the same time:

1. Fix the amount of a penal bond to be given by the person or corporation owning or taking tolls on the ferry for the benefit of the county, and all persons crossing or desiring to cross the same, and provide for the annual renewal thereof.

2. Fix the amount of license tax to be paid by the person or corporation for taking tolls thereon, not less than three dollars nor over one hundred dollars per month, payable annually.

3. Fix the rate of tolls which may be collected for crossing the ferry.

4. Make all necessary orders relative to the construction, erection, and business of ferries which they have by law the power to make. The board of commissioners may, at any time they see fit, authorize and maintain fords across any water within any distance of any ferry.

History: En. Sec. 2824, Pol. C. 1895; re-en. Sec. 1461, Rev. C. 1907; re-en. Sec. 1770, R. C. M. 1921. Cal. Pol. C. Sec. 2845.

Collateral References

Ferries—30, 30½, 31.
36 C.J.S. Ferries §§ 14, 24, 25, 29.

References

State ex rel. Rankin v. Martin, 68 M 392, 397, 219 P 632.

32-1506. (1771) Report of owner or keeper of ferry. Every owner or keeper of a ferry must report annually to the board of commissioners from which his license is obtained, under oath, the following facts:

1. The actual cost of the construction or erection and equipment of the ferry.

2. The repairs made during the preceding year, and the actual cost thereof.

3. The expense of labor and hire of agents, and other costs necessarily incurred in and about the conduct of his business.

4. The amount of tolls collected; and

5. The estimated actual cash value of the ferry, exclusive of the franchise.

History: En. Sec. 2825, Pol. C. 1895; re-en. Sec. 1462, Rev. C. 1907; re-en. Sec. 1771, R. C. M. 1921. Cal. Pol. C. Sec. 2847.

Collateral References

Ferries—27.
36 C.J.S. Ferries §§ 22, 23.

References

State ex rel. Rankin v. Martin, 68 M 392, 397, 219 P 632.

32-1507. (1772) Power and duty of commissioners in regard to ferry. The board of commissioners may make all needful rules and regulations for the government of ferries and ferry-keepers, prescribing:

1. How many boats must be kept, their character, and how propelled.
2. The number of hands, boatmen, or ferrymen to be employed, and rules for their government.
3. When and under what circumstances to make trips in the night-time.
4. Who may be ferried free of toll.
5. In what cases of danger or peril not to cross.
6. Penalties for violation of regulations.
7. In case of steamboats, the rate of speed.
8. The method of and preference in loading and crossing; and
9. How and by whom action must be brought to recover penalties.

History: En. Sec. 2826, Pol. C. 1895;
re-en. Sec. 1463, Rev. C. 1907; re-en. Sec.
1772, R. C. M. 1921. Cal. Pol. C. Sec. 2894.

References

State ex rel. Rankin v. Martin, 68 M
392, 397, 219 P 632.

32-1508. (1773) All passengers must be accommodated. Subject to the foregoing regulations, ferry-keepers must make trips to accommodate all passengers who desire to cross, and any failure so to do subjects the franchise to forfeiture, by a proper proceeding for that purpose.

History: En. Sec. 2827, Pol. C. 1895;
re-en. Sec. 1464, Rev. C. 1907; re-en. Sec.
1773, R. C. M. 1921.

Collateral References

Ferries \Rightarrow 28.
36 C.J.S. Ferries § 27.
22 Am. Jur. 561, Ferries, §§ 17 et seq.

References

State ex rel. Rankin v. Martin, 68 M
392, 397, 219 P 632.

Ferry operator's duty as regards auto-
mobiles or their occupants. 82 ALR 798.

32-1509. (1774) Penalties recovered, how disposed of. Penalties recovered under this chapter must be paid to the county treasury for the use of the general road fund of the county.

History: En. Sec. 2828, Pol. C. 1895;
re-en. Sec. 1465, Rev. C. 1907; re-en. Sec.
1774, R. C. M. 1921. Cal. Pol. C. Sec. 2895.

Collateral References

Ferries \Rightarrow 34.
36 C.J.S. Ferries § 32.

References

State ex rel. Rankin v. Martin, 68 M
392, 397, 219 P 632.

32-1510. (1775) Bond to be given. The bond required of the owner or keeper of the ferry must be in the sum fixed by the board of commissioners, with one or more sureties, and conditioned that the ferry will be kept in good repair and condition, and that the keeper will faithfully comply with the laws of the state and all legal orders of the board of commissioners regulating the same, and pay all damages recovered against him by any person injured or damaged by reason of delay at or defect in such ferry, or in any manner resulting from a non-compliance with the laws or lawful orders regulating the same. The bond must be approved by the board of commissioners.

History: En. Sec. 2829, Pol. C. 1895;
re-en. Sec. 1466, Rev. C. 1907; re-en. Sec.
1775, R. C. M. 1921. Cal. Pol. C. Sec. 2850.

References

State ex rel. Rankin v. Martin, 68 M
392, 397, 219 P 632.

Collateral ReferencesFerries \Rightarrow 30 ½.

36 C.J.S. Ferries § 29.

32-1511. (1776) License tax of ferry connecting two counties, how paid. The license tax for a ferry connecting two counties must be paid to the treasurer of the county granting it, and the license issued, but the treasurer of such county must pay to the treasury of the county in which the other end or landing of the ferry is located one-half of the sum so received annually.

History: En. Sec. 2830, Pol. C. 1895; re-en. Sec. 1467, Rev. C. 1907; re-en. Sec. 1776, R. C. M. 1921. Cal. Pol. C. Sec. 2851.

Collateral ReferencesFerries \Rightarrow 30.

36 C.J.S. Ferries § 24.

References

State ex rel. Rankin v. Martin, 68 M 392, 397, 219 P 632.

Situs of ferry boats for taxation. 6 ALR 2d 1391.

32-1512. (1777) Interested commissioner must not act. When a county commissioner is interested in an application to erect, construct, or take tolls on a ferry, he must not act in any such matters.

History: En. Sec. 2831, Pol. C. 1895; re-en. Sec. 1468, Rev. C. 1907; re-en. Sec. 1777, R. C. M. 1921. Cal. Pol. C. Sec. 2852.

Collateral ReferencesFerries \Rightarrow 14.

36 C.J.S. Ferries § 11.

References

State ex rel. Rankin v. Martin, 68 M 392, 397, 219 P 632.

32-1513. (1778) Ferry within one mile of another, when. No toll-ferry must be established within one mile immediately above or below a regularly established ferry, unless the situation of a town or village, the crossing of a public highway, or the intersection of some creek or ravine renders it necessary for public convenience. In addition to the public notice hereinafter required, notice of intention to apply for authority to erect a toll-ferry, as in this section provided, must be served upon the proprietor of the ferry already established, at least ten days prior thereto, giving the time and place and grounds of such application.

History: En. Sec. 2832, Pol. C. 1895; re-en. Sec. 1469, Rev. C. 1907; re-en. Sec. 1778, R. C. M. 1921. Cal. Pol. C. Sec. 2853.

Collateral ReferencesFerries \Rightarrow 21.

36 C.J.S. Ferries § 16.

References

State ex rel. Rankin v. Martin, 68 M 392, 397, 219 P 632.

Right of ferry company not having an exclusive franchise to protection against, or damages for, interference with its operations, property, or plant by a competitor. 119 ALR 456.

32-1514. (1779) Owner of land preferred. The owner of the land on either of the waters to be crossed, and the owner of the land on the left bank descending, over the owner of the land on the right bank, is entitled to preference in procuring authority to construct a ferry; but where such owner fails or neglects to apply for such authority within a reasonable time after the necessity therefor arises, the board of commissioners may grant such authority to another.

History: En. Sec. 2833, Pol. C. 1895; re-en. Sec. 1470, Rev. C. 1907; re-en. Sec. 1779, R. C. M. 1921. Cal. Pol. C. Sec. 2854.

References

State ex rel. Rankin v. Martin, 68 M 392, 397, 219 P 632.

Collateral References

36 C.J.S. Ferries § 10.

FerriesⒸ12.

32-1515. (1780) How land acquired for use of ferry. When there are lands necessary for the construction, erection, or use of such ferry which cannot be procured by agreement between the owner and the landowner, the right of way and all other lands necessary for the use and construction or erection thereof may be acquired by condemnation.

History: En. Sec. 2834, Pol. C. 1895;
re-en. Sec. 1471, Rev. C. 1907; re-en. Sec.
1780, R. C. M. 1921. Cal. Pol. C. Sec. 2855.

Collateral References

Eminent DomainⒸ22.
29 C.J.S. Eminent Domain § 52.

References

State ex rel. Rankin v. Martin, 68 M
392, 397, 219 P 632.

32-1516. (1781) Must post rates of toll. The owner of every ferry must have the rates of toll as fixed by the board of commissioners printed or written, and posted up in some conspicuous place on or near the ferry.

History: En. Sec. 2835, Pol. C. 1895;
re-en. Sec. 1472, Rev. C. 1907; re-en. Sec.
1781, R. C. M. 1921. Cal. Pol. C. Sec. 2856.

Collateral References

FerriesⒸ31.
36 C.J.S. Ferries § 25.

References

State ex rel. Rankin v. Martin, 68 M
392, 397, 219 P 632.

32-1517. (1782) Keep banks in repair. All ferry-keepers must keep the banks of the streams or waters at the landings of their ferries graded and in good order for the passage of vehicles. For every day compliance herewith is neglected twenty-five dollars is forfeited, to be collected for the use of the road fund of the county.

History: En. Sec. 2836, Pol. C. 1895;
re-en. Sec. 1473, Rev. C. 1907; re-en. Sec.
1782, R. C. M. 1921. Cal. Pol. C. Sec. 2858.

Collateral References

FerriesⒸ23.
36 C.J.S. Ferries § 19.

References

State ex rel. Rankin v. Martin, 68 M
392, 397, 219 P 632.

CHAPTER 16

STATE HIGHWAY COMMISSION AND HIGHWAY ENGINEER—
POWERS AND DUTIES

- Section 32-1601. State highway commission—creation—salary—bond—term of office.
32-1602. Meetings—engineer—duties and bond.
32-1603. Duties of commission—reports.
32-1604. Compilation of statistics—investigation and consultation.
32-1605. County commissioners to furnish information.
32-1606. Commission to prescribe certain rules—designation of state highways.
32-1607. Office and field men.
32-1608. Contracts, how awarded.
32-1609. Assent to federal aid road act.
32-1610. Division of maintenance and control.
32-1611. Standard guide signs to be erected—road association signs.
32-1612. Penalty for defacing standard guides.
32-1613. County commissioners may convey right of way.
32-1614. Preparation of official road map.
32-1615. Rights of way, how procured.

- 32-1616. Highway commission may sell lands when and how.
- 32-1617. Execution and contents of deed.
- 32-1618. Prosecution for violation of highway law.
- 32-1619. State highway fund and trust fund.
- 32-1620. Presentation and payment of claims.
- 32-1621. Unconstitutional.

32-1601. (1783) State highway commission—creation—salary—bond—term of office. (1) There is hereby created a commission to be known as the state highway commission to consist of five (5) members to be appointed by the governor with the consent of the senate for terms of office as herein provided, and with the qualifications herein specified, and each of said members shall be a citizen of the United States and of the state of Montana.

(2) One (1) of said members shall be a bona fide resident of a district consisting of the following counties: Lincoln, Flathead, Sanders, Lake, Mineral, Missoula, Ravalli, Granite, Lewis and Clark, Jefferson and Broadwater; and one (1) shall be a bona fide resident of a district consisting of the following counties: Powell, Deer Lodge, Silver Bow, Beaverhead, Madison, Gallatin, Meagher, Wheatland, Park and Sweet Grass; and one (1) shall be a bona fide resident of a district consisting of the following counties: Glacier, Toole, Liberty, Hill, Blaine, Pondera, Teton, Chouteau, Cascade, and Judith Basin; and one (1) shall be a bona fide resident of a district consisting of the following counties: Fergus, Petroleum, Garfield, Phillips, Valley, McCone, Prairie, Dawson, Wibaux, Richland, Roosevelt, Daniels and Sheridan; and one (1) shall be a bona fide resident of a district consisting of the following counties: Golden Valley, Stillwater, Carbon, Big Horn, Yellowstone, Musselshell, Rosebud, Treasure, Custer, Powder River, Carter and Fallon. Provided that said districts are herein referred to only for the purpose of defining the sections of the state of Montana from which the members of said commission shall be appointed.

(3) The members of said state highway commission shall be appointed within ten (10) days after the passage of this act. The terms of office of three (3) of the members shall be for four (4) years, and shall expire on February 1, 1957; and the terms of office of the two (2) remaining members shall be for two (2) years, and shall expire on February 1, 1955, and thereafter each succeeding commissioner shall hold his office for a term of four (4) years, and until his successors shall have been appointed and qualified. In case of a vacancy the person appointed to fill such vacancy shall hold office for the unexpired term in which the vacancy occurs, and such vacancy shall be filled by appointment by the governor with the consent of the senate as hereinbefore provided.

(4) No two (2) members of said state highway commission shall at the time of appointment or thereafter during their respective terms of office be residents of the same district, as defined in [sub]section (2). Not more than three (3) members of said state highway commission, except the first appointments to said state highway commission, shall, at the time of appointment or thereafter during their respective terms of office, be members of the same political party. No elective state official or state officer during the term of office to which he was elected or appointed, or

state employee shall be a member of said commission. No state highway commissioner shall be removed from office by the governor before the expiration of his term unless for a disqualifying change of residence or for a cause based upon determination of incapacity, incompetence, neglect of duty and malfeasance in office.

(5) The commission shall choose one (1) of its own number as the chairman, who shall hold office for one (1) year; provided, election as chairman shall not interfere with the member's right to vote on all matters before the commission, and shall have the power to appoint an engineer to be known as the "state highway engineer" and other employees of the commission, and shall fix the salaries of such engineer and other employees.

(6) Each member of the state highway commission shall receive fifteen dollars (\$15.00) per diem for each day actually spent in the performance of his duties and his actual necessary traveling and other expenses in going to, attending and returning from meetings of the commission, and his actual and necessary traveling and other expenses incurred in the discharge of such duties as may be requested of him by a majority vote of the commission, but in no event shall a commissioner's per diem payments exceed fifteen hundred dollars (\$1,500.00) in any one (1) year.

(7) Each commissioner shall give bond conditioned for the faithful performance of his duties in the sum of ten thousand dollars (\$10,000.00).

History: Earlier acts were chapter 170, L. 1917, and chapter 207, L. 1921. This section en. Sec. 1, Ch. 10, Ex. L. 1921; re-en. Sec. 1783, R. C. M. 1921; amd. Sec. 1, Ch. 129, L. 1925; amd. Sec. 1, Ch. 111, L. 1941; amd. Sec. 1, Ch. 86, L. 1945; amd. Sec. 1, Ch. 118, L. 1953.

Compiler's Note

The bracketed prefix "sub" was inserted by the compiler.

Board Must Act as a Whole

Under this section as amended and now in force, all three of the highway commissioners have equal powers, and it as a whole must function in all official matters, in a convened session. State ex rel. Matson v. O'Hearn, 104 M 126, 139, 65 P 2d 619.

County Without Power to Control Acts of Commission

Held, on application for writ of supervisory control to annul restraining order, that a county, under the state highway act, sections 32-1601 to 32-1620, has no power to control or veto acts done by the commission in compliance with the act. State ex rel. State Highway Commission v. District Court, 105 M 44, 48, 69 P 2d 112.

Custom No Defense to Illegal Fees—Ignorance

A custom or practice claimed by public officer to have been followed by predecessors in office, cannot have the force of law

no matter how long continued in collecting illegal fees, nor may he plead ignorance of the law. Questions of administrative policy and value received were for the governor hearing the charges. State ex rel. Matson v. O'Hearn, 104 M 126, 146, 65 P 2d 619.

Status of Commission and Liability of Commissioners

The highway commission is an agency of the state for the accomplishment of the governmental function of establishing, constructing and maintaining a system of highways within the state for use, convenience and benefit of the public. Coldwater v. State Highway Comm., 118 M 65, 162 P 2d 772, 775.

Id. In performing duties imposed upon it by law, the highway commission acts in a governmental capacity.

Id. The state highway commission was not liable for the death of occupant of automobile which skidded from highway, allegedly as result of defective condition of highway and absence of signs.

Id. Where highway commission was not liable for death caused by defective highway and absence of signs, in absence of legislative sanction, the members of the commission could not be held individually liable except for willful or malicious negligence.

Id. The highway commissioners are not required to personally supervise the repair and maintenance of highways, but are

only required to exercise general supervision through the state engineer and such other officers and employees as the commissioners deem necessary.

Id. Where no notice of negligence of employees or others was alleged and there was no charge of misfeasance or personal negligence against highway commissioners, such commissioners were not liable personally for death of automobile occupant allegedly caused by defective highway and absence of signs.

Id. The highway commissioners are responsible only for their own misfeasance and negligence and not for the negligence of those who are employed under them, if commissioners have employed persons of suitable skill.

Strictly Construed in Favor of State

Public officers can claim only such compensation as is provided by law, and if not so provided services are deemed to have been gratuitous; statutes relating to fees

and compensation must be strictly construed in favor of the government. *State ex rel. Matson v. O'Hearn*, 104 M 126, 142, 65 P 2d 619.

References

Gary Hay & Grain Co., Inc. v. Carlson, 79 M 111, 255 P 722; *State v. State Highway Commission*, 82 M 63, 65, 265 P 1; *State ex rel. McMaster v. District Court*, 80 M 228, 260 P 134; *State et al. v. Hoblitt et al.*, 87 M 403, 288 P 181; *Arps v. State Highway Commission*, 90 M 152, 300 P 549; *Guillot v. State Highway Commission*, 102 M 149, 151, 56 P 2d 1072; *State ex rel. Holt v. District Court*, 103 M 438, 443, 63 P 2d 1026; *Kirkpatrick v. Douglas*, 104 M 212, 222, 65 P 2d 1169.

Collateral References

Highways 91.
39 C.J.S. *Highways* § 155.
25 Am. Jur. 888, *Highways*, §§ 599 et seq.

32-1602. (1784) Meetings — engineer — duties and bond. The state highway commission shall meet at least once each month for the purpose of transacting its business, including the consideration of claims and the letting of contracts. Three (3) members shall constitute a quorum at any meeting, but no resolution, motion, or other decision of the commission shall be adopted or passed without the favorable vote of at least three (3) members. The state highway engineer shall perform any acts or duties relating to the office of the highway commission which said commission may, from time to time, impose upon him; such engineer shall take and file the constitutional oath of office before entering the performance of his duties; he shall give a bond in such sum as the commission may determine and may be removed by the commission at any time for cause.

History: En. Sec. 2, Ch. 10, Ex. L. 1921; re-en. Sec. 1784, R. C. M. 1921; amd. Sec. 2, Ch. 86, L. 1945; amd. Sec. 1, Ch. 117, L. 1953.

Governor Not Disqualified by Estoppel in Hearing Removal Charges

Proceeding under Art. V, Sec. 18, Const., to remove members of commission for collection of illegal fees and per diem, governor not barred from passing upon accusation by doctrine of estoppel or *res judicata* because he had passed upon and approved the alleged illegal claims as a member of the state board of examiners. *State ex rel. Matson v. O'Hearn*, 104 M 126, 135, 65 P 2d 619.

Quo Warranto

Held, in quo warranto proceeding, that grant of power to governor to remove a state officer for cause implies authority to judge of the existence of that cause, and he lawfully removed members of highway commission for alleged collection of

illegal fees, and as lawfully appointed their successors. *State ex rel. Matson v. O'Hearn*, 104 M 126, 152, 65 P 2d 619.

Removal by Governor—Procedure—Discretion

In the absence of legislative direction as to the manner in which the governor shall proceed in removing a member of the state commission for cause, he may adopt any method of inquiry not in conflict with public policy of the state, and in hearing charges is clothed with discretion in considering the issues, and not required to disregard ordinary rules of fair procedure or to hear and admit everything in evidence, however incompetent, irrelevant or repetitious. *State ex rel. Matson v. O'Hearn*, 104 M 126, 132, 134, 65 P 2d 619.

Repealed in Part by Implication

Section 32-1602, insofar as it relates to the powers of the highway engineer, was impliedly repealed by section 32-1601, a

later enactment. *Kirkpatrick et al. v. Douglas et al.*, 104 M 212, 222, 65 P 2d 1169.

References

Gary Hay & Grain Co., Inc. v. Carlson, 79 M 111, 255 P 722; *State ex rel. McMaster v. District Court*, 80 M 228, 260 P 134; *State et al. v. Hoblitt et al.*, 87 M 403, 288 P 181; *Arps v. State Highway*

Commission, 90 M 152, 300 P 549; *State ex rel. Holt v. District Court*, 103 M 438, 443, 63 P 2d 1026; *Coldwater v. State Highway Commission*, 118 M 65, 162 P 2d 772, 774.

Collateral References

Highways ⇐ 93, 95(1).
39 C.J.S. *Highways* §§ 157, 164.

32-1603. (1785) Duties of commission—reports. The state highway commission shall maintain and preserve all its records in its office at the capitol; said office shall be kept open at such times as the business of the commission shall require. The commission shall file and safely keep a record of all proceedings and orders pertaining to the matters under its direction and copies of all plans, specifications, contracts, estimates and official acts. The commission shall prepare and submit to the governor on or before the fifteenth day of each month a report of the work constructed, under construction, and proposed for construction and the progress made during the preceding month, and shall make recommendations as to the needed improvements and their estimated cost.

History: En. Sec. 3, Ch. 10, Ex. L. 1921; re-en. Sec. 1785, R. C. M. 1921; amd. Sec. 3, Ch. 86, L. 1945.

Cross-Reference

Labor on highways, state may require, sec. 83-201.

References

Gary Hay & Grain Co., Inc. v. Carlson, 79 M 111, 255 P 722; *State ex rel. McMaster v. District Court*, 80 M 228, 260 P

134; *State et al. v. Hoblitt et al.*, 87 M 403, 288 P 181; *Arps v. State Highway Commission*, 90 M 152, 300 P 549; *State ex rel. Matson v. O'Hearn*, 104 M 126, 140, 65 P 2d 619; *Coldwater v. State Highway Commission*, 118 M 65, 162 P 2d 772, 774.

Collateral References

Highways ⇐ 96(1).
39 C.J.S. *Highways* § 154.

32-1604. (1786) Compilation of statistics—investigation and consultation. In addition to its other powers and duties, the state highway commission shall compile statistics relative to public highways throughout the state, and shall collect all information in regard thereto deemed expedient. It shall investigate and determine upon various methods of road construction adapted to different sections of the state, and as to the best methods of construction and maintenance of roads, bridges, road markers and shall investigate and determine upon such other information relating thereto as it shall deem appropriate and necessary. The highway commission and the state highway engineer may be consulted at all reasonable times by county officers having care and authority over highways and bridges and shall advise such officers relative to the construction, repair, altering or maintenance of the same, and shall furnish such other information and advice as may be requested by persons interested in the construction, maintenance and marking of public highways, and shall at all times lend their aid in promoting highway improvement throughout the state.

History: En. Sec. 4, Ch. 10, Ex. L. 1921; re-en. Sec. 1786, R. C. M. 1921; amd. Sec. 4, Ch. 86, L. 1945.

References

Gary Hay & Grain Co., Inc. v. Carlson,

79 M 111, 255 P 722; *State ex rel. McMaster v. District Court*, 80 M 228, 260 P 134; *State et al. v. Hoblitt et al.*, 87 M 403, 288 P 181; *Arps v. State Highway Commission*, 90 M 152, 300 P 549; *State ex rel. Matson v. O'Hearn*, 104 M 126, 140,

65 P 2d 619; Coldwater v. State Highway Commission, 118 M 65, 162 P 2d 772, 774.

Collateral References

Highways 96(1).
39 C.J.S. Highways § 154.

32-1605. (1787) County commissioners to furnish information. The county commissioners and road supervisors of any county, and all other officers who now have or may hereafter have by law the care and supervision of the public highways and bridges, shall, from time to time, upon the written request of the state highway commission, furnish all available information in connection with the building and maintenance of the state highways and bridges in their respective districts or counties.

History: En. Sec. 5, Ch. 10, Ex. L. 1921; re-en. Sec. 1787, R. C. M. 1921; amd. Sec. 5, Ch. 86, L. 1945.

References

Gary Hay & Grain Co., Inc. v. Carlson, 79 M 111, 255 P 722; State ex rel. McMas-

ter v. District Court, 80 M 228, 260 P 134; State et al. v. Hoblitt et al., 87 M 403, 288 P 181; Arps v. State Highway Commission, 90 M 152, 300 P 549; Coldwater v. State Highway Commission, 118 M 65, 162 P 2d 772, 774.

32-1606. (1788) Commission to prescribe certain rules—designation of state highways. The state highway commission shall have power and it shall be its duty, to formulate all rules and regulations necessary for the government of the state highway commission and it is hereby authorized to make all rules necessary to comply with the provisions of the federal aid road act of congress, approved July 11, 1916, and all other acts granting aid for public highways, and to obtain for the state of Montana the full benefit of such acts. The state highway commission is hereby authorized to, and shall, in conjunction with the board of county commissioners of the several counties in the state, designate such public roads in the state as shall be classed as state highways and subject to improvements under the provisions of said federal aid road act of congress, and the state highway commission in conjunction with the board of county commissioners shall also formulate necessary rules and regulations for the construction, repair, maintenance and marking of state highways and bridges, and may provide for local supervision in such cases.

History: En. Sec. 6, Ch. 10, Ex. L. 1921; re-en. Sec. 1788, R. C. M. 1921; amd. Sec. 6, Ch. 86, L. 1945.

Construction With Relation to County Commissioners

This section providing that the state highway commission in conjunction with board of county commissioners shall designate public roads as shall be classed as state highways, etc., held not open to construction that county boards shall co-operate in the matter of laying out or building new state highways, the "public roads" herein referred to meaning roads then built and in use in the several counties, and subject to improvement. State ex rel. State Highway Commission v. District Court, 105 M 44, 50, 69 P 2d 112.

"Safety Cards" Handed Drivers Over Roads Under Construction—Instruction

In an action to recover for the death of

a highway flagman, held that the power of the commission under this section to make rules for the protection of public and men working on repair, construction or maintenance of highways justified giving an instruction that flagman could assume that drivers of automobiles will obey the traffic laws and regulations. Koppang v. Sevier, 106 M 79, 92, 75 P 2d 790.

References

Gary Hay & Grain Co., Inc. v. Carlson, 79 M 111, 255 P 722; State ex rel. McMaster v. District Court, 80 M 228, 260 P 134; State et al. v. Hoblitt et al., 87 M 403, 288 P 181; Arps v. State Highway Commission, 90 M 152, 300 P 549; State ex rel. Matson v. O'Hearn, 104 M 126, 141, 65 P 2d 619; Coldwater v. State Highway Commission, 118 M 65, 162 P 2d 772, 774.

Collateral References

Highways 95(1).

39 C.J.S. Highways § 157.
25 Am. Jur. 889, Highways, §§ 602 et seq.

Power to employ counsel. 2 ALR 1212.
Establishment of highway over park lands. 18 ALR 1248.

Power to limit weight of vehicle or load thereon with respect to use of highways. 26 ALR 747.

Mandamus to compel improvement or repair of street or highway as affected by its abandonment. 46 ALR 266.

Personal liability of highway officers for negligence of subordinates or employees. 61 ALR 300.

Constitutionality and construction of statute relating to location or relocation of highways. 63 ALR 516.

What justifies discontinuance of highway. 68 ALR 794.

Power of highway officers in respect of billboards or other conditions on ad-

joining property which are deemed dangerous to travel or offensive esthetically to travelers. 81 ALR 1547.

Personal liability of highway officers for injury to property by change of grade, cuts and fills. 90 ALR 1490.

Power and duty of highway officers as regards location or routes of roads to be constructed or improved. 91 ALR 242.

Private citizen's right to complain of rerouting of highway or removal or change of route or directional signs. 97 ALR 192.

Prohibition to control administrative officers in matters relating to highways and streets. 115 ALR 23.

Officer's failure to maintain highways in proper condition as neglect of duty punishable as an offense. 134 ALR 1256.

Traffic regulations affected by closing of street to general public. 157 ALR 1164.

32-1607. (1789) Office and field men. The highway commission shall employ office and field men as it shall deem necessary and the compensation for all such employees shall be determined by the state highway commission to be paid out of the state highway fund in the same manner as other state employees are paid.

At the discretion of the state highway commission, engineers and other persons in their employ may be temporarily assigned for service to any county when a request has been made by the county commissioners thereof. The expense of this service to the counties shall be paid to the state highway fund by the counties receiving such service.

History: En. Sec. 7, Ch. 10, Ex. L. 1921; re-en. Sec. 1789, R. C. M. 1921; amd. Sec. 1. Ch. 155, L. 1945.

References

Guillot v. State Highway Commission, 102 M 149, 151, 56 P 2d 1072; Coldwater

v. State Highway Commission, 118 M 65, 162 P 2d 772, 774.

Collateral References

Highways—95(1, 2).
39 C.J.S. Highways § 157.

32-1608. (1790) Contracts, how awarded. All contracts for work on state highways shall be let by the state highway commission. When the estimated cost of any piece of work shall exceed one thousand dollars, it shall be the duty of the state highway commission to let such contract by competitive bidding, upon such notice and upon such terms as the commission by its rules and regulations prescribe; provided that if the commission shall find such work may be done and performed by force account or by day's labor in a more efficient manner, it may so conduct the work, and provided further that the commission may use convict labor as, in its judgment, is deemed proper. A contractor upon being awarded a contract for construction, improvement, maintenance or marking upon a state highway, and before entering upon such work shall execute to the state of Montana a bond to be approved by the commission, and to be conditioned for the faithful discharge of its duties under such contract.

History: En. Sec. 8, Ch. 10, Ex. L. 1921; re-en. Sec. 1790, R. C. M. 1921.

Assignment

Where the assignment of funds to be

come due one who contracted with the state highway commission to construct a road expressly referred to the contract, the assignee bank was chargeable with knowledge of the contents of the contract; the assignee was further chargeable with notice of the fact that before entering upon the work the contractor was required to furnish bond provided for by this section, and of the rights of the surety and the liabilities of the commission. *Lanstrum et al. v. Zumwalt et al.*, 73 M 502, 237 P 205.

References

Gary Hay & Grain Co., Inc. v. Carlson,

79 M 111, 255 P 722; *State ex rel. McMaster v. District Court*, 80 M 228, 260 P 134; *State et al. v. Hoblitt et al.*, 87 M 403, 288 P 181; *Arps v. State Highway Commission*, 90 M 152, 300 P 549; *Kirkpatrick v. Douglas*, 104 M 212, 222, 65 P 2d 1169; *Coldwater v. State Highway Commission*, 118 M 65, 162 P 2d 772, 774.

Collateral References

Highways—113(2, 3, 5).
40 C.J.S. Highways §§ 208, 210.
See generally, 43 Am. Jur. 737, *Public Works and Contracts*.

32-1609. (1791) Assent to federal aid road act. For and on behalf of the state of Montana, and in conformity with the requirement of section 1 of said act, the provisions of that certain act of congress approved July 11, 1916, known as the federal aid road act and entitled "An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes," is hereby assented to. The state highway commission is hereby authorized to, for and on behalf of the state of Montana, enter into all contracts and agreements with the United States government or any officer, department or bureau thereof, relative to the construction or maintenance of highways in the state of Montana; and the state highway commission for and on behalf of the state of Montana is hereby authorized to do all other things necessary or required to carry out fully the co-operation contemplated by the said act of congress as hereby assented to, relative to the construction and maintenance of roads and highways in the state of Montana.

History: En. Sec. 9, Ch. 10, Ex. L. 1921; re-en. Sec. 1791, R. C. M. 1921.

State v. State Highway Commission, 82 M 63, 65, 265 P 1.

Operation and Effect

Held, on application for writ of mandate to compel the state highway commission to include within its construction program a piece of road, a part of the federal highway system, which during periods of high water is rendered impassable, leaving no highway connection between a county seat and the rest of the county that the fact that the road in question is a part of the federal forest road does not deprive the highway commission of authority of expending any portion of the gasoline license tax funds to match federal aid funds, nothing appearing prohibiting it from doing so.

References

Gary Hay & Grain Co., Inc. v. Carlson, 79 M 111, 255 P 722; *State ex rel. McMaster v. District Court*, 80 M 228, 260 P 134; *State et al. v. Hoblitt et al.*, 87 M 403, 288 P 181; *Arps v. State Highway Commission*, 90 M 152, 300 P 549; *State ex rel. State Highway Commission v. District Court*, 105 M 44, 53, 69 P 2d 112; *Wheeler v. Mitchell*, 110 M 385, 388, 101 P 2d 1071; *Coldwater v. State Highway Commission*, 118 M 65, 162 P 2d 772, 774.

Collateral References

Highways—99¼.
40 C.J.S. Highways § 176.

32-1610. (1792) Division of maintenance and control. The state highway commission shall have authority to organize and operate a division of maintenance and control, and by co-operation with the board of county commissioners in the several counties of the state, if necessary, to maintain state highways constructed by the state and such additional mileage as the commission may deem necessary.

History: En. Sec. 10, Ch. 10, Ex. L. 1921; re-en. Sec. 1792, R. C. M. 1921.

References

Gary Hay & Grain Co., Inc. v. Carlson,

79 M 111, 255 P 722; State ex rel. McMaster v. District Court, 80 M 228, 260 P 134; State et al. v. Hoblitt et al., 87 M 403, 288 P 181; Arps v. State Highway Commission, 90 M 152, 300 P 549; Wheeler v. Mitchell, 110 M 385, 388, 101 P 2d 1071;

Coldwater v. State Highway Commission, 118 M 65, 162 P 2d 772, 774.

Collateral References

Highways ⇌ 105(1).
40 C.J.S. Highways § 177.

32-1611. (1793) Standard guide signs to be erected—road association signs. The state highway commission shall cause to be erected and maintained such standard guides and warning signs as it may deem necessary on and along state highways. Such signs shall be of uniform design and size throughout the state and such uniform design shall be approved by the highway commission. It shall be unlawful to erect or display any other guides or warning signs on or along state highways except in case of emergency and except that trail or road associations having distinctive emblems or signs for their trails or roads may, at their own expense submit and furnish such emblems or signs for the approval of the state highway commission. Such trail or road association emblems or signs, if approved by the state highway commission, may be used by said trail or road association on such roads and trails as they may have assumed jurisdiction over and on no other. The state highway commission shall have full control and authority over all advertising, guide, warning and other signs now constructed or placed upon or to be constructed or placed upon state highways, and shall cause to be removed any such signs conflicting with the provisions of this act, or the policies, rules and regulations now existing or to be created and adopted by the state highway commission. It shall be the duty of the state highway commission to cause to be removed any unlawful advertising, guide, warning or other sign.

History: En. Sec. 11, Ch. 10, Ex. L. 1921; re-en. Sec. 1793, R. C. M. 1921.

References

Gary Hay & Grain Co., Inc. v. Carlson, 79 M 111, 255 P 722; State ex rel. McMaster v. District Court, 80 M 228, 260 P 134; State et al. v. Hoblitt et al., 87 M 403, 288 P 181; Arps v. State Highway Commission, 90 M 152, 300 P 549; Coldwater v. State Highway Commission, 118 M 65, 162 P 2d 772, 774.

Collateral References

Highways ⇌ 105(1), 165.
40 C.J.S. Highways §§ 182, 232.

Liability for injury due to signal guidepost or "silent policeman" in street. 12 ALR 333.

Right to place monument or marker in highway. 16 ALR 927.

Right of private citizen to complain of rerouting of highway or removal or change of route or directional signs. 97 ALR 192.

32-1612. (1794) Penalty for defacing standard guides. After the marking of the state highway, or any section thereof, it shall be unlawful for any person, corporation, or association to deface, damage, or injure any state highway guide, warning or other signs, or any advertising signs erected or placed on the state highway with the approval and sanction of the state highway commission. Any person, corporation or association found guilty of defacing, damaging or injuring said signs shall be deemed guilty of a misdemeanor and shall be subject to a fine of not less than ten dollars nor more than one hundred dollars for each offense.

History: En. Sec. 12, Ch. 10, Ex. L. 1921; re-en. Sec. 1794, R. C. M. 1921.

References

Gary Hay & Grain Co., Inc. v. Carlson, 79 M 111, 255 P 722; State ex rel. McMaster v. District Court, 80 M 228, 260 P

134; State et al. v. Hoblitt et al., 87 M 403, 288 P 181; Arps v. State Highway Commission, 90 M 152, 300 P 549; Coldwater v. State Highway Commission, 118 M 65, 162 P 2d 772, 774.

Collateral References

Highways⇒186.
40 C.J.S. Highways § 247.

32-1613. (1795) County commissioners may convey right of way. It shall be lawful for boards of county commissioners to transfer and convey to the state of Montana rights of way over and along county roads for state road purposes, and it is hereby made their duty to make such transfer or conveyance upon receiving notice from the state highway commission that a state road has been established and definitely located over a county road and that said road will be improved and maintained by the state, and that funds are available for the immediate construction of such road.

History: En. Sec. 13, Ch. 10, Ex. L. 1921; re-en. Sec. 1795, R. C. M. 1921.

state acquires property. State ex rel. State Highway Commission v. District Court, 105 M 44, 54, 69 P 2d 112.

Purpose — Relinquishment of County Control

This section does not recognize title in the county, making it lawful for commissioners to convey rights of way over established county roads when designated as state highways, but has for its purpose the relinquishment by the county of its control thereover and the fixing, as a matter of record, of responsibility for their supervision and maintenance. Counties are not the owners of public roads established within their boundaries; they belong to the state, and county acts as a trustee and agency through which the

References

Gary Hay & Grain Co., Inc. v. Carlson, 79 M 111, 255 P 722; State ex rel. McMaster v. District Court, 80 M 228, 260 P 134; State et al. v. Hoblitt et al., 87 M 403, 288 P 181; Arps v. State Highway Commission, 90 M 152, 300 P 549; Coldwater v. State Highway Commission, 118 M 65, 162 P 2d 772, 774.

Collateral References

Highways⇒23.
39 C.J.S. Highways § 39.

32-1614. (1796) Preparation of official road map. Upon the selection and approval by the commission of the system of state highways, the commission shall cause to be prepared an official road map of the state of Montana showing outlined thereon the exact location of said state highways prior to October 1, 1921, if possible; a copy of such map shall be filed with each county clerk and after such selection and filing no changes except the necessary re-locations and alterations in portions of the state highway system for purposes of construction shall be made by said commission until further investigation or hearings are held in the county or counties in which such change or changes are proposed. If, after investigation or hearing, any alteration or additions shall be deemed expedient by the commission, the change shall be entered in writing upon the records and maps of the commission and each county clerk shall be immediately notified to alter the official map on file with him in accordance therewith.

History: En. Sec. 14, Ch. 10, Ex. L. 1921; re-en. Sec. 1796, R. C. M. 1921.

sive control and supervision of the commission on the county records. State ex rel. State Highway Commission v. District Court, 105 M 44, 58, 69 P 2d 112.

Map—Purpose—Failure to File

The mere failure of the state highway commission to file a map with the county clerk as required by this section, before letting of contract for construction, was insufficient ground for obtaining a restraining order against its letting, the purpose of the requirement being to show what roads or highways are under exclu-

References

Gary Hay & Grain Co., Inc. v. Carlson, 79 M 111, 225 P 722; State ex rel. McMaster v. District Court, 80 M 228, 260 P 134; State et al. v. Hoblitt et al. 87 M 403, 288 P 181; Arps v. State Highway Commission, 90 M 152, 300 P 549; Cold-

water v. State Highway Commission, 118 M 65, 162 P 2d 772, 774.

Collateral References

Highways 96(1).

39 C.J.S. Highways § 157.

32-1615. (1797) Rights of way, how procured. The state highway commission shall have the power and authority to acquire by purchase or otherwise, necessary rights of way for state highways and to lay out, alter, construct, improve and maintain highways in the state of Montana, and to acquire by purchase or otherwise, deposits of road-building materials, and the state highway commission shall have the authority to exercise the power of eminent domain in the name of the state for any of the above mentioned purposes.

Whenever it shall be deemed necessary by the commission to secure the rights of way as herein provided, or to acquire deposits of road-building materials, and the same cannot be acquired by purchase, the commission may direct the attorney general or any county attorney in any county in the state to procure the rights of way or deposits of road-building materials by proceedings to be instituted in the manner as provided in sections 93-9901 to 93-9926 against all non-accepting land-holders and when thereunder the right of way is procured, the road must be declared public highway and open in the manner provided by law.

History: En. Sec. 15, Ch. 10, Ex. L. 1921; re-en. Sec. 1797, R. C. M. 1921.

"Cannot be Acquired by Purchase" Defined

The provision of this section, authorizing the state highway commission to condemn land for highway purposes if it cannot be acquired by purchase, contemplates no more than a fair effort to negotiate an agreement; it does not mean that the right of way cannot be bought at any price. *State et al. v. Whitcomb et al.*, 94 M 415, 424, 22 P 2d 823.

Necessary Allegation in Complaint

Where the state highway commission seeks to condemn lands for highway purposes it must, in order to invoke the jurisdiction of the court, allege in its complaint that it has been unable to acquire the right of way desired by purchase. *State et al. v. Whitcomb et al.*, 94 M 415, 424, 22 P 2d 823.

Necessity for Taking of Land—Sufficient Showing

The requirement of this section, that land sought to be condemned for highway purposes must be "necessary" does not mean an absolute necessity for the particular location, but means reasonably requisite for the accomplishment of the end in view, under the circumstances of the case. *State et al. v. Whitcomb et al.*, 94 M 415, 424, 22 P 2d 823.

Id. Where the highway commission selects a particular route for a highway, a land owner whose land is sought to be condemned for right of way will not be

heard to say that a different one could have been selected; solution of the question of necessity involving consideration of the questions of the greatest good to the public and the least injury to the owner whose property is sought to be taken.

Right to Condemn for a Highway

Held, under this section that the right to obtain a right of way for a state highway by the exercise of condemnation proceedings is lodged exclusively with the state highway commission, the right to be exercised in the name of the state upon direction by the commission to the attorney general or a county attorney. *State ex rel. McMaster v. District Court*, 80 M 228, 260 P 134.

The highway commission is the only tribunal authorized to relocate state highways through the power of eminent domain. A public utility cannot condemn land for a right of way for the relocation of a highway which is necessitated by the fact that the present highway will be affected by the construction of a dam for which the utility is using the eminent domain power. *State v. District Court*, 126 M 183, 248 P 2d 215, 216.

Selection of Routes Discretionary

Held, that where a particular route has been selected and designated by the state highway commission as a highway, it is within its discretion to decide which segment or portion thereof shall be first constructed, and the mere fact that such portion runs through a sparsely settled country and would in itself benefit but

few persons does not authorize the courts to enjoin its construction on the ground that cost thereof would constitute a wanton waste of money. *State ex rel. State Highway Commission v. District Court*, 107 M 126, 131, 81 P 2d 347.

References

Gary Hay & Grain Co., Inc. v. Carlson, 79 M 111, 255 P 722; *State et al. v. Hoblitt et al.*, 87 M 403, 288 P 181; *Arps v. State Highway Commission*, 90 M 152, 300 P 549; *State ex rel. State Highway Commission v. District Court*, 105 M 44, 49, 69 P 2d 112; *Coldwater v. State Highway Commission*, 118 M 65, 162 P 2d 772, 774.

Collateral References

Highways 99, 109.

40 C.J.S. Highways §§ 177, 180.

See generally, 18 Am. Jur. 621, *Eminent Domain*; 25 Am. Jur. 544, *Highways*, §§ 253 et seq.

Constitutionality of statutory provisions as to political corporations or divisions which shall bear cost of maintaining highways. 2 ALR 746.

Reversion of title upon vacation of public street or highway. 18 ALR 1008.

Mandamus to compel improvement or repair of street or highway as affected by its abandonment. 46 ALR 266.

Right of owner of nonabutting property to compensation for vacation of section of street or highway. 49 ALR 330.

Constitutionality and construction of statute relating to location or relocation of highways. 63 ALR 516.

What justifies discontinuance of highway. 68 ALR 794.

Power of highway officer in respect of billboards or other conditions on adjoining property which are deemed dangerous to travel or offensive esthetically to travelers. 81 ALR 1547.

Personal liability of highway officers for injury to property by change of grades, cuts and fills. 90 ALR 1490.

Power and duty of highway officers as regards location or routes of roads to be constructed or improved. 91 ALR 242.

Interest on damages for injury by change of grade for period before judgment. 111 ALR 1307.

Prohibition to control administrative officers in matters relating to highways and streets. 115 ALR 23.

Officers' failure to maintain highways in proper condition as neglect of duty punishable as an offense. 134 ALR 1256.

Deeds for public street or highway purposes as conveying fee or easement. 136 ALR 393.

Deduction of benefit in determining compensation or damages in eminent domain. 145 ALR 7.

Increment to value from projects for which land is condemned, as a factor in fixing compensation. 147 ALR 66.

What physical construction amounts to change of grade within statute relating to award of damages. 156 ALR 416.

32-1616. Highway commission may sell lands when and how. The state highway commission of the state of Montana shall have the power to sell any interest in real estate, however acquired, belonging to the state of Montana and purchased by highway funds, and which is not necessary to the laying out, altering, construction, improvement or maintenance of any state highway. If the property sought to be sold is reasonably of a value in excess of one hundred dollars (\$100.00), the sale shall be to the highest bidder at public auction or by sealed bids to the discretion of the highway commission, at the office of the state highway commission, highway building in the city of Helena, Montana, after previous notice given by publication in a newspaper published in the county in which said real estate is situated, notice to be published once a week for two successive weeks. The sale shall be for cash, lawful money of the United States. In all sales in property of a value in excess of one hundred dollars (\$100.00) there must, before any sale, be an appraisal thereof by the highway commission and at a price representing a fair market value of such property and such appraised value shall be stated in the notice of sale. No sale shall be made of any property unless it has been appraised within three months prior to the date of sale and no such sale shall be made for less than ninety percent of the appraised value. If no bid or offer is made for any property offered for sale after appraisal and notice given

as provided herein, the highway commission may at any time thereafter sell such property at private sale and may on such private sale accept as the purchase price therefor an amount not less than ninety percent of the appraised value thereof. No title to any property sold under the provision thereof shall pass from the state of Montana until the purchaser shall have paid the full amount of the purchase price therefor into the state treasury to the credit of the state highway fund.

History: En. Sec. 1, Ch. 92, L. 1939.

Collateral References

Highways⇒95(1).

39 C.J.S. Highways § 157.

32-1617. Execution and contents of deed. The governor, and in case of his absence or inability, the lieutenant governor, shall be, and is hereby authorized to execute deed or patent of conveyance transferring without covenants any and all lands sold by the state highway commission under the laws of this state when full payment has been made therefor. Such deed or patent shall contain the reservation of easements for rights of way to the United States, and all other reservations to which the particular land conveyed may be subject. Such deed or patent shall be attested by the secretary of state, and have the great seal of the state of Montana thereto attached, but need not be acknowledged.

History: En. Sec. 2, Ch. 92, L. 1939.

32-1618. (1798) Prosecution for violation of highway law. The state highway commission shall have power, and it shall be its duty, to prosecute all persons guilty of any violation of "The General Highway Law."

History: En. Sec. 16, Ch. 10, Ex. L. 1921; re-en. Sec. 1798, R. C. M. 1921.

403, 288 P 181; Arps v. State Highway Commission, 90 M 152, 300 P 549; Coldwater v. State Highway Commission, 118 M 65, 162 P 2d 772, 774.

References

Gary Hay & Grain Co., Inc. v. Carlson, 79 M 111, 255 P 722; State ex rel. McMaster v. District Court, 80 M 228, 260 P 134; State et al. v. Hoblitt et al., 87 M

Collateral References

Highways⇒164, 186.

40 C.J.S. Highways §§ 231, 247.

32-1619. (1799) State highway fund and trust fund. For the purpose of carrying out the provisions of this act, there is hereby created a state highway fund and a state highway trust fund. The state highway fund shall be credited with all moneys received for the use and purpose of the state highway commission from the receipt or transfer of motor vehicle license fees, as provided by law, or from other sources except as herein provided. The state highway trust fund shall be credited with all moneys received from the counties, and from the federal government or other agencies for expenditure by the commission in connection with the actual construction of specific projects. All moneys in the hands of any state officer on the first day of April, 1921, shall be segregated by such state officer and credited to the respective fund to which it properly belongs as above defined. Hereafter all moneys collected for the state highway fund or the state highway trust fund as authorized by law shall be credited to such fund or funds by the state treasurer; provided, however, that nothing herein contained shall prevent the state highway commission from recovering from the state highway trust fund moneys deposited or paid into such trust fund by counties and the federal government or other

agencies, to defray the cost of engineering incident to the construction, supervision and inspection of projects carried on under the direction of the commission.

History: En. Sec. 17, Ch. 10, Ex. L. 1921; re-en. Sec. 1799, R. C. M. 1921.

Operation and Effect

Held, that while the state highway commission may not use the funds in the state highway trust fund created by this section, into which fund go the moneys received from the federal government for federal aid prospects, for the acquisition of rights of way for contemplated state highways, it may properly use the funds in the state highway fund, created by the same section, into which flow all moneys

collected under the gasoline license tax. State ex rel. McMaster v. District Court, 80 M 228, 237, 260 P 134.

References

Gary Hay & Grain Co., Inc. v. Carlson, 79 M 111, 255 P 722; State ex rel. McMaster v. District Court, 80 M 228, 260 P 134; State et al. v. Hoblitt et al., 87 M 403, 288 P 181; Arps v. State Highway Commission, 90 M 152, 300 P 549; Wheeler v. Mitchell, 110 M 385, 388, 101 P 2d 1071; Coldwater v. State Highway Commission, 118 M 65, 162 P 2d 772, 774.

32-1620. (1800) Presentation and payment of claims. All accounts and expenditures shall be certified by the state highway engineer, approved by the state board of examiners, and paid by the state treasurer upon warrants drawn by the state auditor out of the proper funds created by this act. In submitting claims for payment as herein provided, the state highway commission shall certify whether the warrant is to be drawn against the state highway fund or the state highway trust fund, and if the claim is against the state highway trust fund, it shall state the particular project to which the payment will apply. The state treasurer is hereby authorized to receive all warrants drawn by the United States government in accordance with the provisions of any act of congress, and to credit the same to the state highway trust fund.

The state highway commission shall provide a system of accounting for each project considered which shall show the amount of money received therefor, and also an itemized statement of the expenses in connection therewith. Such system shall be approved by the state board of examiners.

History: En. Sec. 18, Ch. 10, Ex. L. 1921; re-en. Sec. 1800, R. C. M. 1921; amd. Sec. 7, Ch. 86, L. 1945.

State Board of Examiners Not to Contract for Insurance of Bridges

Held, on appeal from a judgment enjoining the board of examiners from carrying out a contract for the insurance of all bridges in the state, which are a component part of the state highways and under the control of the state highway commission, the premium, \$120,000, to be paid out of the state highway fund, that the board of examiners is without authority to enter into such a contract, and that, if such a contract is to be made it is to be initiated by the highway commission, though, under the Constitution, Art. VII, Sec. 20, and

statutes, any claim arising therefrom, must be examined by the state board of examiners. Wheeler v. Mitchell, 110 M 385, 387, 101 P 2d 1071.

References

Gary Hay & Grain Co., Inc. v. Carlson, 79 M 111, 255 P 722; State ex rel. McMaster v. District Court, 80 M 228, 260 P 134; State et al. v. Hoblitt et al., 87 M 403, 288 P 181; Arps v. State Highway Commission, 90 M 152, 300 P 549; Coldwater v. State Highway Commission, 118 M 65, 162 P 2d 772, 774.

Collateral References

Highways \approx 99¼; States \approx 123.
40 C.J.S. Highways § 176; 81 C.J.S. States § 159.

32-1621. Unconstitutional.

Unconstitutional

This section (Laws 1949, Ch. 51), authorizing the expenditure of state highway funds on toll bridges crossing any

river in the state, was declared unconstitutional in *Sjostrum v. State Highway Commission*, 124 M 562, 228 P 2d 238.

This section (Laws 1949, Ch. 51) was

held to be a local and special law since the only toll bridge crossing a river in the state is the Great Northern Railway bridge at Snowden owned and operated by such railroad and the state is prohibited by Const. Art. V, Sec. 26 from using highway

funds for the construction, reconstruction, betterment, maintenance, administration or engineering thereof. *Sjostrum v. State Highway Commission*, 124 M 562, 228 P 2d 238.

CHAPTER 17

NATIONAL DEFENSE HIGHWAY PROGRAM

Section 32-1701. State highway traffic advisory committee abolished—transfer of powers and duties.

32-1702. Powers and duties.

32-1703. Highway safety and driver training program.

32-1704. Repealed.

32-1705. Repealed.

32-1701. State highway traffic advisory committee abolished—transfer of powers and duties. The state highway traffic advisory committee is hereby abolished and the records, duties and powers of said committee are hereby transferred to the director of the civil defense agency (hereinafter referred to as the director).

History: En. Sec. 1, Ch. 82, L. 1941;
amd. Sec. 2, Ch. 94, L. 1953.

32-1702. Powers and duties. The said director is hereby vested with the following powers and duties:

(a) To cooperate with the agencies of this and other states and of the federal government which are connected with national defense, in the formulation and execution of plans for the rapid and safe movement over the highways of troops, vehicles of a military nature, and materials affecting the national defense.

(b) To coordinate the activities of the Montana highway commission, the Montana highway patrol, and the registrar of motor vehicles in a manner which will best serve to effectuate any such plan for the rapid and safe movement of troops, vehicles and materials as referred to in paragraph (a) of this section.

(c) To solicit the cooperation of officials of the various political subdivisions of the state in the proper execution of such plans.

(d) To take an inventory, by counties, of the trucks and buses in the state, publicly and privately owned, which would be available in case of emergency affecting the national defense.

History: En. Sec. 2, Ch. 82, L. 1941;
amd. Sec. 3, Ch. 94, L. 1953.

32-1703. Highway safety and driver training program. The director may, in conjunction with any interested public or private agencies, conduct a highway safety and driver training program as an aid to the national defense.

History: En. Sec. 3, Ch. 82, L. 1941;
amd. Sec. 4, Ch. 94, L. 1953.

32-1704, 32-1705. Repealed—Chapter 94, Laws of 1953.**Repeal**

These sections (Secs. 4, 5, Ch. 82, L. 1941), relating to the compensation of members of the state highway traffic ad-

visory committee and their employees, were repealed by Sec. 1, Ch. 94, Laws 1953.

CHAPTER 18

STOCK LANE LAW

- Section 32-1801. Stock lane law.
 32-1802. Stock lane defined.
 32-1803. Laws applicable to stock lanes.
 32-1804. Power of county commissioners exclusive.

32-1801. Stock lane law. This act shall be known as the "Stock Lane Law."

History: En. Sec. 1, Ch. 63, L. 1939.

32-1802. Stock lane defined. Within the meaning of this act a stock lane shall be deemed to be a public highway established and maintained for the driving of and travel of livestock thereon. The width of such highway shall be determined by the order or orders of the county commissioners creating the same and shall be not less than sixty (60) feet in width.

History: En. Sec. 2, Ch. 63, L. 1939.

Collateral References

Highways \Rightarrow 18.
 39 C.J.S. Highways § 1.

32-1803. Laws applicable to stock lanes. The provisions of sections 32-401 to 32-417, and the general laws of this state relating to the establishing, altering and vacating of public highways including the right of exercise of the power of eminent domain shall likewise apply to stock lanes except that such highways in all petitions, orders and proceedings shall be referred to as "stock lanes" to differentiate them from other highways.

History: En. Sec. 3, Ch. 63, L. 1939.

32-1804. Power of county commissioners exclusive. The power to establish, alter or vacate stock lanes shall belong exclusively to the county commissioners of the respective counties, to be exercised when they deem it expedient and necessary for the convenience of the public, and when they deem it to be for the convenience of the travel of the public on highways now established. Any such lane established may adjoin and parallel a public highway and shall be described in the petition for the creation of and the order of the county commissioners creating the same.

History: En. Sec. 4, Ch. 63, L. 1939.

Collateral References

Highways \Rightarrow 23.
 39 C.J.S. Highways § 39.

CHAPTER 19

MONTANA TOLL BRIDGE AUTHORITY

Section	32-1901.	Definitions.
	32-1902.	Creation of authority—members—salary—officers—seal.
	32-1903.	Powers.
	32-1904.	Estimates of costs—limitations on placing of toll bridges—petitions, contents.
	32-1905.	Bond issues, nature, maturity, interest, contents—registration—sale.
	32-1906.	Use of money received from bond issue—liens.
	32-1907.	Powers of authority in connection with bond issues.
	32-1908.	Fixing of toll charges—expiration of toll charges.
	32-1909.	Construction fund—revenue fund—sinking fund.
	32-1910.	Construction fund—disposition of surplus.
	32-1911.	Sinking fund.
	32-1912.	State highway engineer, duties—revenue fund.
	32-1913.	Records—annual statement—transfer of proceeds from revenue fund to sinking fund.
	32-1914.	Rights of way—eminent domain.
	32-1915.	Limitations on building bridges near toll bridge.

32-1901. Definitions. As used in this act, the terms, "Montana toll bridge authority" and "authority" shall be used interchangeably, and shall mean the Montana toll bridge authority created by this act; and "toll bridge" shall mean any bridge constructed under the provisions of this act, upon which tolls will be charged as hereinafter provided, together with all appurtenances and additions, alterations or improvements thereto or replacements thereof, and the approaches thereto, and all lands used therefor and improvements thereon.

History: En. Sec. 1, Ch. 31, L. 1953.

Monarch Mining Co. et al. v. State Highway Commission, — M —, 270 P 2d 738.

Constitutionality

The Montana supreme court refused to pass upon the constitutionality of this act (secs. 32-1901 to 32-1915) on the ground that plaintiffs failed to show they would be adversely affected by its operation.

Collateral References

Bridges ⇨ 7.

11 C.J.S. Bridges § 10.

32-1902. Creation of authority — members — salary — officers — seal. There is hereby created an authority to be known as the Montana toll bridge authority, which shall be composed of the members of the state highway commission. In addition to the powers and duties heretofore conferred on them the members of said state highway commission shall, as members of the Montana toll bridge authority, have the powers and perform the duties provided for in this act. All members of the authority shall serve without compensation other than that received as members of the state highway commission. The expense of any surveys and reports, paid from the funds of the state highway commission, shall be deemed fully repaid when such toll bridge becomes a free public bridge as provided in section 32-1908. The chairman of the state highway commission shall be the chairman of said authority and the state highway engineer shall be the secretary-treasurer thereof. The authority is authorized to adopt rules and regulations for its own government and for the administration of this act and the execution of the powers and duties hereby conferred. All contracts, bonds and other instruments of the authority shall be executed in the name of Montana toll bridge authority by its chairman

and attested by its secretary-treasurer. The authority shall have and adopt a seal bearing its name which shall be affixed to such bonds, instruments and records as the authority or its chairman may direct.

History: En. Sec. 2, Ch. 31, L. 1953.

32-1903. Powers. The Montana toll bridge authority is empowered to establish and construct a toll bridge or toll bridges upon any of the public highways of this state, together with approaches thereto, wherever the same shall be found and determined to be necessary, advantageous and practicable for crossing any stream or body of water within this state.

History: En. Sec. 3, Ch. 31, L. 1953.

32-1904. Estimates of costs—limitations on placing of toll bridges—petitions, contents. (1) Whenever the Montana toll bridge authority shall find and determine that the construction of any toll bridge is necessary, advantageous and practicable, it shall adopt a resolution making such finding and determination and declaring that public convenience and necessity require the construction of such toll bridge, which resolution shall contain a preliminary estimate of the cost of such construction and of the amount to be raised for such purpose by the issuance of revenue bonds, and a statement of the probable amount of money, property materials or labor, if any, to be contributed from other sources in aid of any such construction. The authority shall also make estimates of the cost of such toll bridge, and of the cost of maintaining, repairing and operating the same, and of the revenues to be derived therefrom, and no such toll bridge shall be constructed hereunder unless said authority shall first find and determine that the probable revenues to be derived therefrom will be sufficient to pay the cost of maintaining, repairing and operating such toll bridge, and to pay the principal and interest or revenue bonds issued to provide funds with which to pay the cost thereof; provided, however, that in connection with the issuance of any such bonds, the failure of the authority to make the estimates required by this section or to make the same in proper form shall in no way affect the validity or enforceability of any such bonds.

(2) No toll bridge shall be authorized or constructed over or across any stream within a radius of fifty (50) miles on either side of any free public bridge now existing upon said stream, unless and until there shall first have been filed with the authority a petition requesting the construction of such toll bridge, signed by not less than twenty (20%) per cent of the taxpaying freeholders whose names appear on the last completed assessment roll of the county wherein such toll bridge is proposed to be constructed, or, if the same is to be located upon a stream at a point where such stream constitutes the boundary between two (2) counties, then such petition shall be signed by not less than twenty (20%) per cent of the taxpaying freeholders whose names appear on the last completed assessment roll of both of said counties.

(3) Such petition or petitions shall contain a statement showing the location of the proposed toll bridge and the location of all free public bridges existing upon the same stream within a radius of fifty (50) miles of such proposed toll bridge, and shall further contain a concise statement of facts showing that the construction of such toll bridge is necessary,

advantageous and practicable. Several petitions identical in form may be circulated, and after being signed there shall be attached thereto an affidavit of the person circulating the same to the effect that the signatures are genuine and that the signers knew the contents thereof at the time of signing the same. All petitions from each county shall be attached together so as to form a single petition before being filed with the authority, and such petition shall have attached thereto a certificate of the county clerk and recorder showing whether or not the same has been signed by twenty (20%) per cent or more of the taxpaying freeholders whose names appear on the last completed assessment roll of such county, and such petition shall thereupon be transmitted by said county clerk and recorder to the authority. The members of the authority shall meet and consider such petition within thirty (30) days after the filing thereof. The authority shall be the sole judge of the sufficiency of the petition and its findings shall be conclusive in favor of the innocent holder of bonds issued by reason of the presentation of such petition. If it is found that the petition bears the requisite number of signatures and is in proper form, and if the authority shall further find and determine that the construction of the proposed toll bridge is necessary, advantageous and practicable, the authority shall adopt a resolution making such finding and determination and containing the estimates and data hereinbefore provided for in subsection one (1) of this section.

History: En. Sec. 4, Ch. 31, L. 1953.

32-1905. Bond issues, nature, maturity, interest, contents—registration—sale. (1) The authority is hereby authorized to provide by resolution, at one time or from time to time, for the issuance of toll bridge revenue bonds for the purpose of paying the cost of any toll bridge. The principal and interest of such bonds shall be payable solely from the special fund herein provided for such payment, and such bonds shall not be a debt, liability or obligation of the state of Montana, and shall be secured only by the revenues from the toll bridge or toll bridges constructed by virtue of this act. Said bonds shall mature at such time or times, not more than twenty (20) years from their date or dates, as may be fixed by such resolution, but may be made redeemable before maturity at the option of the authority at such price or prices and under such terms and conditions as may be fixed by the authority prior to the issuance of the bonds. The authority shall determine the rate of interest such bonds shall bear, not exceeding six (6%) per centum per annum, the time or times of payment of such interest, the form of the bonds and the interest coupons to be attached thereto, and the manner of executing the bonds and coupons, and shall fix the denomination or denominations of the bonds and the place or places of payment of principal and interest thereof, which may be at any bank or trust company within or without the state.

(2) All bonds issued under this act shall contain a statement on the face thereof that the state shall not be obligated to pay the same or the interest thereon except from the special fund hereinafter provided for. In case any of the officers whose signatures appear on the bonds or coupons shall cease to be such officers before the delivery of such bonds, such signatures shall nevertheless be valid and sufficient for all purposes with the

same effect as though they had remained in office until such delivery. All such bonds shall be negotiable instruments and shall have and are hereby declared to have all the qualities and incidents of negotiable instruments under the negotiable instruments law of the state.

(3) Provisions may be made for the registration of any of such bonds in the name of the owner as to principal alone or as to both principal and interest. The bonds authorized under the provisions of this act may be issued and sold from time to time, in such amounts as shall be determined by the authority, and the authority may sell said bonds in such manner and for such price; as it may determine to be for the best interests of the state, but no such sale shall be made for less than a price which, computed with relation to the absolute maturity of the bonds in accordance with standard tables of bond values, will show a net return of six (6%) per centum per annum to the purchaser upon the amount paid therefor. The proceeds of such bonds shall be used solely for the payment of the cost of any toll bridge constructed hereunder, and the proceeds of such bonds shall be disbursed in such manner and under such restrictions as the authority may provide.

(4) If the proceeds of such bonds, by error of calculation or otherwise, shall be less than the cost of any toll bridge, additional bonds may in like manner be issued to provide the amount of such deficit and, unless otherwise provided in the resolution authorizing the bonds, shall be deemed to be of the same issue and shall be entitled to payment from the same fund, and shall be of equal preference and priority as the bonds first issued for the same toll bridge. If the proceeds of the bonds issued for any such toll bridge shall exceed the cost thereof, the surplus shall be paid into the fund hereinafter provided for the payment of principal and interest of such bonds. Prior to the preparation of definitive bonds, the authority may under like restrictions issue temporary bonds with or without coupons, exchangeable for definitive bonds when such bonds have been executed and are available for delivery.

(5) Each resolution providing for the issuance of bonds shall set forth and identify the toll bridge for which the bonds are to be issued, and the bonds authorized by each such resolution shall constitute a separate series. The bonds of each series shall be identified by a series letter or letters, and may be sold and delivered at one time or from time to time.

History: En. Sec. 5, Ch. 31, L. 1953.

Collateral References

States \hookrightarrow 152.

81 C.J.S. States § 182.

32-1906. Use of money received from bond issue—liens. All moneys received from any bonds issued pursuant to this act shall be applied solely to the payment of the cost of the toll bridge for the payment of which such bonds were issued, and there shall be and hereby is created and granted a lien upon such moneys until so applied, in favor of the holders of such bonds.

History: En. Sec. 6, Ch. 31, L. 1953.

32-1907. Powers of authority in connection with bond issues. In connection with the issuance and in order to secure the payment of such bonds, the authority shall have power:

(a) To pledge all or any part of the tolls, income, profit and revenue of any such toll bridge, and to covenant to pay such tolls, income, profit and revenue into the appropriate fund therefor.

(b) To covenant to fix and establish such tolls, rates and charges as will provide at all times sufficient funds (1) to pay all costs of operation and maintenance of such toll bridge together with necessary repairs thereto, and (2) to meet and pay the principal and interest of all such bonds as they severally become due and payable, and (3) to create such reserves for the principal and interest of all such bonds and to meet contingencies in the operation and maintenance of such toll bridge as the authority shall determine; and to make such further covenants as to such tolls, rates and charges as the authority shall deem necessary to secure the payment of such bonds; provided that no truck, trailer or automobile licensed in the name of the state of Montana or the federal government or any branch or department thereof, shall be required to pay any toll for the crossing of any such toll bridge.

(c) To create a special fund or funds, in addition to those required by this act, for moneys reserved for principal and interest on bonds and for meeting contingencies in the operation and maintenance of any such toll bridge and to determine the depository or depositories in which such funds shall be deposited and the manner in which such deposits shall be secured, and it shall be lawful for any bank or trust company incorporated under the laws of this state to act as such depository and to furnish such indemnifying bonds or to pledge such securities as may be required by the authority.

(d) To provide for the replacement of lost, destroyed or mutilated bonds.

(e) To covenant against extending the time for the payment of the principal of or interest on any of such bonds, directly or indirectly by any means or in any manner.

(f) To prescribe and covenant as to the events of default and terms and conditions upon which any or all of such bonds shall become or may be declared due before maturity and as to the terms and conditions upon which such declaration and its consequences may be waived.

(g) To covenant as to the rights, liabilities, powers and duties arising upon the breach of any covenant, condition or obligation.

(h) To vest in a trustee or trustees the right to enforce any covenant made to secure or to pay such bonds, to provide for the powers and duties of such trustee or trustees, to limit the liabilities thereof, and to provide the terms and conditions upon which the trustee or trustees or the holders or any proportion of them may enforce any such covenant.

(i) To make such covenants and do any and all such acts and things as may be necessary or convenient or desirable in order to secure such bonds or to make such bonds more marketable, notwithstanding that such covenants, acts or things may not be enumerated or expressly authorized herein, it being intended to grant unto the authority power to do all things in the issuance of such bonds and in providing for their security that may not be inconsistent with the constitution of Montana.

History: En. Sec. 7, Ch. 31, L. 1953.

32-1908. Fixing of toll charges—expiration of toll charges. The authority is hereby empowered to fix the rates of toll and other charges for all toll bridges built under the terms of this act, and from time to time to change such rates of toll and other charges. Such tolls and charges shall at all times be fixed at rates to yield annual revenue equal to annual operating and maintenance expenses and to redeem and pay the principal and interest of all bonds as they severally become due and to create such reserves as the authority shall deem necessary; and such tolls and revenues shall constitute a trust fund for the security and payment of such bonds and shall not be pledged for any other purpose as long as such bonds or any of them are outstanding and unpaid. Whenever the toll bridge revenue bonds issued for the purpose of paying the cost of any toll bridge shall have been retired and the cost of construction of such toll bridge shall thereby have been repaid in full, such bridge thereafter shall be maintained and operated by the state highway commission as a free bridge.

History: En. Sec. 8, Ch. 31, L. 1953.

32-1909. Construction fund—revenue fund—sinking fund. The authority shall create three (3) separate funds in respect of the bonds of each series issued by the authority, one (1) fund to be known as the "toll bridge construction fund, series" another fund to be known as the "toll bridge revenue fund, series" and another fund to be known as the "toll bridge sinking fund, series" each such fund to be identified by the same series letter or letters as the bonds of such series. The moneys in each such fund shall be deposited in such depository or depositories and secured in such manner as may be determined by the authority. It shall be lawful for any bank or trust company incorporated under the laws of this state to act as such depository and to furnish such indemnifying bonds or to pledge such securities as may be required by the authority.

History: En. Sec. 9, Ch. 31, L. 1953.

32-1910. Construction fund—disposition of surplus. The proceeds of the bonds of each series issued under the provisions of this act shall be placed to the credit of the appropriate construction fund, which fund shall at all times be kept segregated and set apart from all other funds. There shall also be credited to the appropriate construction fund all accrued interest upon the bonds and the interest received upon the deposits of moneys in such fund and moneys received by grant or donation from the United States or from any other source for the construction of such toll bridge. The moneys in each construction fund shall be disbursed in such manner as may be determined by the authority, subject to the provisions of this act, to pay the cost of the toll bridge for which such fund was created. Any surplus which may remain in any construction fund after providing for the payment of the cost of such toll bridge shall be added to and become a part of the appropriate sinking fund hereinafter provided for.

History: En. Sec. 10, Ch. 31, L. 1953.

32-1911. Sinking fund. The authority shall provide, in the proceedings authorizing the issuance of each series of bonds, for paying into the ap-

propriate sinking fund at stated intervals all moneys then remaining in the toll bridge revenue fund after paying all costs of operation, maintenance and repair of the toll bridge with respect of which such revenue fund was created. All moneys in each sinking fund shall be pledged for the payment of and used only for the purpose of paying (a) the interest upon the bonds as such interest shall fall due, and (b) the necessary fiscal agency charges for paying bonds and interest, and (c) the principal of the bonds as they fall due, and (d) any premiums upon bonds retired by call or purchase as herein provided. Prior to the issuance of the bonds of each series the authority may provide by resolution for using the sinking fund or any part thereof in the purchase of any of the outstanding bonds payable therefrom, at the market price thereof, but not exceeding the price, if any, at which the same shall at the next interest date be payable or redeemable, and all bonds redeemed or purchased shall forthwith be cancelled and no bonds shall be issued in place thereof. The moneys in each sinking fund, less such reserve as may be provided for the payment of principal and interest in the resolution authorizing the bonds, if not used within a reasonable time for the purchase of bonds for cancellation as above provided, shall be applied to the redemption of bonds then subject to redemption at the redemption price then applicable.

History: En. Sec. 11, Ch. 31, L. 1953.

32-1912. State highway engineer, duties—revenue fund. The state highway engineer shall have full charge of the construction of all toll bridges that may be authorized by the Montana toll bridge authority, and shall have full charge of the operation and maintenance thereof, and, under the supervision of said authority and subject to its rules and regulations said state highway engineer shall have charge of the collection of all tolls, which tolls shall be deposited to the credit of the respective toll bridge revenue fund designated by the authority.

Whenever funds are available for the construction of any toll bridge hereunder, the state highway engineer shall proceed with the construction thereof, but all contracts for such construction shall be let by the state highway commission by competitive bidding, after such notice and upon such terms as it shall prescribe by its rules and regulations.

History: En. Sec. 12, Ch. 31, L. 1953.

32-1913. Records—annual statement—transfer of proceeds from revenue fund to sinking fund. The state highway engineer shall keep full and complete accounts relating to each toll bridge constructed hereunder, and shall annually cause to be prepared and filed in the office of the secretary of state a balance sheet and income and profit and loss statement showing the financial condition of each toll bridge. All books, records and papers pertaining to any toll bridge shall at all reasonable times be open to the inspection of any citizen of the state.

The moneys remaining in each separate toll bridge revenue fund after providing the amount required for interest and redemption of bonds as hereinbefore provided, shall be held and applied in accordance with the proceedings relating to the authorization of such bonds.

The authority shall make and adopt rules and regulations regarding the collection of tolls and the deposit thereof to the credit of the appropriate toll bridge revenue fund, and the transfer therefrom to the appropriate toll bridge sinking fund of moneys for the payment and redemption of bonds as they severally mature.

History: En. Sec. 13, Ch. 31, L. 1953.

32-1914. Rights of way—eminent domain. The Montana toll bridge authority shall have power and authority to acquire by purchase or otherwise, necessary rights of way for any toll bridge and the approaches thereto, and it may exercise the power of eminent domain in the name of the state for said purpose.

Whenever it shall be deemed necessary by the authority to secure any right of way as herein provided, and the same cannot be acquired by purchase, the authority may direct the attorney general or any county attorney in any county wherein such right of way is situated, to procure such right of way by proceedings to be instituted as provided in sections 93-9901 to 93-9926 against all nonaccepting landholders.

A right of way is hereby given, dedicated and set apart for toll bridges and approaches thereto, through, over, upon or across any property of this state, including highways, and through, over, upon or across any county road and any street or alley, and the acquisition and use thereof as herein provided shall be deemed superior and a more necessary public use and purpose than the public use or purpose to which such highway, road, street or alley has theretofore been dedicated.

History: En. Sec. 14, Ch. 31, L. 1953.

32-1915. Limitations on building bridges near toll bridge. So long as any of the bonds issued hereunder for the construction of any toll bridge are outstanding and unpaid, there shall not be erected, constructed or maintained any other bridge for public use over or across the stream upon which such toll bridge is located within a distance of twenty (20) miles from either side of such toll bridge, excepting bridges actually in existence and being used at the time of the issuance of such bonds.

History: En. Sec. 15, Ch. 31, L. 1953.

TITLE 33

HOMESTEADS

Chapter 1. Homesteads, 33-101 to 33-129.

CHAPTER 1

HOMESTEADS

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33-101. (6945) Homestead—of what it consists. The homestead consists of the dwelling-house in which the claimant resides, and the land on which the same is situated, selected as in this chapter provided.

History: Earlier homestead acts were Sec. 194, p. 81, Bannack Stat.; Secs. 1-9, pp. 77-79, L. 1869; re-en. Secs. 261-269, pp. 84-85, Cod. Stat. 1871; re-en. Secs. 311-319, pp. 123-125, L. 1877; amd. by act of February 15, 1879; re-en. Secs. 311-319, First Div. Rev. Stat. 1879; re-en. Secs. 322-330, Comp. Stat. 1887.

This section en. Sec. 1670, Civ. C. 1895; re-en. Sec. 4694, Rev. C. 1907; re-en. Sec. 6945, R. C. M. 1921. Cal. Civ. C. Sec. 1237.

Cross-References

Decedents' estates, setting apart homestead, secs. 91-2501 to 91-2507.

Divorce cases, disposal of homestead, secs. 21-145 to 21-147.

Construction

The purpose of the homestead statutes is to carry out the mandate of the constitution, “that the legislative assembly shall enact liberal homestead and exemptions laws.” *Mitchell v. McCormick*, 22 M 249, 252, 56 P 216.

Homestead exemption laws were enacted for the benefit of the debtor and should be liberally construed in his favor. *Oregon Mtg. Co., Ltd. v. Dunbar et al.*, 87 M 603, 606, 289 P 559.

Lien on Homesteads

A money judgment cannot be impressed as a lien on a homestead without a showing that the money was borrowed for the purpose of buying the homestead, it not being sufficient that the money did buy the homestead. *Mitchell v. McCormick*, 22 M 249, 253, 56 P 216.

On What a Homestead May Be Claimed

A homestead may be claimed upon an undivided interest in land. *Wall v. Dugan et al.*, 76 M 239, 245 P 953.

Where the owner of two contiguous tracts of agricultural land upon each of which there was a dwelling-house, worked the land as a unit through a tenant, the owner sometimes residing in the one house and sometimes in the other according to whether the one or the other was occupied by the tenant, the fact of such tenancy did not bar the owner of the right to select the lands as a homestead. *Oregon Mtg. Co., Ltd. v. Dunbar et al.*, 87 M 603, 606, 289 P 559.

Probate Homestead

The homestead authorized to be selected by the probate court under section 91-2402, where none was selected prior to the death of decedent, is the homestead provided for by sections 33-101 to 33-104, and therefore the value and extent of it must not be any greater than as prescribed by those sections. In *re Trepp's Estate*, 71 M 154, 160, 162, 227 P 1005.

References

Cited or applied as section 1670, Civil Code, in *Yerrick v. Higgins*, 22 M 502, 505, 57 P 95; *Vincent v. Vineyard*, 24 M 207, 213, 61 P 131; *McCarthy v. Kelley et al.*, 63 M 233, 236, 206 P 782; *De Fontenay v. Childs*, 93 M 480, 485, 19 P 2d 650.

Collateral References

Homestead⇒58.

33-102. (6946) From what it may be selected. If the claimant be married, the homestead may be selected from the property of the husband, or, with the consent of the wife, from her separate property. When the claimant is not married, but is head of a family, within the meaning of section 33-125, the homestead may be selected from any of his or her property.

History: En. Sec. 1671, Civ. C. 1895; re-en. Sec. 4695, Rev. C. 1907; re-en. Sec. 6946, R. C. M. 1921. Cal. Civ. C. Sec. 1238.

Collateral References

Homestead⇒38.

33-103. (6947) Separate property of wife. The homestead cannot be selected from the separate property of the wife, without her consent, shown by her making, or joining in making, the declaration of homestead.

40 C.J.S. Homestead § 52.

26 Am. Jur. 1 et seq., Homestead.

Exemption of proceeds of voluntary sale of homestead. 1 ALR 483 and 46 ALR 814.

Scope and import of term "owner" in statute relating to real property. 2 ALR 778, at p. 793 and 95 ALR 1085, at p. 1095.

Failure of head of family to claim homestead exemption as affecting other members of family. 33 ALR 611.

Validity of contractual stipulations waiving debtor's exemption. 47 ALR 300.

Misconduct of surviving spouse as affecting marital rights in other's estate. 71 ALR 277, at p. 286 and 139 ALR 486, at p. 499.

Inclusion of different tracts or parcels in homestead. 73 ALR 116.

Homestead as subject to assessment for local improvements. 79 ALR 712.

Time of which, and extent to which, homestead exemption attaches to property received in exchange for homestead. 83 ALR 54.

Estate or interest in real property to which a homestead claim may attach. 89 ALR 511.

Effect of divorce on homestead. 97 ALR 1095.

One who supports (or is under a duty to support) in whole or part relatives who do not live with him as "head of family," "householder," etc., within homestead exemption statute. 118 ALR 1386.

Creation of homestead right in real estate as affecting previous mortgage, trust deed, or purchase money or vendor's lien. 123 ALR 427.

Multiple dwelling house part of which is occupied by owners as subject of homestead. 128 ALR 1431.

Extent of exemption of proceeds of voluntary sale of homestead as affected by lien or encumbrance. 161 ALR 1256.

Purchase of homestead as fraud on creditors. 161 ALR 1287.

40 C.J.S. Homestead § 43.

26 Am. Jur. 55-58, Homestead, §§ 87-91.

Validity of homestead declarations filed after bankruptcy. 145 ALR 501.

History: En. Sec. 1672, Civ. C. 1895; re-en. Sec. 4696, Rev. C. 1907; re-en. Sec. 6947, R. C. M. 1921. Cal. Civ. C. Sec. 1239.

Operation and Effect

Where a wife does not join in a home-

stead declaration on property owned by them as tenants in common, the exemption from attachment or execution does not attach to her interest. *Isom v. Larson*, 78 M 395, 400, 255 P 1049.

33-104. (6948) Exempt from forced sale. The homestead is exempt from execution or forced sale, except as in this chapter provided.

History: En. Sec. 1673, Civ. C. 1895; re-en. Sec. 4697, Rev. C. 1907; re-en. Sec. 6948, R. C. M. 1921. Cal. Civ. C. Sec. 1240.

Cross-Reference

Exemption from execution, sec. 93-5818.

Operation and Effect

The filing of a homestead declaration after a writ of attachment had been levied upon the land exempts the land from sale on execution obtained after the declaration was filed. *Wall v. Duggan et al.*, 76 M 239, 245, 245 P 953.

Where a wife does not join in a homestead declaration on property owned by them as tenants in common, the exemption from attachment or execution does not attach to her interest. *Isom v. Larson*, 78 M 395, 400, 255 P 1049.

Homestead exemption laws were enacted for the benefit of the debtor and should be liberally construed in his favor. *Oregon Mtg. Co., Ltd. v. Dunbar et al.*, 87 M 603, 608, 289 P 559.

References

Cited or applied as section 1673, Civil Code, in *Vincent v. Vineyard*, 24 M 207, 214, 61 P 131.

Collateral References

Homestead \hookrightarrow 12.
40 C.J.S. Homestead § 3.

Rights of surviving spouse and children in proceeds of sale of homestead in decedent's estate. 6 ALR 2d 515.

33-105. (6949) When subject to execution or forced sale. The homestead is subject to execution or forced sale in satisfaction of judgments obtained:

1. Before the declaration of homestead was filed for record, and which constitute liens upon the premises; but no judgments obtained before this code takes effect shall constitute such liens;
2. On debts secured by mechanics' or vendors' liens upon the premises;
3. On debts secured by mortgages on the premises, executed and acknowledged by the husband and wife, or by an unmarried claimant;
4. On debts secured by mortgages on the premises, executed and recorded before the declaration of homestead was filed for record.

History: En. Sec. 1674, Civ. C. 1895; re-en. Sec. 4698, Rev. C. 1907; re-en. Sec. 6949, R. C. M. 1921. Cal. Civ. C. Sec. 1241.

Filing of Homestead After Levy of Attachment

The filing of a homestead declaration after a writ of attachment had been levied upon the land exempts the land from sale on execution obtained after the declaration was filed. *Wall v. Duggan et al.*, 76 M 239, 244, 245, 245 P 953.

Id. The exemption statute which, by failing to include a homestead subject to attachment within the exceptions to the general rule that a homestead is exempt from execution, in effect declares that the lien of an attachment does not operate to defeat a homestead declaration, enters into and constitutes a part of a contract of sale of goods; therefore the contention

of the seller that to hold a homestead declaration filed after he (the seller) had caused an attachment to be levied on the land sought to be homesteaded by the buyer, would destroy a vested right secured to him by the lien, cannot be sustained.

Liens Against Homesteads

A homestead is subject to the lien of a mechanic for material, as well as labor, where the material is the object of the labor for which he claims his lien. *Merrigan v. English*, 9 M 113, 125, 22 P 454. See *Bonner v. Minnier*, 13 M 269, 275, 34 P 30.

A homestead is not exempt from foreclosure and sale to satisfy a lien for materials used by the owner in the improvement thereof, such lien being a "mechanic's lien" within the meaning of a statute

providing that the exemption of homesteads from forced sale shall not affect any laborer's or mechanic's lien. *Bonner v. Minnier*, 13 M 269, 275, 34 P 30.

A judgment docketed in 1892 was not a lien on the homestead subject to execution under this section, whatever its value, and a mortgage of the homestead given in 1895 took precedence of such judgment. *Vincent v. Vineyard*, 24 M 207, 214, 61 P 131.

Loans for Purchase of Homestead

In an action to quiet title to land claimed by plaintiff as a homestead, defendant judgment creditor asserted that he had advanced the money for the purchase of the property and that under the doctrine of subrogation he had a vendor's lien upon the premises which entitled him to subject the land to sale on execution, under this section. Held, that in the absence of evidence that the money was loaned for the purpose of purchasing the homestead, the claim of vendor's lien may not be upheld, even though it was actually used for that purpose. *De Fontenay v. Childs*, 93 M 480, 487, 19 P 2d 650.

Mortgage of Homestead

A mortgage of a homestead was void, and not subject to foreclosure, unless executed by the husband and wife, and the acknowledgment was an essential part of the execution by the wife. The abandonment of the homestead did not make valid a past mortgage of the same void ab initio. *American Sav. etc. Assn. v. Burghardt*, 19 M 323, 326, 48 P 391.

A homestead can be had in lands belonging to the United States. All the improvements upon the land, including fences, belong to the homestead, and cannot be taken by a creditor. Where a mortgage was given upon the homestead property by the husband, who afterward abandoned his wife, and the latter had not joined in the execution of the instrument, she was entitled to be protected in the enjoyment of the mortgaged premises as against the mortgagee seeking to foreclose the mortgage. *Watterson v. E. L. Bonner Co.*, 19 M 554, 555, 48 P 1108.

Waiver of Exemptions

While courts have held that advance general waivers in executory contracts of the exemption laws are void as contravening public policy, where a homestead claimant, with full knowledge of his rights in the premises and of the consequences of a relinquishment of his rights to withhold the specific property from forced sale, mortgages it, he waives his exemption if the statutory restrictions found in this section and section 33-106, are complied

with. *United States Bldg. etc. Assn. v. Stevens*, 93 M 11, 16, 17 P 2d 62.

Subd. 4. Construction—Where Homestead Exempted

In construing a statute the supreme court is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; hence, where a mortgage was recorded before a declaration of homestead filed, but outlawed before suit was brought on the note it was given to secure, to hold that the homestead described in the mortgage was subject to execution and forced sale under the money judgment on the note, not at the time of such judgment "secured" by such mortgage, would amount to interpolating the word "originally" into this subdivision, thus making it read "debts originally secured by mortgages." *Siuru v. Sell*, 108 M 438, 444, 91 P 2d 411.

Where Homestead Protected After Mortgage Outlawed

Where a mortgage was "executed and recorded before the declaration of homestead was filed for record," as required by this section, but had lost its validity by lapse of time as a security and ceased to be a mortgage or lien under section 52-206, held, that although the note which the mortgage was given to secure was still alive, and a money judgment obtained on the note, the homestead was not subject to execution or forced sale to satisfy such judgment, because the mortgage was outlawed and the debt therefore not "secured" by it when the judgment on the note was entered. *Siuru v. Sell*, 108 M 438, 442, 91 P 2d 411.

References

Cited or applied as section 1674, Civil Code, in *Mitchell v. McCormick*, 22 M 249, 251, 56 P 216; *Yerrick v. Higgins*, 22 M 502, 508, 57 P 95.

Collateral References

Homestead \Rightarrow 90.
40 C.J.S. Homestead § 93.
26 Am. Jur. 66, Homestead, §§ 103 et seq.

Validity of statute reducing or abolishing homestead exemption as against particular classes of claims. 6 ALR 1140.

Effect of exemptions as against fines, penalties, and costs. 10 ALR 770.

Lien of tax collector's bonds. 54 ALR 1285.

Mechanic's or materialman's lien on homestead. 65 ALR 1192.

Homestead as subject to assessment for local improvements. 79 ALR 712.

Who are within constitutional or statutory provisions subjecting homesteads to claims of laborers, servants or the like. 114 ALR 767.

33-106. (6950) How conveyed or encumbered. The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife.

History: En. Sec. 1675, Civ. C. 1895; re-en. Sec. 4699, Rev. C. 1907; re-en. Sec. 6950, R. C. M. 1921. Cal. Civ. C. Sec. 1242.

Operation and Effect

While courts have held that advance general waivers in executory contracts of the exemption laws are void as contravening public policy, where a homestead claimant, with full knowledge of his rights in the premises and of the consequences of a relinquishment of his rights to withhold the specific property from forced sale, mortgages it, he waives his exemption if the statutory restrictions found in section 33-105, and this section are complied with. *United States Bldg. etc. Assn. v. Stevens*, 93 M 11, 16, 17, 17 P 2d 62.

References

Cited or applied in *American Sav. etc. Assn. v. Burghardt*, 19 M 323, 326, 48 P 391; *Watterson v. E. L. Bonner Co.*, 19 M 554, 557, 48 P 1108; *Brown et al. v. Timmons et al.*, 79 M 246, 255, 256 P 176; *Siuru v. Sell*, 108 M 438, 445, 91 P 2d 411.

Collateral References

Homestead 118, 119.
40 C.J.S. Homestead §§ 129 et seq., 137.
26 Am. Jur. 82, Homestead, §§ 128 et seq.

Action for damage against signing spouse for breach of contract to convey homestead signed by one spouse only. 4 ALR 1272 and 16 ALR 1036.

Validity and effect of alienation or encumbrance of homestead without joinder or consent of wife. 45 ALR 395.

33-107. (6951) How abandoned. A homestead can be abandoned only by a declaration of abandonment, or a grant thereof, executed and acknowledged:

1. By the husband and wife, if the claimant is married;
2. By the claimant, if unmarried.

History: En. Sec. 1676, Civ. C. 1895; re-en. Sec. 4700, Rev. C. 1907; re-en. Sec. 6951, R. C. M. 1921. Cal. Civ. C. Sec. 1243.

Operation and Effect

In the absence of legislation to that effect, alienation of a homestead granted to a surviving wife does not constitute an abandonment of it. *Kerlee v. Smith*, 46 M 19, 23, 124 P 777.

References

United States Bldg. etc. Assn. v. Stevens, 93 M 11, 17, 17 P 2d 62.

Collateral References

Homestead 154, 166.
40 C.J.S. Homestead §§ 157, 163, 172.
26 Am. Jur. 118, Homestead, §§ 192 et seq.

Imprisonment as effecting abandonment of homestead. 5 ALR 259.

Loss of homestead rights by wife through absence enforced by act of husband. 42 ALR 1162 and 129 ALR 305.

33-108. (6952) When declaration of abandonment effectual. A declaration of abandonment is effectual only from the time it is filed in the office in which the homestead was recorded.

History: En. Sec. 1677, Civ. C. 1895; re-en. Sec. 4701, Rev. C. 1907; re-en. Sec. 6952, R. C. M. 1921. Cal. Civ. C. Sec. 1244.

Collateral References

Homestead 166.
40 C.J.S. Homestead § 172.

33-109. (6953) Proceedings on execution against homestead. When an execution for the enforcement of a judgment obtained in a case not within the classes enumerated in section 33-105 is levied upon the homestead, the judgment creditor may apply to the district court of the county

in which the homestead is situated, or a judge thereof, for the appointment of persons to appraise the value thereof.

History: En. Sec. 1678, Civ. C. 1895; re-en. Sec. 4702, Rev. C. 1907; re-en. Sec. 6953, R. C. M. 1921. Cal. Civ. C. Sec. 1245.

the execution paid from the excess above that amount. *Vincent v. Vineyard*, 24 M 207, 215, 61 P 131.

Operation and Effect

Judgments not constituting liens cannot be enforced under this section, but, after notice to the claimant and a report of the appraisers that the value of the homestead exceeds two thousand dollars, and that the property can be divided without material injury, execution can be enforced against such excess; if, however, the property cannot be divided, a sale will be ordered and

References

Cited or applied as section 1678, Civil Code, in *Yerrick v. Higgins*, 22 M 502, 507, 57 P 95; *Wall v. Duggan et al.*, 76 M 239, 245 P 953.

Collateral References

Homestead \S 200.
40 C.J.S. Homestead \S 216.

33-110. (6954) Application for appraisal. The application must be made upon a verified petition, showing:

1. The fact that an execution has been levied upon the homestead;
2. The name of the claimant;
3. That the value of the homestead exceeds the amount of the homestead exemption.

History: En. Sec. 1679, Civ. C. 1895; re-en. Sec. 4703, Rev. C. 1907; re-en. Sec. 6954, R. C. M. 1921. Cal. Civ. C. Sec. 1246.

References

Cited or applied as section 1679, Civil Code, in *Vincent v. Vineyard*, 24 M 207, 214, 61 P 131.

33-111. (6955) Filing petition. The petition must be filed with the clerk of the district court.

History: En. Sec. 1680, Civ. C. 1895; re-en. Sec. 4704, Rev. C. 1907; re-en. Sec. 6955, R. C. M. 1921. Cal. Civ. C. Sec. 1247.

33-112. (6956) Service of petition—notice of hearing. A copy of the petition, with a notice of the time and place of hearing, must be served upon the claimant, at least two days before the hearing.

History: En. Sec. 1681, Civ. C. 1895; re-en. Sec. 4705, Rev. C. 1907; re-en. Sec. 6956, R. C. M. 1921. Cal. Civ. C. Sec. 1248.

33-113. (6957) Appointment of appraisers. At the hearing the judge may, upon proof of the service of a copy of the petition and notice, and of the facts stated in the petition, appoint three disinterested residents and freeholders of the county to appraise the value of the homestead.

History: En. Sec. 1682, Civ. C. 1895; re-en. Sec. 4706, Rev. C. 1907; re-en. Sec. 6957, R. C. M. 1921. Cal. Civ. C. Sec. 1249.

33-114. (6958) Oath of appraisers. The persons appointed, before entering upon the performance of their duties, must take an oath to faithfully perform the same.

History: En. Sec. 1683, Civ. C. 1895; re-en. Sec. 4707, Rev. C. 1907; re-en. Sec. 6958, R. C. M. 1921. Cal. Civ. C. Sec. 1250.

33-115. (6959) Duty of appraisers. They must view the premises and appraise the value thereof, and if the appraised value exceeds the home-

stead exemption, they must determine whether the land claimed can be divided without material injury.

History: En. Sec. 1684, Civ. C. 1895; re-en. Sec. 4708, Rev. C. 1907; re-en. Sec. 6959, R. C. M. 1921. Cal. Civ. C. Sec. 1251.

33-116. (6960) Report of appraisers—contents. Within fifteen days after their appointment they must make to the judge a report in writing, which report must show the appraised value and their determination upon the matter of a division of the land claimed.

History: En. Sec. 1685, Civ. C. 1895; re-en. Sec. 4709, Rev. C. 1907; re-en. Sec. 6960, R. C. M. 1921. Cal. Civ. C. Sec. 1252.

33-117. (6961) Setting apart homestead. If, from the report, it appears to the judge that the land claimed can be divided without material injury, he must, by an order, direct the appraisers to set off to the claimant so much of the land, including the residence, as will amount in value to the homestead exemption, and the execution may be enforced against the remainder of the land.

History: En. Sec. 1686, Civ. C. 1895; re-en. Sec. 4710, Rev. C. 1907; re-en. Sec. 6961, R. C. M. 1921. Cal. Civ. C. Sec. 1253.

33-118. (6962) Order directing sale—when to be made. If, from the report, it appears to the judge that the land claimed exceeds in value the amount of the homestead exemption, and that it cannot be divided, he must make an order directing its sale under execution.

History: En. Sec. 1687, Civ. C. 1895; re-en. Sec. 4711, Rev. C. 1907; re-en. Sec. 6962, R. C. M. 1921. Cal. Civ. C. Sec. 1254.

Collateral References

Homestead 78, 199.
40 C.J.S. Homestead §§ 117, 216.

33-119. (6963) Amount of bid. At such sale no bid must be received, unless it exceeds the amount of the homestead exemption.

History: En. Sec. 1688, Civ. C. 1895; re-en. Sec. 4712, Rev. C. 1907; re-en. Sec. 6963, R. C. M. 1921. Cal. Civ. C. Sec. 1255.

33-120. (6964) Application of proceeds of sale. If the sale is made, the proceeds thereof, to the amount of the homestead exemption, must be paid to the claimant, and the balance applied to the satisfaction of the execution.

History: En. Sec. 1689, Civ. C. 1895; re-en. Sec. 4713, Rev. C. 1907; re-en. Sec. 6964, R. C. M. 1921. Cal. Civ. C. Sec. 1256.

References

Cited or applied as section 1689, Civil Code, in *Vincent v. Vineyard*, 24 M 207, 215, 61 P 131.

33-121. (6965) After sale, money equal to homestead exemption protected. The money paid to the claimant is entitled, for the period of six months thereafter, to the same protection against legal process and the voluntary disposition of the husband, which the law gives to the homestead.

History: En. Sec. 1690, Civ. C. 1895; re-en. Sec. 4714, Rev. C. 1907; re-en. Sec. 6965, R. C. M. 1921. Cal. Civ. C. Sec. 1257.

Collateral References

Homestead 78.
40 C.J.S. Homestead § 73.
26 Am. Jur. 31, Homestead, §§ 48 et seq.

Exemption of proceeds of voluntary sale of homestead. 1 ALR 483 and 46 ALR 814.
Extent of exemption of proceeds of vol-

untary sale of homestead as affected by lien or encumbrance. 161 ALR 1256.

33-122. (6966) Compensation of appraisers. The court must fix the compensation of the appraisers, not to exceed three dollars per day each for the time actually engaged.

History: En. Sec. 1691, Civ. C. 1895; re-en. Sec. 4715, Rev. C. 1907; re-en. Sec. 6966, R. C. M. 1921. Cal. Civ. C. Sec. 1258.

33-123. (6967) Costs. The execution creditor must pay the costs of these proceedings in the first instance; but in the cases provided for in sections 33-117 and 33-118 the amount so paid must be added as costs on execution, and collected accordingly.

History: En. Sec. 1692, Civ. C. 1895; re-en. Sec. 4716, Rev. C. 1907; re-en. Sec. 6967, R. C. M. 1921. Cal. Civ. C. Sec. 1259. 253, 56 P 216; Yerrick v. Higgins, 22 M 502, 507, 57 P 95; Wall v. Duggan et al, 76 M 239, 244, 245 P 953.

References

Cited or applied as section 1692, Civil Code, in Mitchell v. McCormick, 22 M 249,

Collateral References

Homestead \Rightarrow 199.
40 C.J.S. Homestead § 216.

33-124. (6968) Homesteads—quantity and value of land. Homesteads may be selected and claimed:

1. Consisting of any quantity of land not exceeding three hundred and twenty (320) acres used for agricultural purposes, and the dwelling house thereon and its appurtenances, and not included in any town plot, city or village; or

2. A quantity of land not exceeding in amount one-fourth ($\frac{1}{4}$) of an acre, being within a town plot, city or village, and the dwelling house thereon and its appurtenances.

3. Such homestead, in either case, shall not exceed in value the sum of two thousand five hundred dollars (\$2500.00), provided, however, that in any proceedings instituted to determine the value of such homestead, the assessed value of such land, with included appurtenances, if any, and of such dwelling house as appears on the last completed assessment roll preceding the institution of such proceedings shall be prima facie evidence of the value of the property claimed as a homestead.

History: En. Sec. 1693, Civ. C. 1895; re-en. Sec. 4717, Rev. C. 1907; re-en. Sec. 6968, R. C. M. 1921; amd. Sec. 1, Ch. 126, L. 1931; amd. Sec. 1, Ch. 166, L. 1937; amd. Sec. 1, Ch. 50, L. 1941. Cal. Civ. C. Sec. 1260.

Conflicts

There is no conflict between the provisions of this section and section 33-127. Mitchell v. McCormick, 22 M 249, 253, 56 P 216.

Excessive Area

Where a declaration of homestead inadvertently included one-sixth more land than allowed, the whole claim was invalid. Yerrick v. Higgins, 22 M 502, 507, 57 P 95.

While failure to accurately set forth in a homestead declaration the value of the

premises does not invalidate it, failure to strictly comply with the requirement that the area claimed must not exceed the statutory limit renders the declaration void. McCarthy v. Kelley et al., 63 M 233, 236, 206 P 782.

Id. Held, under the above rule, that a declaration of homestead covering "an undivided one-half interest and equity" in a 240 acre agricultural tract was void as an attempt to claim as exempt an area greater in quantity than 160 acres allowed by this section.

The validity of a homestead declaration was not affected by the fact that declarant included ten acres of farm land in the total of 160 acres selected, which he did not own; not having exceeded the limitation prescribed by statute, the declaration was good as to the remaining 150

acres. *Oregon Mtg. Co., Ltd. v. Dunbar et al.*, 87 M 603, 606, 289 P 559.

Homestead in Land Held in Cotenancy

A cotenant is entitled to a homestead in real estate held in cotenancy. *Lindley v. Davis*, 7 M 206, 213, 14 P 717 (overruling *Lindley v. Davis*, 6 M 453, 13 P 118); *Ferguson v. Speith*, 13 M 487, 495, 497, 34 P 1020.

Homestead in Partnership Property

When a creditor of a partnership has attached real estate belonging to such partnership, the members of the firm cannot, by mutual releases, destroy the nature of the property, or of the tenancy, so that either one of them can annul the lien of attachment by claiming a part of the land as a homestead. *Lindley v. Davis*, 6 M 453, 455, 13 P 118, overruled in *Lindley v. Davis*, 7 M 206, 211, 14 P 717. See *Ferguson v. Speith*, 13 M 487, 497, 34 P 1020.

A partner is entitled, as against the creditors of the firm, to claim and hold a homestead in the partnership estate. *Ferguson v. Speith*, 13 M 487, 489, 34 P 1020.

Land Used for Agricultural Purposes

Held, that lands used by a homestead claimant for grazing horses fall within the provision of this section, that homesteads may comprise land "used for agricultural purposes," the fact that the animals were not used for tilling the soil being immaterial. *De Fontenay v. Childs*, 93 M 480, 485, 19 P 2d 650.

Location of Parcels of Land in Homestead

Conceding, without deciding, that where an agricultural homestead consists of more

than one parcel of land, the parcels selected must be contiguous (this section, defining such a homestead, being silent on the subject), where two tracts cornered with each other and were used as one farm, they were contiguous, and the declaration of homestead attacked as void on the ground of noncontiguity by the purchaser of the land in an action to quiet title, was not open to the objection urged. *Oregon Mtg. Co., Ltd. v. Dunbar et al.*, 87 M 603, 606, 289 P 559.

Necessity for Actual Occupation

Actual occupancy of the land claimed as a homestead is necessary in order to exempt it from sale on execution. *Power v. Burd*, 18 M 22, 43 P 1094.

Probate Homestead

The homestead authorized to be selected by the probate court under section 91-2402, where none was selected prior to the death of decedent, is the homestead provided for by sections 33-101 to 33-104, and therefore the value and extent of it must not be any greater than as prescribed by those sections. In *re Trepp's Estate*, 71 M 154, 160, 162, 227 P 1005.

References

Cited or applied as section 1693, Civil Code, in *Vincent v. Vineyard*, 24 M 207, 213, 61 P 131.

Collateral References

Homestead \Rightarrow 61-68.
40 C.J.S. Homestead §§ 56-62.
26 Am. Jur. 55-58, Homestead, §§ 87-91.

Validity of homestead declarations filed after bankruptcy. 145 ALR 501.

33-125. (6969) "**Head of family**" defined. The phrase "head of a family" as used in this chapter, includes within its meaning:

1. The husband, when the claimant is a married person, or the wife, where the husband fails to join in the declaration.

2. Every person who has attained the age of sixty years and who actually resides on the premises.

3. Every person who has residing on the premises with him or her, and under his or her care and maintenance, either:

First. His or her minor child, or the minor child of his or her wife or husband, or former wife or husband;

Second. A minor grandchild, brother or sister, or minor child of a brother or sister;

Third. A father, mother, grandfather, or grandmother;

Fourth. The father, mother, grandfather, or grandmother, of a husband or wife; or former husband or wife;

Fifth. An unmarried sister or any other of the relatives mentioned in this section, who have attained the age of majority and are unable to take care of or support themselves.

History: En. Sec. 1694, Civ. C. 1895; re-en. Sec. 4718, Rev. C. 1907; re-en. Sec. 6969, R. C. M. 1921; amd. Sec. 1, Ch. 86, L. 1925. Cal. Civ. C. Sec. 1261.

Operation and Effect

The expression "head of a family" includes the abandoned wife. *Mennell v. Wells*, 51 M 141, 148, 149 P 954.

Held, under the above rules, that a declaration of homestead stating that the declarant "is the head of a family" was sufficient as against the contention that under section 33-127, providing that the declaration must contain, *inter alia*, "a statement showing that the person making it is the head of a family," it was incumbent upon declarant to state the facts showing that she was such head as defined by this section. *Esterly v. Broadway Garage Co. et al.*, 87 M 64, 68, 285 P 172.

Id. Where a widow had residing with her on land claimed by her as a homestead, her daughter and her minor child abandoned by the husband and father, the daughter working off and on and the child, when she worked, being taken care


of by claimant, the latter was the "head of a family" within the meaning of the homestead law, subdivision 3 of this section, declaring that one having resided on the premises with him or her, a minor grandchild, is the head of a family.

A homestead claimant who at the time of filing his declaration lived on the property with his second wife and three minor children of his first (divorced) wife, and lived thereon at the time of the trial, except that his second wife was then deceased, was the "head of a family" within the meaning of this section, unaffected by the fact that the custody of the children had been awarded to the first wife in the divorce action. *De Fontenay v. Childs*, 93 M 480, 486, 19 P 2d 650.

References

Williams v. Sorenson, 106 M 122, 125, 75 P 2d 784.

Collateral References

Homestead  18.

40 C.J.S. Homestead § 24.

33-126. (6970) Mode of selection. In order to select a homestead, the husband or other head of a family, or in case the husband has not made such selection, the wife, must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record.


History: En. Sec. 1700, Civ. C. 1895; re-en. Sec. 4719, Rev. C. 1907; re-en. Sec. 6970, R. C. M. 1921. Cal. Civ. C. Sec. 1262.

Operation and Effect

The alienation of a probate homestead, by the widow, is not an abandonment. *Kerlee v. Smith*, 46 M 19, 23, 124 P 777.

When the husband fails to select a homestead, the wife may select it. *Mennell v. Wells*, 51 M 141, 148, 149 P 954.

Collateral References

Homestead  41-47.

40 C.J.S. Homestead § 46.

26 Am. Jur. 55-58, Homestead, §§ 87-91.

33-127. (6971) Declaration of homestead—must contain what. The declaration of homestead must contain:

1. A statement, showing that the person making it is the head of a family; or, when the declaration is made by the wife, showing that her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit;

2. A statement that the person making it is residing on the premises, and claims them as a homestead;

3. A description of the premises;

4. An estimate of their actual cash value.

History: En. Sec. 1701, Civ. C. 1895; re-en. Sec. 4720, Rev. C. 1907; re-en. Sec. 6971, R. C. M. 1921. Cal. Civ. C. Sec. 1263.

Conflicts

There is no conflict between the provisions of this section and section 33-124. *Mitchell v. McCormick*, 22 M 249, 253, 56 P 216.

Probate Homestead

In selecting a homestead for the family of a decedent where none was selected prior to his death, the probate court may, in the absence of a mode of procedure prescribed by the statute, proceed in substantially the manner indicated by this section et seq., for its selection during the lifetime of a decedent, thereafter follow-

ing the procedure outlined by sections 91-2502 to 91-2507. In re Trepp's Estate, 71 M 154, 163, 227 P 1005.

Sufficiency of Declaration

Under an admission that property in controversy is a homestead, and has been set apart as provided by law, it cannot be objected that the homesteader did not allege its statutory value in the declaration of homestead. *Mitchell v. McCormick*, 22 M 249, 252, 56 P 216.

Id. The declaration of homestead must contain the estimated value, not the statutory value.

A declaration of homestead is valid and effective, though the estimated cash value is far in excess of the limit fixed in the statute, provided it contains the other statements required; but, as to area, the premises described must fall within the statutory limit, otherwise the declaration is ineffective to exempt the property claimed. *Yerrick v. Higgins*, 22 M 502, 508, 57 P 95; *Mitchell v. McCormick*, 22 M 249, 56 P 216, modified.

The requirements of the statute by which a homestead exemption right becomes fixed are mandatory and must be complied with. *Yerrick v. Higgins*, 22 M 502, 510, 57 P 95.

33-128. (6972) Declaration must be recorded. The declaration must be recorded in the office of the clerk of the county in which the land is situated.

History: En. Sec. 1702, Civ. C. 1895; re-en. Sec. 4721, Rev. C. 1907; re-en. Sec. 6972, R. C. M. 1921. Cal. Civ. C. Sec. 1264.

33-129. (6973) Tenure by which homestead is held. From and after the time the declaration is filed for record, the premises therein described constitute a homestead. Upon the death of the person whose property was selected as a homestead, it shall go to his or her heirs or devisees, subject to the use of the widow during her life, if the property selected as a homestead, before selection, belonged to the husband; and subject to the use of the husband during his life, if the property selected as a homestead before selection belonged to the wife. And in no case shall the homestead be held liable for the debts of the owner, except as provided in this chapter.

History: En. Sec. 1703, Civ. C. 1895; re-en. Sec. 4722, Rev. C. 1907; re-en. Sec. 6973, R. C. M. 1921. Cal. Civ. C. Sec. 1265.

Operation and Effect

A homestead, being exempt from execution under this section, does not pass to the trustee in bankruptcy where the bankrupt makes claim of exemption, and as to such property sold on mortgage foreclosure, the bankrupt retains his right of redemption which he may transfer, entitling the transferee to make redemption. *Brown et al. v. Timmons et al.*, 79 M 246, 255, 256 P 176.

Held, under the above rules, that a declaration of homestead stating that the declarant "is the head of a family" was sufficient as against the contention that under this section, providing that the declaration must contain, *inter alia*, "a statement showing that the person making it is the head of a family," it was incumbent upon declarant to state the facts showing that she was such head as defined by section 33-125. *Esterly v. Broadway Garage Co.*, et al., 87 M 64, 68 et seq., 285 P 172.

Value

The homestead consists of the real property described in the declaration, although its value exceeds two thousand five hundred dollars. *Vincent v. Vineyard*, 24 M 207, 214, 61 P 131.

Id. Where a declaration of homestead was filed, the homestead attribute was impressed on all the property described in the declaration, although its value exceeded the sum of two thousand five hundred dollars.

Collateral References

Homestead \Rightarrow 43.
40 C.J.S. Homestead § 46.

References

Cited or applied as section 1703, Civil Code, in *Mitchell v. McCormick*, 22 M 249, 252, 56 P 216; *Yerrick v. Higgins*, 22 M 502, 508, 57 P 95; *Vincent v. Vineyard*, 24 M 207, 213, 61 P 131; as section 4722, Revised Codes, in *Kerlee v. Smith*, 46 M 19, 23, 124 P 777; *Wall v. Duggan et al.*, 76 M 239, 244, 245 P 953.

Collateral References

Homestead \Rightarrow 47, 134.
40 C.J.S. Homestead §§ 46, 242.

TITLE 34

HOTELS

- Chapter 1. Liability to guests—lien for accommodations—penalty for defrauding, 34-101 to 34-112.
2. Sanitation and control by state board of health, 34-201 to 34-217.

CHAPTER 1

LIABILITY TO GUESTS—LIEN FOR ACCOMMODATIONS— PENALTY FOR DEFRAUDING

- Section 34-101. Innkeeper's liability.
34-102. How exempted from liability.
34-103. Lien of hotel, boarding-house and lodging-house keepers.
34-104. Sale of baggage by boarding- or lodging-house keepers.
34-105. How exempted from liability.
34-106. Penalty.
34-107. Limitation of innkeeper's liability.
34-108. Liable for loss or damage caused by fire, when.
34-109. Not liable without negligence.
34-110. Enforcement of lien.
34-111. Notice of sale.
34-112. Defrauding inn- and hotel-keepers, etc.—penalty.

34-101. (7673) Innkeeper's liability. An innkeeper is liable for all losses of or injuries to personal property placed by his guests under his care, unless occasioned by an irresistible superhuman cause, by a public enemy, by the negligence of the owner, or by the act of some one whom he brought into the inn.

History: En. Sec. 2500, Civ. C. 1895; re-en. Sec. 5164, Rev. C. 1907; re-en. Sec. 7673, R. C. M. 1921. Cal. Civ. C. Sec. 1859. Field Civ. C. Sec. 936.

Cross-Reference

Refusal to receive guests, penalty, sec. 94-35-104.

Collateral References

Innkeepers \Rightarrow 11.
43 C.J.S. Innkeepers § 12.
28 Am. Jur. 585, Innkeepers, §§ 67 et seq.

Improper motive or purpose in going to hotel as affecting one's status as guest, or invitee of a guest, for purpose of determining degree of care owed by proprietor. 16 ALR 1388.

What information must be given by a

guest upon delivering articles into custody of innkeeper. 53 ALR 1048.

Liability of hotel company for loss or damage to guest's baggage while being transported to or from hotel. 76 ALR 1106.

Construction, scope and application of words descriptive of property in statute relating to liability of innkeeper to guest for loss or damage to property. 115 ALR 1088.

Place of posting, and contents of, notice by innkeeper as to safety receptacle for valuables of guests, necessary to comply with statutory provisions in that regard. 119 ALR 796.

Effect of notice limiting liability for valuables or effects of guests in hotel. 9 ALR 2d 818.

Tort liability of innkeeper for theft by servant. 15 ALR 2d 836.

34-102. (7674) How exempted from liability. If an innkeeper keeps a fire-proof safe, and gives notice to a guest, either personally or by putting up a printed notice in a prominent place in the room occupied by the guest, that he keeps such a safe, and will not be liable for money, jewelry, documents, or other articles of unusual value and small compass, unless placed

therein, he is not liable, except so far as his own acts contribute thereto, for any loss of or injury to such articles, if not deposited with him, and not required by the guest for present use.

History: En. Sec. 2501, Civ. C. 1895; re-en. Sec. 5165, Rev. C. 1907; re-en. Sec. 7674, R. C. M. 1921. Cal. Civ. C. Sec. 1860. Field Civ. C. Sec. 937.

43 C.J.S. Innkeepers § 17.

Effect of notice limiting liability for valuables or effects of guests in hotel. 9 ALR 2d 818.

Collateral References

Innkeepers 11(7, 11).

34-103. (7675) Lien of hotel, boarding-house and lodging-house keepers. Hotel men, boarding-house and lodging-house keepers shall have a lien upon the baggage and other property of value brought into such hotel, inn, or boarding- or lodging-house, by such guest or boarder or lodger, for his accommodation, board, or lodging and room rent, and such extras as are furnished at his request, with the right of the possession of such baggage or other property of value, until all such charges are paid; provided, however, that nothing herein contained shall be construed to give a lien upon property sold on the instalment plan, and title to which is to remain in the vendor until final payment.

History: En. Sec. 2502, Civ. C. 1895; amd. Sec. 1, p. 132, L. 1899; re-en. Sec. 5166, Rev. C. 1907; re-en. Sec. 7675, R. C. M. 1921. Cal. Civ. C. Sec. 1861.

Collateral References

Innkeepers 13.

43 C.J.S. Innkeepers § 26.

28 Am. Jur. 624, Innkeepers, §§ 123 et seq.

Cross-Reference

Agister's liens, secs. 45-1106 to 45-1108.

Innkeeper's lien or right of distress on property sold on conditional sale. 45 ALR 949, 960.

34-104. (7676) Sale of baggage by boarding- or lodging-house keepers. Whenever any trunk, carpetbag, valise, box, bundle, or other baggage has heretofore come, or shall hereafter come into the possession of the keeper of any hotel, inn, boarding- or lodging-house, as such, and has remained, or shall remain unclaimed for the period of six months, such keeper may proceed to sell the same at public auction, and out of the proceeds of such sale may retain the charges for storage, if any, and the expense of advertising and sale thereof; but no such sale shall be made until the expiration of four weeks from the first publication of notice of such sale in a newspaper published in or nearest the city, town, or place in which said hotel, inn, boarding- or lodging-house is situated. Said notice shall be published once a week for four successive weeks in some newspaper, daily or weekly, of general circulation, and shall contain a description of each trunk, carpetbag, valise, box, bundle, or other baggage, as near as may be; the name of the owner, if known; the name of said keeper and the time and place of sale; and the expenses incurred for advertising shall be a lien upon such trunk, carpetbag, valise, box, bundle, or other baggage, in a ratable proportion, according to the value of such piece of property, or thing, or article sold; and in case any balance arising from such sale shall not be claimed by the rightful owner within one week from the day of said sale, the same shall be paid into the treasury of the county in which such sale took place; and if the same be not claimed by the owner thereof,

or his legal representatives, within one year thereafter, the same shall be paid into the general fund of said county.

History: En. Sec. 2503, Civ. C. 1895;
re-en. Sec. 5167, Rev. C. 1907; re-en. Sec.
7676, R. C. M. 1921. Cal. Civ. C. Sec. 1862.

Collateral References

28 Am. Jur. 632, Innkeepers, § 132.

34-105. (7677) How exempted from liability. Whenever the proprietor or proprietors of any hotel or inn shall provide a safe or other secure place of deposit therein for the safe-keeping of any money, jewels, ornaments, or other articles of value, belonging to any guest or guests of such hotel or inn, and shall cause to be posted and maintained printed notices thereof in the office or public room, and within every guest's room of such inn or hotel, the proprietor or proprietors thereof shall not be liable to any such guest or guests who shall neglect to deliver their money, jewels, ornaments, or other articles of value to the proprietor or other person in charge of such safe or place of deposit for deposit and safe-keeping therein, for any loss of such money or other articles which may be sustained by such guest by theft or otherwise.

History: En. Sec. 2504, Civ. C. 1895;
re-en. Sec. 5168, Rev. C. 1907; re-en. Sec.
7677, R. C. M. 1921. Cal. Civ. C. Sec. 1860.

Collateral References

Innkeepers 11(7, 11).
43 C.J.S. Innkeepers § 17.
28 Am. Jur. 591, Innkeepers, §§ 74-81.

34-106. (7678) Penalty. Any person or officer violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail not to exceed ninety days, or by a fine of not more than one hundred dollars, and costs, or both such fine and imprisonment.

History: En. Sec. 2507, Civ. C. 1895;
re-en. Sec. 5171, Rev. C. 1907; re-en. Sec.
7678, R. C. M. 1921.

Collateral References

Innkeepers 15, 16.
43 C.J.S. Innkeepers §§ 27, 28.

34-107. (7679) Limitation of innkeeper's liability. No innkeeper shall be liable for the loss or destruction by fire of the property received by him from a guest, stored or being, with the knowledge of such guest, in a barn or other outbuilding, where it shall appear that such loss or destruction is the work of an incendiary, and occurred without the fault or negligence of such innkeeper or his servants.

History: En. Sec. 2508, Civ. C. 1895;
re-en. Sec. 5172, Rev. C. 1907; re-en. Sec.
7679, R. C. M. 1921.

Collateral References

Innkeepers 11(11).
43 C.J.S. Innkeepers § 20.
28 Am. Jur. 616, Innkeepers, § 106.

34-108. (7680) Liable for loss or damage caused by fire, when. All inn- or hotel-keepers coming within the provisions of this chapter shall be liable for loss of or damage to any baggage or other property of their guests caused by fire, in every case where such loss or damage is the result of the negligence of such keepers or their servants.

History: En. Sec. 2509, Civ. C. 1895;
re-en. Sec. 5173, Rev. C. 1907; re-en. Sec.
7680, R. C. M. 1921.

34-109. (7681) Not liable without negligence. No hotel- or innkeeper shall be liable to any guest for the loss of wearing-apparel, goods, or per-

sonal effects, where it shall appear that such loss occurred without the fault or negligence of such hotel-keeper or his employees.

History: En. Sec. 2510, Civ. C. 1895;
re-en. Sec. 5174, Rev. C. 1907; re-en. Sec.
7681, R. C. M. 1921.

34-110. (7682) Enforcement of lien. Any hotel- or innkeeper who shall have a lien upon any of the goods, baggage, or other chattel property of his guests may, at the expiration of six months from the date of the departure of such guest from such hotel or inn, sell and dispose of the same at public auction and to the highest bidder for cash, or so much thereof as may be necessary to pay the sum due such hotel or innkeeper, together with the cost of storage, advertisement, and sale.

History: En. Sec. 2512, Civ. C. 1895;
re-en. Sec. 5175, Rev. C. 1907; re-en. Sec.
7682, R. C. M. 1921.

Collateral References

Innkeepers \Rightarrow 13.

43 C.J.S. Innkeepers § 26.

28 Am. Jur. 632, Innkeepers, § 132.

34-111. (7683) Notice of sale. Before proceeding to the sale of the property of any guest, as provided in the preceding section, such hotel- or innkeeper shall cause a notice of such sale, containing a description of the property to be sold, and the time and place where such property will be sold, to be published once each week for two successive weeks in a newspaper published in the city or town in which such hotel or inn is situated; but if there be none, then in some newspaper published nearest such town or city, and in case any balance arising from such sale shall not be claimed by the rightful owner within thirty days from the day of such sale, the same shall be paid into the treasury of the county in which such sale took place; and if such balance be not claimed by the owner thereof, or his legal representatives, within one year thereafter, the same shall be paid into the school fund of such county.

History: En. Sec. 2513, Civ. C. 1895;
re-en. Sec. 5176, Rev. C. 1907; re-en. Sec.
7683, R. C. M. 1921.

34-112. (7684) Defrauding inn- and hotel-keepers, etc.—penalty. Any person who shall put up at any inn or hotel, restaurant, cafe, apartment, rooming- or boarding-house, or hospital, and who shall (except where credit is given by agreement) procure any food, entertainment, or accommodation without paying therefor, and with intent to cheat and defraud the owner or keeper thereof out of his pay for same, or who, with intent to cheat and defraud such owner or keeper out of the pay thereof, shall obtain credit at any hotel or inn, restaurant, cafe, apartment, rooming- or boarding-house, or hospital, for such food, entertainment, or accommodation, by means of any false show of baggage or effects brought thereto, or who shall, with such intent, remove or cause to be removed any baggage or effects from any hotel or inn, restaurant, cafe, apartment, rooming- or boarding-house, or hospital, where there is a lien existing thereon for the proper charges due from such guest for fare and board furnished therein, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by imprisonment not exceeding three months, or by fine not exceeding one hundred dollars and costs, or both such fine and imprisonment.

History: En. Sec. 2514, Civ. C. 1895; re-en. Sec. 5177, Rev. C. 1907; amd. Sec. 1, Ch. 9, L. 1917; re-en. Sec. 7684, R. C. M. 1921. Cal. Pen. C. Sec. 537.

NOTE.—This act also appears in the Code as section 94-3550.

References

Saner v. Bowker, 69 M 463, 467, 222 P 1056.

Collateral References

Innkeepers 16.
43 C.J.S. Innkeepers § 28.
28 Am. Jur. 648, Innkeepers, §§ 151, 152.

CHAPTER 2

SANITATION AND CONTROL BY STATE BOARD OF HEALTH

- Section 34-201.** Hotel defined—must maintain office and register.
34-202. Regulation of hotels as to sanitation, plumbing and washroom supplies.
34-203. Bedrooms and bedding, regulation of.
34-204. Regulation of cooking utensils, kitchens and dining-rooms.
34-205. Ashes.
34-206. Fumigation of rooms.
34-207. State board of health to adopt rules for enforcement of act.
34-208. Appointment of assistants by state board of health—qualifications.
34-209. Certificate of inspection—posting.
34-210. Inspector to file complaints for violation of act—preliminary notice.
34-211. Disposal of fines.
34-212. Drinking water.
34-213. Penalty for violations.
34-214. Cleansing walls before putting on new paper or wall covering.
34-215. Duty in case of contagious or infectious disease.
34-216. County and city boards of health to enforce act.
34-217. Violation of act a misdemeanor.

34-201. (2485) Hotel defined—must maintain office and register.

Every building or structure kept, used, or maintained as, or advertised as, or held out to the public to be an inn, hotel or public lodging house or place where sleeping accommodations are furnished for hire to transient guests, whether with or without meals, in which five or more rooms are used for the accommodation of such transient guests, shall maintain an office and register and for the purpose of this act shall be deemed to be a hotel, and whenever the word hotel shall occur in this act, it shall be construed to mean every such structure as described in this section.

History: En. Sec. 1, Ch. 36, L. 1919; re-en. Sec. 2485, R. C. M. 1921.

References

State ex rel. Altop v. City of Billings et al., 79 M 25, 28, 255 P 11.

Cross-Reference

Powers of board of health with respect to this chapter, sec. 69-105.1.

Collateral References

Innkeepers 3.
43 C.J.S. Innkeepers § 1.

34-202. (2486) Regulation of hotels as to sanitation, plumbing and washroom supplies. Every hotel shall be well constructed, plumbed and drained according to established sanitary principles; shall be kept clean and in a sanitary condition, free from effluvia arising from any sewer, drain, privy, or other source within control of owner, manager, agent, or other person in charge. All hotels in cities, towns, and villages where a system of water-works and sewers is maintained for public use, shall be equipped with suitable lavatories and toilet facilities, within the building, for the accommodation of its guests. The sewer must be connected with

the public sewer system. Public washrooms must be supplied with clean individual towels or paper towels. Use of the common roller towel is absolutely prohibited. All hotels in cities, towns, or villages not having a public sewer system or water works, shall have properly constructed privies, vaults, or other sanitary devices, which shall always be kept clean, properly ventilated, and well-screened from insects and rodents, and shall be provided with tight-fitting self-closing doors. All toilets or privies shall be lighted. The wall or partition between the apartments must be tight. A separate apartment with separate entrance, properly designated and screened from public view, must be provided for each sex. Where septic tanks are installed, they must be constructed according to plans approved by the state board of health.

History: En. Sec. 2, Ch. 36, L. 1919;
re-en. Sec. 2486, R. C. M. 1921.

Cross References

Fire escape act, violations, sec. 69-1809.
Retiring rooms for employees required
in hotels, secs. 69-2501 to 69-2504.

References

State ex rel. Altop v. City of Billings
et al., 79 M 25, 28, 255 P 11.

Collateral References

Innkeepers \Rightarrow 2.
43 C.J.S. Innkeepers § 5.
25 Am. Jur. 302, Health, §§ 24-27.

34-203. (2487) Bedrooms and bedding, regulation of. All bedrooms shall be kept free from vermin, and the bedding shall be clean and sufficient in quantity and quality; all sheets shall be at least eight feet long; each guest shall at all times be furnished with two clean towels; in case bedrooms are carpeted, the carpet or carpets thereon shall be taken up and thoroughly cleaned at least once each year; and in all hotels where fifty cents or more per night is charged for lodging, the sheets and pillow cases shall be changed after the departure of each guest.

History: En. Sec. 3, Ch. 36, L. 1919;
re-en. Sec. 2487, R. C. M. 1921.

Collateral References

28 Am. Jur. 559, Innkeepers, § 32.

Justification of guest in leaving hotel or
boarding-house before expiration of con-
tract. 10 ALR 127.

What constitutes a hotel or inn. 19 ALR
517.

34-204. (2488) Regulation of cooking utensils, kitchens and dining-rooms. No rusted tin or iron vessel or utensil shall be used in cooking food, and all food stuffs shall be kept in a clean and suitable place, free from dampness and contamination; the closets, cupboards, refrigerators and the floors and walls of all kitchens and dining-rooms shall be, at all times, kept free from dirt, and no dust or greases shall be allowed to collect thereon.

History: En. Sec. 4, Ch. 36, L. 1919;
re-en. Sec. 2488, R. C. M. 1921.

Cross-Reference

Oleomargarine, use regulated, sec. 94-35-
146.

34-205. (2489) Ashes. No ashes from any hotel shall be dumped or kept in or adjacent thereto, or in any outhouse connected with any hotel unless the same be placed in a tight metal container with a tight metal lid kept thereon, or be disposed of in such manner as to eliminate any possibility of fire and public nuisances.

History: En. Sec. 5, Ch. 36, L. 1919;
re-en. Sec. 2489, R. C. M. 1921.

34-206. (2490) Fumigation of rooms. Whenever any room in any hotel shall have been occupied by any person having a contagious or infectious disease, the said room shall be thoroughly fumigated under the direction of the health officer, and all bedding therein thoroughly disinfected, before said room shall be occupied by any other person; but, in any event, such room shall not be let to any person for at least twenty-four hours after such fumigation, or disinfection.

History: En. Sec. 6, Ch. 36, L. 1919;
re-en. Sec. 2490, R. C. M. 1921.

34-207. (2491) State board of health to adopt rules for enforcement of act. The state board of health shall adopt all needful rules and regulations for the thorough and uniform enforcement of the provisions of this act throughout the state.

History: En. Sec. 7, Ch. 36, L. 1919;
re-en. Sec. 2491, R. C. M. 1921.

References

State ex rel. Altop v. City of Billings
et al., 79 M. 25, 28, 255 P. 11.

Collateral References

Innkeepers \Rightarrow 1.
43 C.J.S. Innkeepers § 4.
25 Am. Jur. 314, Health, §§ 36 et seq.

34-208. (2492) Appointment of assistants by state board of health—qualifications. It shall be the duty of the state board of health and it shall have power, jurisdiction, and authority to engage or appoint such assistants or inspectors as may be needed in enforcing the provisions of this act and the rules and regulations as provided for under the preceding section. Such inspectors or appointees shall possess such qualifications as the state board of health may determine are necessary to successfully carry on the work. The state board of health shall also fix their compensation and shall assign to them their duties.

History: En. Sec. 8, Ch. 36, L. 1919;
re-en. Sec. 2492, R. C. M. 1921.

Collateral References

Health \Rightarrow 7(1).
39 C.J.S. Health § 7.

34-209. (2493) Certificate of inspection—posting. If the inspector shall find, after the examination of any hotel that the provisions of this act and the rules and regulations of the state board of health adopted in conformity therewith have been fully complied with he shall issue a certificate to the effort to the person operating the same, and said certificate shall be posted in a conspicuous place in said inspected building.

History: En. Sec. 9, Ch. 36, L. 1919;
re-en. Sec. 2493, R. C. M. 1921.

34-210. (2494) Inspector to file complaints for violation of act—preliminary notice. It shall be the duty of the inspector, upon ascertaining by inspection or otherwise, that any hotel or other place or thing required or allowed by this act to be inspected, is being carried on contrary to the provisions of this act, to make complaint and cause the arrest of the person so violating the same, and it shall be the duty of the county attorney in such case to prepare all necessary papers and conduct such prosecution; provided, however, that no prosecution shall follow until such time as the person conducting or operating such hotel, public inn or lodging house, has been notified wherein such hotel, public inn or lodging house fails to meet the requirements of this act or the rules and regulations of the state

board of health, and such time to remedy the failure as the state board of health or its representatives may rule.

History: En. Sec. 10, Ch. 36, L. 1919;
re-en. Sec. 2494, R. C. M. 1921.

Collateral References

Innkeepers↔15.
43 C.J.S. Innkeepers § 27.

34-211. (2495) Disposal of fines. All moneys collected for fines under this act shall be turned over to the state treasurer, who shall deposit them to the credit of the general fund.

History: En. Sec. 11, Ch. 36, L. 1919;
amd. Sec. 1, Ch. 84, L. 1921; re-en. Sec.
2495, R. C. M. 1921.

Collateral References

Fines↔20.
36 C.J.S. Fines § 19.

34-212. (2497) Drinking water. It shall be the duty of every person conducting or operating a hotel, public inn or lodging house to have available at all times in the lobby, office, or other convenient place, an ample supply of drinking water, pure and free from contamination. The source of supply must be far enough removed from privy vaults or other means of contamination to prevent drainage from said vaults to the wells or other source of supply, and the water supply shall be subject to examination by the state board of health and when found unfit for drinking purposes, its use must be discontinued forthwith.

History: En. Sec. 12, Ch. 36, L. 1919;
re-en. Sec. 2497, R. C. M. 1921.

34-213. (2498) Penalty for violations. Each owner, manager, agent, or person in charge of a hotel, or other business mentioned in this act, who violates any provisions of this act shall be deemed guilty of a misdemeanor and shall be fined not less than ten dollars nor more than one hundred dollars, or shall be imprisoned in the county jail for not less than ten days, nor more than three months, or both, and every day that such hotel is carried on in violation of this act shall constitute a separate offense.

History: En. Sec. 13, Ch. 36, L. 1919;
re-en. Sec. 2498, R. C. M. 1921.

34-214. (2499) Cleansing walls before putting on new paper or wall covering. Whenever the paper or substitute wall covering on the ceiling or walls of a room in any dwelling, tenement, or apartment house, or house owned or maintained for rental purposes, has become loosened so as to be in danger of collecting and retaining dust, germs, vermin, or filth, the same shall be removed, and the walls and ceilings thoroughly cleaned before new wall-paper or substitute wall covering shall be put thereon.

History: En. Sec. 1, Ch. 160, L. 1917;
re-en. Sec. 2499, R. C. M. 1921.

Collateral References

Health↔32.
39 C.J.S. Health § 22.

34-215. (2500) Duty in case of contagious or infectious disease. No wall-paper or substitute wall covering shall be placed upon the walls or ceiling of any room where there has been a case of contagious or infectious disease, until all wall-paper and substitute wall covering thereon has been entirely removed, and the walls and ceiling thoroughly cleansed, oil-painted walls and ceilings excepted.

History: En. Sec. 2, Ch. 160, L. 1917;
re-en. Sec. 2500, R. C. M. 1921.

34-216. (2501) County and city boards of health to enforce act. The county board of health in each county of this state shall have power to examine into the enforcement of this act in any city, town, or elsewhere within its respective county; provided, that in cities or towns where a board of health is established, then such city board of health shall have such power to examine into the enforcement of this act within the boundaries of such city or town.

History: En. Sec. 3, Ch. 160, L. 1917;
re-en. Sec. 2501, R. C. M. 1921.

Collateral References

Health↔6.

39 C.J.S. Health § 9.

25 Am. Jur. 314, Health, §§ 36 et seq.

34-217. (2502) Violation of act a misdemeanor. That any person or persons who violate any of the provisions of this act, or who shall cause any person or persons to violate any section of this act, shall be deemed guilty of a misdemeanor.

History: En. Sec. 4, Ch. 160, L. 1917;
re-en. Sec. 2502, R. C. M. 1921.

Collateral References

Innkeepers↔15.

43 C.J.S. Innkeepers § 27.

TITLE 35

HOUSING

- Chapter 1. Housing authorities law, 35-101 to 35-146.
2. Validation proceedings under housing authorities law, 35-201 to 35-203.
3. Additional war powers of housing authorities, 35-301 to 35-307.
4. Emergency war and veterans' housing facilities, 35-401 to 35-407.

CHAPTER 1

HOUSING AUTHORITIES LAW

- Section 35-101. Short title.
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35-144. Act controlling.
35-145. Home owners' loan corporation bonds as security for deposit of public funds.
35-146. Housing authorities may be dissolved when and how.

35-101. (5309.1) Short title. This act may be referred to as the Housing Authorities Law.

History: En. Sec. 1, Ch. 140, L. 1935.

City Cannot Repudiate Cooperation Contract

After the Helena city council created the Helena housing authority by declaring the need for low-income housing, and then entered into a local cooperation agreement as is required by U. S. C., Tit. 28, § 1415 (7) (b) (i) before federal loans are given, the city council could not then validly pass an ordinance repudiating the cooperation agreement to justify a change of mind about the advisability of the project. After the city council created the housing authority and entered into the cooperation agreement, it had completed its discretionary duties, and the supervision and completion of the project passed under the exclusive control of the housing authority. The ordinance assuming to cancel and void the cooperation agreement violates the United States and Montana Constitutions which prohibit the passing of laws impairing the obligations of contracts. *State ex rel. Helena Housing Authority v. City Council of Helena*, 125 M 592, 242 P 2d 250, 251, 253.

Constitutionality of Housing Law

Held, that the grant of eminent domain to the housing authorities does not violate either Art. III, Sec. 14 or Art. XV, Sec. 9, of the state Constitution, providing for just compensation; being public property, housing properties are exempted from taxation under Art. XII, Sec. 2, Const.; the bonds authorized to be issued by a housing authority are not an indebtedness under Secs. 1, 2, 4 or 6, Art. XIII, Const.; a city making donations is not violating Art. XIII, Sec. 1, Const., the functions being primarily municipal; not class legislation under Art. V, Sec. 26, Const.; and act not contravening Art. V, Sec. 36 as delegating legislative power to the commission. *Rutherford v. City of Great Falls*, 107 M 512, 86 P 2d 656.

The housing authorities act, contemplating eradication of slums, promoting the general welfare, is for a public rather than a private or local purpose, in the exercise of the state's sovereign police powers, and a city so cooperating functions not in its proprietary but in its governmental capacity, hence the act is not invalid as levying taxes upon the inhabitants of the city for municipal purposes in contravention of Art. XII, Sec. 4 of the state constitution. *State ex rel. Helena Housing Authority v. City Council of City of Helena*, 108 M 347, 352, 90 P 2d 514.

Construction of State Housing Law

Construing sections 35-101 to 35-141, together constituting the state housing law, held that the two acts were passed in the exercise of the state's police powers, the purpose being the eradication of slums and substitution of safe and sanitary dwellings in place thereof, thus falling within the definition of "public purpose" i. e. the promotion of the general welfare, health, safety, morals, security, prosperity, contentment and equality before the law, for which public money may be spent and private property acquired. *Rutherford v. City of Great Falls*, 107 M 512, 516, 86 P 2d 656.

Montana's housing authority law is the statute that defines the conditions under which a municipality and a state housing authority may negotiate with the federal agency (Public Housing Authority). *State ex rel. Helena Housing Authority v. City Council of City of Helena*, 125 M 592, 242 P 2d 250, 251.

Emergency Measure Excepted from Referendum Act

As against the contention that to compel a city to pass an ordinance or resolution for the rezoning of the city and vacation of streets by mandamus at the instance of the city housing authority would destroy the exercise of right of referendum by the city inhabitants, held, that the housing authorities being an emergency measure, this section specifically provides that an emergency measure is excepted from the provisions of the referendum act. *State ex rel. Great Falls Housing Authority v. City of Great Falls*, 110 M 318, 331, 100 P 2d 915.

Validity of Contracts With City

A contract between a city and a housing authority under the state housing law, in which the city binds itself to demolish unsanitary dwellings equal in number to dwellings constructed by the authority, etc., and to cooperate generally with the program, held, not invalid as constituting an attempt by the city to bind itself in its exercise of governmental functions. *Rutherford v. City of Great Falls*, 107 M 512, 523, 86 P 2d 656.

Where City Compelled to Appropriate Expenses

Held, as against the contention that the city had no money in its treasury "not appropriated to some other purpose" (sec. 35-138) after creation of housing authority under this section et seq., preliminary expenses being a mandatory expenditure

"required by law," the city has no discretion in the matter under section 11-1409 authorizing expenditures in cases of emergency, but must estimate the amount necessary and make the appropriation. State ex rel. Helena Housing Authority

v. City Council of City of Helena, 108 M 347, 350, 90 P 2d 514.

Collateral References

Health⌚32.

39 C.J.S. Health § 22.

35-102. (5309.2) Finding and declaration of necessity. It is hereby declared that unsanitary or unsafe dwelling accommodations exist in urban and rural areas throughout the state and that such unsafe or unsanitary conditions arise from overcrowding and concentration of population, the obsolete and poor conditions of buildings, improper planning, excessive land coverage, lack of proper light, air and space, unsanitary design and arrangement, lack of proper sanitary facilities, and the existence of conditions which endanger life or property by fire and other causes; that in such urban and rural areas many persons of low income are forced to reside in unsanitary or unsafe dwelling accommodations; that in such urban and rural areas there is a lack of safe or sanitary dwelling accommodations available to all the inhabitants thereof and that consequently many persons of low income are forced to occupy over-crowded and congested dwelling accommodations; that these conditions cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals and welfare of the citizens of the state and impair economic values; that these conditions cannot be remedied by the ordinary operations of private enterprises; that the clearance, replanning and reconstruction of the areas in which unsanitary or unsafe housing conditions exist and the providing of safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which public money may be spent and private property acquired; that it is in the public interest that work on such projects be instituted as soon as possible; and that the necessity for the provisions hereinafter enacted is hereby declared as a matter of legislative determination to be in the public interest.

History: En. Sec. 2, Ch. 140, L. 1935; amd. Sec. 1, Ch. 153, L. 1941.

Legislative Finding of Public Necessity Upheld

The legislature having determined and declared by this section the necessity in the public interest for provisions for slum clearance and that such is a public purpose, the court will not interfere with such

finding in the absence of a clear showing that such determination was wrong. Held, that the legislative determination was correct. Rutherford v. City of Great Falls, 107 M 512, 516, 86 P 2d 656.

Collateral References

Statutes⌚179.

81 C.J.S. Statutes § 315.

35-103. (5309.3) Definitions. The following terms, wherever used or referred to in this act shall have the following respective meanings, unless a different meaning clearly appears from the context:

(1) "Authority" or "Housing Authority" shall mean a public body and a body corporate and politic organized in accordance with the provisions of this act for the purposes, with the powers and subject to the restrictions hereinafter set forth.

(2) "City" shall mean the city of the first or second class which is, or is about to be, included in the territorial boundaries of an authority when created hereunder.

(3) "Council" shall mean the legislative body, council, board of commissioners, board of trustees, or other body charged with governing the city.

(4) "City clerk" and "mayor" shall mean the clerk and mayor, respectively, of the city or the officers thereof charged with the duties customarily imposed on the clerk and mayor respectively.

(5) "Municipality" shall mean any city, town or incorporated village, other than the city as defined above, which is located within the territorial boundaries of an authority.

(6) "Commissioner" shall mean one of the members of an authority appointed in accordance with the provisions of this act.

(7) "Government" shall include the state and federal governments and any subdivision, agency or instrumentality, corporate or otherwise, of either of them.

(8) "State" shall mean the state of Montana.

(9) "Federal government" shall include the United States of America, the federal emergency administration of public works or any agency, instrumentality, corporate or otherwise, of the United States of America.

(10) "Housing project" shall include all real and personal property, buildings and improvements, stores, offices, lands for farming and gardening, and community facilities acquired or constructed or to be acquired or constructed pursuant to a single plan or undertaking (a) to demolish, clear, remove, alter or repair unsanitary or unsafe housing, and/or (b) to provide safe and sanitary dwelling accommodations for persons of low income. The term "housing project" may also be applied to the planning of the buildings and improvements, the acquisition of property, the demolition of existing structures, the construction, reconstruction, alteration and repair of the improvements and all other work in connection therewith.

(11) "Community facilities" shall include real and personal property, and buildings and equipment for recreational or social assemblies, for educational, health or welfare purposes and necessary utilities, when designed primarily for the benefit and use of the housing authority and/or the occupants of the dwelling accommodations.

(12) "Bonds" shall mean any bonds, interim certificates, notes, debentures, or other obligations of the authority issued pursuant to this act.

(13) "Mortgage" shall include deeds of trust, mortgage, building and loan contracts or other instruments conveying real or personal property as security for bonds and conferring a right to foreclose and cause a sale thereof.

(14) "Trust indenture" shall include instruments pledging the revenues of real or personal properties but not conveying such properties or conferring a right to foreclose and cause a sale thereof.

(15) "Contract" shall mean any agreement of an authority with or for the benefit of an obligee whether contained in a resolution, trust indenture, mortgage, lease, bond or other instrument.

(16) "Real property" shall include lands, lands under water, structures, and any and all easements, franchises and incorporeal hereditaments and every estate and right therein, legal and equitable, including terms for years and liens by way of judgment, mortgage or otherwise.

(17) "Obligee of the authority" or "obligee" shall include any bondholder, trustee or trustees for any bondholders, any lessor demising property to the authority used in connection with a housing project or any assignee or assignees of such lessor's interest or any part thereof, and the United States of America, when it is a party to any contract with the authority.

History: En. Sec. 3, Ch. 140, L. 1935.

References

State ex rel. Helena Housing Authority
v. City of Helena, 108 M 347, 355, 90 P
2d 514.

Collateral References

Constitutionality, construction, and application of statutes or governmental projects for improvement of housing conditions (slum clearance). 105 ALR 911.

35-104. (5309.4) Notice, hearing and creation of authority. Any twenty-five (25) residents of a city and of the area within ten miles from the territorial boundaries thereof may file a petition with the city clerk setting forth that there is a need for an authority to function in the city and said surrounding area. Upon the filing of such a petition the city clerk shall give notice of the time, place and purposes of a public hearing at which the council will determine the need for an authority in the city and said surrounding area. Such notice shall be given at the city's expense by publishing a notice, at least ten days preceding the day on which the hearing is to be held, in a newspaper having a general circulation in the city and said surrounding area or, if there be no such newspaper, by posting such a notice in at least three public places within the city, at least ten days preceding the day on which the hearing is to be held.

Upon the date fixed for said hearing held upon notice as provided herein, an opportunity to be heard shall be granted to all residents and taxpayers of the city and said surrounding area and to all other interested persons. After such a hearing, the council shall determine:

(1) Whether unsanitary or unsafe inhabited dwelling accommodations exist in the city and said surrounding area, and/or

(2) Whether there is a lack of safe or sanitary dwelling accommodations in the city and said surrounding area available for all the inhabitants thereof.

In determining whether dwelling accommodations are unsafe or unsanitary, the council shall take into consideration the following: the physical condition and age of the buildings; the degree of overcrowding; the percentage of land coverage; the light and air available to the inhabitants of such dwelling accommodations; the size and arrangement of the rooms; the sanitary facilities; and the extent to which conditions exist in such buildings which endanger life or property by fire or other causes.

If it shall determine that either or both of the above enumerated conditions exist, the council must draft an ordinance authorizing the mayor to appoint five commissioners to act as an authority, which said ordinance shall not be effective until it has been approved by a majority vote of the electors within the city limits voting, either at a special or general election. Said commission shall be a public body and a body corporate and politic upon the completion of the taking of the following proceedings:

The commissioners shall present to the secretary of the state an application signed by them, which shall set forth (without any detail other than the mere recital) (1) that a notice has been given and public hearing has been held as aforesaid, that the council made the aforesaid determination after such hearing, and that the mayor has appointed them as commissioners; (2) the name, and official residence of each of the commissioners, together with a certified copy of the appointment evidencing their right to office, the date and place of induction into and taking oath of office, and that they desire the housing authority to become a public body and a body corporate and politic under this act; (3) the term of office of each of the commissioners; (4) the name which is proposed for the corporation; and (5) the location of the principal office of the proposed corporation. The application shall be subscribed and sworn to by each of said commissioners before an officer authorized by the laws of the state to take and certify oaths, who shall certify upon the application that he personally knows the commissioners and knows them to be the officers as asserted in the application, and that each subscribed and swore thereto in the officer's presence. The secretary of state shall examine the application and if he finds that the name proposed for the corporation is not identical with that of a person or of any other corporation of this state or so nearly similar as to lead to confusion and uncertainty he shall receive and file it and shall record it in an appropriate book of record in his office.

When the application has been made, filed and recorded, as herein provided, the authority shall constitute a public body and a body corporate and politic under the name proposed in the application; the secretary of state shall make and issue to the said commissioners, a certificate of incorporation pursuant to this act, under the seal of the state, and shall record the same with the application.

The boundaries of such authority shall include said city and the area within ten miles from the territorial boundaries of said city but in no event shall it include the whole or a part of any other city nor any area included within the boundaries of another authority. In case an area lies within ten miles of the boundaries of more than one city, such area shall be deemed to be within the boundaries of the authority embracing such area which was first established, all priorities to be determined on the basis of the time of the issuance of the aforesaid certificates by the secretary of state. After the creation of an authority, the subsequent existence within its territorial boundaries of more than one city shall in no way affect the territorial boundaries of such authority.

If the council, after a hearing as aforesaid, shall determine that neither of the above enumerated conditions exist, it shall adopt a resolution denying the petition. After three months shall have expired from the date of the denial of any such petitions, subsequent petitions may be filed as aforesaid and new hearings and determinations made thereon.

In any suit, action or proceeding involving the validity or enforcement of, or relating to any contract of the authority, the authority shall be conclusively deemed to have been established in accordance with the provisions of this act upon proof of the issuance of the aforesaid certificate by the secretary of state. A copy of such certificate, duly certified by the

secretary of state shall be admissible in evidence in any such suit, action or proceeding, and shall be conclusive proof of the filing and contents thereof.

History: En. Sec. 4, Ch. 140, L. 1935; amd. Sec. 1, Ch. 68, L. 1953.

Controlling Over Prior Statute

It is not necessary that the city council should pass upon a resolution authorizing expenditures to meet an emergency by unanimous vote as provided by section 11-1409, in the matter of authorizing the creation of a city housing authority under section 35-101 et seq., but this section, a part of the housing authorities law, later in point of time and not requiring a unanimous vote, being controlling. State ex rel. Helena Housing Authority v. City of Helena, 108 M 347, 351, 90 P 2d 514.

Mandamus to Compel Completion

After a city council regularly created a housing authority, any act required of that body to bring the project to completion was purely a ministerial act, and mandamus therefore could properly issue to compel the council to take the necessary steps to vacate and re-zone the land selected by the authority for the project. State ex rel. Great Falls Housing Authority v. City of Great Falls, 110 M 318, 332, 100 P 2d 915.

Collateral References

Municipal Corporations 175.
62 C.J.S. Municipal Corporations § 672.
42 Am. Jur. 779, Public Housing Laws.

35-105. (5309.5) Appointment, qualifications and tenure of commissioners—officers, legal assistance—delegation of power. An authority shall consist of five commissioners appointed by the mayor and he shall designate the first chairman. No commissioner may be a city official.

The commissioners who are first appointed shall be designated by the mayor to serve for terms of one, two, three, four and five years respectively from the date of their appointment. Thereafter, the term of office shall be five years. A commissioner shall hold office until his successor has been appointed and has qualified. Vacancies shall be filled for the unexpired term. Three commissioners shall constitute a quorum. The mayor shall file with the city clerk a certificate of the appointment or reappointment of any commissioner and such certificate shall be conclusive evidence of the due and proper appointment of such commissioner. A commissioner shall receive no compensation for his services but he shall be entitled to the necessary expenses including traveling expenses incurred in the discharge of his duties.

When the office of the first chairman of the authority becomes vacant, the authority shall select a chairman from among its members. An authority shall select from among its members a vice-chairman, and it may employ a secretary (who shall be executive director), technical experts and such other officers, agents and employees, permanent and temporary, as it may require, and shall determine their qualifications, duties and compensation. An authority may call upon the corporation counsel or chief law officer of the city for such legal services as it may require or it may employ its own counsel and legal staff. An authority may delegate to one or more of its agents or employees such powers or duties as it may deem proper.

History: En. Sec. 5, Ch. 140, L. 1935.

62 C.J.S. Municipal Corporations §§ 673-675.

Collateral References

Municipal Corporations 192.

35-106. (5309.6) Duty of the authority and commissioners of the authority. The authority and its commissioners shall be under a statutory duty to comply or to cause compliance strictly with all provisions of this

act and the laws of the state and in addition thereto, with each and every term, provision and covenant in any contract of the authority on its part to be kept or performed.

History: En. Sec. 6, Ch. 140, L. 1935.

Collateral References

Municipal Corporations—192.

62 C.J.S. Municipal Corporations § 676.

35-107. (5309.7) Interested commissioners or employees. No commissioner or employee of an authority shall acquire any interest direct or indirect in any housing project or in any property included or planned to be included in any project, nor shall he have any interest direct or indirect in any contract or proposed contract for materials or services to be furnished or used in connection with any housing project. If any commissioner or employee of an authority owns or controls an interest direct or indirect in any property included or planned to be included in any housing project, he shall immediately disclose the same in writing to the authority and such disclosure shall be entered upon the minutes of the authority. Failure to so disclose such interest shall constitute misconduct in office.

History: En. Sec. 7, Ch. 140, L. 1935.

Collateral References

Municipal Corporations—192.

62 C.J.S. Municipal Corporations § 676.

35-108. (5309.8) Removal of commissioners. The mayor may remove a commissioner for inefficiency or neglect of duty or misconduct in office, but only after the commissioner shall have been given a copy of the charges against him (which may be made by the mayor) at least ten (10) days prior to the hearing thereon and had an opportunity to be heard in person or by counsel.

Any obligee of the authority may file with the mayor written charges that the authority is violating wilfully any law of the state or any term, provision or covenant in any contract to which the authority is a party. The mayor shall give each of the commissioners a copy of such charges at least ten (10) days prior to the hearing thereon and an opportunity to be heard in person or by counsel and shall within fifteen days after receipt of such charges remove any commissioners of the authority who shall have been found to have acquiesced in any such wilful violation.

A commissioner shall be deemed to have acquiesced in a wilful violation by the authority of a law of this state or of any term, provision or covenant contained in a contract to which the authority is a party, if, before a hearing is held on the charges against him, he shall not have filed a written statement with the authority of his objections to, or lack of participation in such violation.

In the event of the removal of any commissioner, the mayor shall file in the office of the city clerk a record of the proceedings together with the charges made against the commissioners and the findings thereon.

History: En. Sec. 8, Ch. 140, L. 1935.

Collateral References

Municipal Corporations—192.

62 C.J.S. Municipal Corporations § 674.

35-109. (5309.9) Powers of authority. An authority shall constitute a public body and a body corporate and politic, exercising public powers, and having all the powers necessary or convenient to carry out and

effectuate the purposes and provisions of this act, including the following powers in addition to others herein granted:

To investigate into living, dwelling and housing conditions and into the means and methods of improving such conditions; to determine where unsafe, or unsanitary dwelling or housing conditions exist; to study and make recommendations concerning the plan of any city or municipality located within its boundaries in relation to the problem of clearing, replanning and reconstruction of areas in which unsafe, or unsanitary dwelling or housing conditions exist, and the providing of dwelling accommodations for persons of low income, and to co-operate with any city, municipal or regional planning agency; to prepare, carry out and operate housing projects; to provide for the construction, reconstruction, improvement, alteration or repair of any housing project or any part thereof; to take over by purchase, lease or otherwise any housing project located within its boundaries undertaken by any government; to act as agent for the federal government in connection with the acquisition, construction, operation and/or management of a housing project or any part thereof; to arrange with any city or municipality located in whole or in part within its boundaries or with a government for the furnishing, planning, replanning, installing, opening or closing of streets, options or property rights or for the furnishing of property or services in connection with a project;

To arrange with the state, its subdivision and agencies, and any county, city or municipality of the state, to the extent that it is within the scope of each of their respective functions, (a) to cause the services customarily provided by each of them to be rendered for the benefit of such housing authority and/or the occupants of any housing projects and (b) to provide and maintain parks and sewage, water and other facilities adjacent to or in connection with housing projects and (c) to change the city or municipality map, to plan, replan, zone or rezone any part of the city or municipality; to lease or rent any of the dwelling or other accommodations or any of the lands, buildings, structures or facilities embraced in any housing project and to establish and revise the rents or charges therefor; to enter upon any building or property in order to conduct investigations or to make surveys or soundings; to purchase, lease, obtain options upon, acquire by gift, grant, bequest, devise, or otherwise any property real or personal or any interest therein from any person, firm, corporation, city, municipality, or government;

To acquire by eminent domain any real property, including improvements and fixtures thereon; to sell, exchange, transfer, assign, or pledge any property real or personal or any interest therein to any person, firm, corporation, municipality, city, or government; to own, hold, clear and improve property, to insure or provide for the insurance of the property or operations of the authority against such risks as the authority may deem advisable; to procure insurance or guarantees from a federal government of the payment of any debts or parts thereof secured by mortgages made or held by the authority on any property included in any housing project;

To borrow money upon its bonds, notes, debentures or other evidences of indebtedness and to secure the same by pledges of its revenues, and (subject to the limitations hereinafter imposed) by mortgages upon prop-

erty held or to be held by it, or in any other manner; in connection with any loan, to agree to limitations upon its right to dispose of any housing project or part thereof or to undertake additional housing projects; in connection with any loan by a government, to agree to limitations upon the exercise of any powers conferred upon the authority by this act; to invest any funds held in reserves or sinking funds, or any funds not required for immediate disbursement, in property or securities in which savings banks may legally invest funds subject to their control;

To sue and be sued; to have a seal and to alter the same at pleasure; to have perpetual succession; to make and execute contracts and other instruments necessary or convenient to the exercise of the powers of the authority to make and from time to time amend and repeal by-laws, rules and regulations not inconsistent with this act, to carry into effect the powers and purposes of the authority;

To conduct examinations and investigations and to hear testimony and take proof under oath at public or private hearings on any matter material for its information;

To issue subpoenas requiring the attendance of witnesses or the production of books and papers and to issue commissions for the examination of witnesses who are out of the state or unable to attend before the authority, or excused from attendance; and to make available to such agencies, boards or commissions as are charged with the duty of abating or requiring the correction of nuisances or like conditions, or of demolishing unsafe or unsanitary structures within its territorial limits, its findings and recommendations with regard to any building or property where conditions exist which are dangerous to the public health, morals, safety or welfare.

Any of the investigations or examinations provided for in this act may be conducted by the authority or by a committee appointed by it, consisting of one or more commissioners, or by counsel, or by an officer or employee specially authorized by the authority to conduct it. Any commissioner, counsel for the authority, or any person designated by it to conduct an investigation or examination shall have power to administer oaths, take affidavits and issue subpoenas or commissions.

An authority may exercise any or all of the powers herein conferred upon it, either generally or with respect to any specific housing project or projects, through or by an agent or agents which it may designate, including any corporation or corporations which are or shall be formed under the laws of this state, and for such purposes an authority may cause one or more corporations to be formed under the laws of this state or may acquire the capital stock of any corporation or corporations.

Any corporate agent, all of the stock of which shall be owned by the authority or its nominee or nominees, may to the extent permitted by law exercise any of the powers conferred upon the authority herein. In addition to all of the other powers herein conferred upon it, an authority may do all things necessary and convenient to carry out the powers expressly given in this act. No provisions with respect to the acquisition, operation or disposition of property by other public bodies shall be applicable to an authority unless the legislature shall specifically so state.

Before any housing projects or additional units to existing housing projects shall be undertaken or a contract be executed therefor, the city or town council must pass an ordinance authorizing the same, and said ordinance shall not be effective until it has been approved by a majority vote of the electors within the corporate limits of such city or town voting either at a special or general election. Provided, however, that provisions on elections herein contained shall not be applicable to repair, maintenance, painting or remodeling of existing units nor to applications on file with the public housing administration on the effective date of this act.

History: En. Sec. 9, Ch. 140, L. 1935; amd. Sec. 2, Ch. 68, L. 1953.

Contract With City for Slum Clearance

A contract between a city and a housing authority whereby the city agreed to eliminate unsafe and unsanitary dwellings

in the city to an extent at least equal to the number of new dwelling units to be erected by the authority and to cooperate generally in the program of the authority is valid. *Rutherford v. City of Great Falls*, 107 M 512, 523, 86 P 2d 656.

35-110. (5309.10) Cooperation between housing authorities. Any two (2) or more housing authorities may join or cooperate with one another in the exercise of any or all of the powers conferred on such housing authorities for the purpose of financing, planning, undertaking, constructing or operating a housing project or projects located within the area of operation of any one or more of such housing authorities.

History: En. Sec. 10, Ch. 140, L. 1935; amd. Sec. 2, Ch. 153, L. 1941.

35-111. (5309.11) Eminent domain. The authority shall have the right to acquire by eminent domain any real property, including fixtures and improvements, which it may deem necessary to carry out the purposes of this act after the adoption by it of a resolution declaring that the acquisition of the property described therein is in the public interest and necessary for public use. The authority may exercise the power of eminent domain pursuant to the provisions of either: (a) sections 93-9901 to 93-9926, both inclusive; or (b) pursuant to any other applicable statutory provisions for the exercise of the power of eminent domain.

Property already devoted to a public use may be acquired, provided that no property belonging to any city or municipality within the boundaries of the authority or to any government may be acquired without its consent and that no property belonging to a public utility corporation may be acquired without the approval of the commission or other officer or tribunal, if any there be, having regulatory power over such corporation.

History: En. Sec. 11, Ch. 140, L. 1935.

Grant of Power of Eminent Domain Constitutional

Housing projects to be carried out by housing authority under this act, being devoted to a public purpose, the grant of power of eminent domain is constitutional. *Rutherford v. City of Great Falls*, 107 M 512, 517, 86 P 2d 656.

Where Extinguishment of County's Lien Not Unconstitutional

Where a city housing authority by eminent domain acquired a city lot upon

which delinquent taxes were due and its appraised value was turned over by the authority to the county, extinguishment of the county's lien did not offend against the provision of Art. V, Sec. 39, Const. prohibiting the release of any obligation held by the state or municipal corporation except by payment into the proper treasury, so long as the county obtains the fair market value of the property. *Housing Authority of City of Butte v. Bjork and County of Silver Bow*, 109 M 552, 555, 98 P 2d 324.

Collateral References

Deduction of benefits in determining compensation or damages in eminent domain. 145 ALR 7.

Increment to value, from projects for which land is condemned, as a factor in fixing compensation. 147 ALR 66.

35-112. (5309.12) Acquisition of land for government. The authority may acquire by purchase or by the exercise of its power of eminent domain as aforesaid, any property real or personal for any housing project being constructed or operated by a government. The authority upon such terms and conditions, with or without consideration, as it shall determine, may convey title or deliver possession of such property so acquired or purchased to such government for use in connection with such housing project.

History: En. Sec. 12, Ch. 140, L. 1935.

29 C.J.S. Eminent Domain § 64; 63 C.J. S. Municipal Corporations § 959.

Collateral References

Eminent Domain 217; Municipal Corporations 223.

35-113. (5309.13) Zoning and building laws. All housing projects of an authority shall be subject to the planning, zoning, sanitary and building laws, ordinances and regulations applicable to the locality in which the housing project is situated.

History: En. Sec. 13, Ch. 140, L. 1935.

Application of General Municipal Laws

After a city council has authorized a housing authority, the general municipal laws relating thereto must be applied only when they will not defeat the purpose of the housing act, and all things thereafter done pass under the exclusive control of the provisions of the act; and after the city has entered into a transaction of a contractual nature with its housing authority with relation to vacating streets and re-zoning land selected for the project, it cannot thereafter repudiate it irrespective of change of personnel of the city council. State ex rel. Great Falls Housing Authority v. City of Great Falls, 110 M 318, 326, 100 P 2d 915.

General Ordinances Will Not Apply to Defeat Purpose of Housing Act

This section, declaring that housing projects shall be subject to the planning, zoning, sanitary and building laws applicable to the locality in which the project is situated, when construed with section 35-127, held to mean that the general municipal laws relating thereto must be applied only when they will not defeat the purpose of the housing act. State ex rel. Great Falls Housing Authority v. City of Great Falls, 110 M 318, 331, 100 P 2d 915.

Collateral References

Municipal Corporations 601.

62 C.J.S. Municipal Corporations § 224.

35-114. (5309.14) Types of bonds. The authority shall have power and is hereby authorized from time to time in its discretion to issue for any of its corporate purposes:

(a) Bonds on which the principal and interest are payable

(1) exclusively from the income and revenues of the housing project financed with the proceeds of such bonds or with such proceeds together with the proceeds of a grant from the federal government to aid in financing the construction thereof, or

(2) exclusively from the income and revenues of certain designated housing projects whether or not they were financed in whole or in part with the proceeds of such bonds;

provided, however, that the credit of the authority shall not be pledged to the payment of such bonds, but such bonds shall be payable only (and the bonds shall so state on their face) from the revenues of the designated housing project or projects and the funds received from the sale or

disposal thereof and, if the authority so determines, shall be additionally secured by a trust indenture pledging such revenues or, in certain instances as hereinafter provided, by a mortgage of the property comprising such designated housing project or projects and the revenue therefrom.

(b) Bonds for the payment of the principal and interest of which the credit of the authority is pledged and which may be additionally secured by a pledge of the revenues of the authority or any part thereof pursuant to a resolution or trust indenture of the authority or, in certain instances as hereinafter provided, may be additionally secured by a mortgage of the property and revenues of the authority or any part thereof.

Neither the commissioners of the authority nor any person executing the bonds shall be liable personally on the bonds by reason of the issuance thereof.

The bonds and other obligations of the authority (and such bonds and obligations shall so state on their face) shall not be a debt of any city or municipality located within its boundaries or of the state and neither the state nor any such city or municipality shall be liable thereon, nor in any event shall they be payable out of any funds or properties other than those of the authority. The bonds shall not constitute an indebtedness within the meaning of any constitutional or statutory provision of the laws of the state. Bonds may be issued under this act notwithstanding any debt or other limitation prescribed by any statute.

History: En. Sec. 14, Ch. 140, L. 1935.

Does Not Violate Constitutional Debt Limitations

Under the provisions of subdivision b of this section, housing authority bonds are not an indebtedness of a city, municipality or the state and they do not contravene the limitations of Sections 1, 2, 4 or 6 of Article XIII of the Constitution. *Rutherford v. City of Great Falls*, 107 M 512, 519, 86 P 2d 656.

Collateral References

Municipal Corporations ~~864~~ 864(1), 910.
64 C.J.S. Municipal Corporations
§§ 1850, 1905 et seq., 4147 et seq.

Exemption of property or bonds of housing authority from taxation. 133 ALR 365.

35-115. (5309.15) Form and sale of bonds. The bonds of the authority shall be authorized by its resolution and shall be issued in one or more series and shall bear such date or dates, mature at such time or times, not exceeding sixty (60) years from their respective dates, bear interest at such rate or rates, not exceeding six per centum (6%) per annum payable semi-annually, be in such denominations (which may be made interchangeable) be in such form, either coupon or registered, carry such registration privileges, be executed in such manner, be payable in such medium of payment, at such place or places, and be subject to such terms of redemption (with or without premium) as such resolution or its trust indenture or mortgage may provide.

The bonds may be sold at public sale held after notice published once at least ten days prior to such sale in a newspaper having a general circulation in the city and in a financial newspaper published in the city of or in the city of provided, however, that such bonds may be sold to the federal government at private sale without any public advertisement. The bonds may be sold

at such price or prices as the authority shall determine provided that the interest cost to maturity of the money received for any issue of said bonds shall not exceed six per centum (6%) per annum.

Pending the authorization, preparation, execution or delivery of definitive bonds, the authority may issue interim certificates, or other temporary obligations to the purchaser of such bonds. Such interim certificates, or other temporary obligations, shall be in such form, contain such terms, conditions and provisions, bear such date or dates, and evidence such agreements relating to their discharge or payment or the delivery of definitive bonds as the authority may by resolution, trust indenture or mortgage determine.

In case any of the officers whose signatures appear on any bonds or coupons shall cease to be such officers before the delivery of such bonds, such signatures shall, nevertheless, be valid and sufficient for all purposes, the same as if they had remained in office until such delivery.

The authority shall have power out of any funds available therefor to purchase any bonds issued by it at a price not more than the principal amount thereof and the accrued interest; provided, however, that bonds payable exclusively from the revenues of a designated project or projects shall be purchased out of any such revenues available therefor. All bonds so purchased shall be cancelled. This paragraph shall not apply to the redemption of bonds.

Any provision of any law to the contrary notwithstanding, any bonds, interim certificates, or other obligations issued pursuant to this act shall be fully negotiable.

History: En. Sec. 15, Ch. 140, L. 1935.

Collateral References

Municipal Corporations ~~§~~ 921(1).

64 C.J.S. Municipal Corporations § 1930.

35-116. (5309.16) Provisions of bonds—trust indentures and mortgages. In connection with the issuance of bonds and/or the incurring of any obligation under a lease and in order to secure the payment of such bonds and/or obligations, the authority shall have power:

(1) To pledge by resolution, trust indenture, mortgage (subject to the limitations hereinafter imposed), or other contract all or any part of its rents, fees, or revenues.

(2) To covenant against mortgaging all or any part of its property, real or personal, then owned or thereafter acquired, or against permitting or suffering any lien thereon.

(3) To covenant with respect to limitations on its right to sell, lease or otherwise dispose of any housing project or any part thereof, or with respect to limitations on its right to undertake additional housing projects.

(4) To covenant against pledging all or any part of its rents, fees and revenues to which its right then exists or the right to which may thereafter come into existence or against permitting or suffering any lien thereon.

(5) To provide for the release of property, rents, fees, and revenues from any pledge or mortgage, and to reserve rights and powers in, or the right to dispose of, property which is subject to a pledge or mortgage.

(6) To covenant as to the bonds to be issued pursuant to any resolution, trust indenture, mortgage or other instrument and as to the issuance

of such bonds in escrow or otherwise, and as to the use and disposition of the proceeds thereof.

(7) To covenant as to what other, or additional debt may be incurred by it.

(8) To provide for the terms, form, registration, exchange, execution and authentication of bonds.

(9) To provide for the replacement of lost, destroyed or mutilated bonds.

(10) To covenant that the authority warrants the title to the premises.

(11) To covenant as to the rents and fees and to be charged, the amount (calculated as may be determined) to be raised each year or other period of time by rents, fees, and other revenues and as to the use and disposition to be made thereof.

(12) To covenant as to the use of any or all of its property, real or personal.

(13) To create or to authorize the creation of special funds in which there shall be segregated (a) the proceeds of any loan and/or grant; (b) all of the rents, fees and revenues of any housing project or projects or parts thereof; (c) any moneys held for the payment of the costs of operation and maintenance of any such housing projects or as a reserve for the meeting of contingencies in the operation and maintenance thereof; (d) any moneys held for the payment of the principal and interest on its bonds or the sums due under its leases and/or as a reserve for such payments; and (e) any moneys held for any other reserves or contingencies; and to covenant as to the use and disposal of the moneys held in such funds.

(14) To redeem the bonds, and to covenant for their redemption and to provide the terms and conditions thereof.

(15) To covenant against extending the time for the payment of its bonds or interest thereon, directly or indirectly, by any means or in any manner.

(16) To prescribe the procedure, if any, by which the terms of any contract with bondholders may be amended or abrogated, the amount of bonds, the holders of which must consent thereto and the manner in which such consent may be given.

(17) To covenant as to the maintenance of its property, the replacement thereof, the insurance to be carried thereon and the use and disposition of insurance moneys.

(18) To vest in an obligee of the authority the right, in the event of the failure of the authority to observe or perform any covenant on its part to be kept or performed, to cure any such default and to advance any moneys necessary for such purpose, and the moneys so advanced may be made an additional obligation of the authority with such interest, security and priority as may be provided in any trust indenture, mortgage, lease or contract of the authority with reference thereto.

(19) To covenant and prescribe as to the events of default and terms and conditions upon which any or all of its bonds shall become or may be

declared due before maturity and as to the terms and conditions upon which such declaration and its consequences may be waived.

(20) To covenant as to the rights, liabilities, powers and duties arising upon the breach by it of any covenant, condition, or obligation.

(21) To covenant to surrender possession of all or any part of any part of any housing project or projects upon the happening of an event of default (as defined in the contract) and to vest in an obligee the right without judicial proceedings to take possession and to use, operate, manage and control such housing projects or any part thereof, and to collect and receive all rents, fees and revenues arising therefrom in the same manner as the authority itself might do and to dispose of the moneys collected in accordance with the agreement of the authority with such obligee.

(22) To vest in a trustee or trustees the right to enforce any covenant made to secure, to pay, or in relation to the bonds, to provide for the powers and duties of such trustee or trustees, to limit liabilities thereof and to provide the terms and conditions upon which the trustee or trustees or the holders of bonds or any proportion of them may enforce any such covenant.

(23) To make covenants other than in addition to the covenants herein expressly authorized, of like or different character.

(24) To execute all instruments necessary or convenient in the exercise of the powers herein granted or in the performance of its covenants or duties, which may contain such covenants and provisions, in addition to those above specified as the government or any purchaser of the bonds of the authority may reasonably require.

(25) To make such covenants and to do any and all such acts and things as may be necessary or convenient or desirable in order to secure its bonds, or in the absolute discretion of the authority tend to make the bonds more marketable; notwithstanding that such covenants, acts or things may not be enumerated herein; it being the intention hereof to give the authority power to do all things in the issuance of bonds, in the provisions for their security that are not inconsistent with the constitution of the state and no consent or approval of any judge or court shall be required thereof; provided, however, that the authority shall have no power to mortgage all or any part of its property, real or personal, except as provided in section 35-117.

History: En. Sec. 16, Ch. 140, L. 1935.

Collateral References

Municipal Corporations §923.

64 C.J.S. Municipal Corporations § 1935.

35-117. (5309.17) Power to mortgage when project financed with aid of a government. In connection with any project financed in whole or in part by a government, the authority shall also have power to mortgage all or any part of its property, real or personal, then owned or thereafter acquired, and thereby:

(a) To vest in a government the right, upon the happening of an event of default (as defined in such mortgage), to foreclose such mortgage through judicial proceedings or through the exercise of a power of sale without judicial proceedings so long as a government shall be the holder of any of the bonds secured by such mortgage.

(b) To vest in a trustee or trustees the right, upon the happening of an event of default (as defined in such mortgage), to foreclose such mortgage through judicial proceedings or through the exercise of a power of sale without judicial proceedings, but only with the consent of the government which aided in financing the housing project involved.

(c) To vest in other obligees the right to foreclose such mortgage by judicial proceedings, but only with the consent of the government which aided in financing the project involved.

(d) To vest in an obligee, including a government, the right in foreclosing any mortgage as aforesaid, to foreclose such mortgage as to all or such part or parts of the property covered thereby as such obligee (in its absolute discretion) shall elect; the institution, prosecution and conclusion of any such foreclosure proceedings and/or the sale of any such parts of the mortgaged property shall not affect in any manner or to any extent the lien of the mortgage on the parts of the mortgaged property not included in such proceedings or not sold as aforesaid.

History: En. Sec. 17, Ch. 140, L. 1935. 63 C.J.S. Municipal Corporations § 963 et seq.

Collateral References

Municipal Corporations 225(1).

35-118. (5309.18) Remedies of an obligee of authority. An obligee of the authority shall have the right in addition to all other rights which may be conferred on such obligee subject only to any contractual restrictions binding upon such obligee:

(a) By mandamus, suit, action or proceeding in law or equity (all of which may be joined in one action) to compel the authority, and the commissioners, officers, agents or employees thereof to perform each and every term, provision and covenant contained in any contract of the authority, and to require the carrying out of any or all covenants and agreements of the authority and the fulfillment of all duties imposed upon the authority by this act.

(b) By suit, action or proceeding in equity to enjoin any acts or things which may be unlawful, or the violation of any of the rights of such obligee of the authority.

(c) By suit, action or proceeding in any court of competent jurisdiction to cause possession of any housing project or any part thereof to be surrendered to any obligee having the right to such possession pursuant to any contract of the authority.

History: En. Sec. 18, Ch. 140, L. 1935. 36 C.J.S. Forcible Entry and Detainer § 3; 43 C.J.S. Injunctions § 150; 55 C.J.S. Mandamus § 169.

Collateral References

Forcible Entry and Detainer 7; Injunctions 102; Mandamus 84.

35-119. (5309.19) Additional remedies conferrable by mortgage or trust indenture. Any authority shall have power by its trust indenture, mortgage, lease or other contract to confer upon any obligee holding or representing a specified amount in bonds, lease or other obligations, the right upon the happening of an "event of default" as defined in such instrument:

(a) By suit, action or proceeding in any court of competent jurisdiction to obtain the appointment of a receiver of any housing project of the authority or any part or parts thereof. If such receiver be appointed, he may enter and take possession of such housing project or any part or parts thereof and operate and maintain same, and collect and receive all fees, rents, revenues, or other charges thereafter arising therefrom in the same manner as the authority itself might do and shall keep such moneys in a separate account or accounts and apply the same in accordance with the obligations of the authority as the court shall direct.

(b) By suit, action or proceeding in any court of competent jurisdiction to require the authority and the commissioners thereof to account as if it and they were the trustees of an express trust.

History: En. Sec. 19, Ch. 140, L. 1935. 62 C.J.S. Municipal Corporations § 546;
75 C.J.S. Receivers § 19.

Collateral References

Municipal Corporations 172; Receivers 14.

35-120. (5309.20) Remedies cumulative. All the rights and remedies hereinabove conferred shall be cumulative and in addition to all other rights and remedies that may be conferred upon such obligee of the authority by law or by any contract with the authority.

History: En. Sec. 20, Ch. 140, L. 1935. **Collateral References**
Municipal Corporations 937.
64 C.J.S. Municipal Corporations § 1956.

35-121. (5309.21) Limitations on remedies of obligee. No interest of the authority in any property, real or personal, shall be subject to sale by the foreclosure of a mortgage thereon, either through judicial proceedings or the exercise of a power of sale contained in such mortgage, except in the case of the mortgages provided for in section 35-117. All property of the authority shall be exempt from levy and sale by virtue of an execution, and no execution or other judicial process shall issue against the same. No judgment against the authority shall be a charge or lien upon its property, real or personal. The provisions of this section shall not apply to or limit the right of obligees to foreclose any mortgage of the authority provided for in section 35-117 and, in case of a foreclosure sale thereunder, to obtain a judgment or decree for any deficiency due on the indebtedness secured thereby and issued on the credit of the authority. Such deficiency judgment or decree shall be a lien and charge upon the property of the authority which may be levied on and sold by virtue of an execution or other judicial process for the purpose of satisfying such deficiency judgment or decree.

History: En. Sec. 21, Ch. 140, L. 1935. 33 C.J.S. Executions § 35; 49 C.J.S. Judgments § 478; 59 C.J.S. Mortgages § 487.

Collateral References

Execution 22; Judgment 776; Mortgages 382.

35-122. (5309.22) Foreclosure sale subject to agreement with government. Notwithstanding anything in this act to the contrary, any purchaser or purchasers at a sale of real or personal property of the authority whether pursuant to any foreclosure of a mortgage, pursuant to judicial

process or otherwise, shall obtain title subject to any contract between the authority and a government relating to the supervision by a government of the operation and maintenance of such property and the construction of improvements thereon.

History: En. Sec. 22, Ch. 140, L. 1935.

35-123. (5309.23) Contracts with federal government. In addition to the powers conferred upon the authority by other provisions of this act, the authority is empowered to borrow money and/or accept grants from the federal government for or in aid of the construction of any housing project which such authority is authorized by this act to undertake, to take over any land acquired by the federal government for the construction of a housing project, to take over or lease or manage any housing project constructed or owned by the federal government, and to these ends, to enter into such contracts, mortgages, trust indentures, leases or other agreements as the federal government may require including agreements that the federal government shall have the right to supervise and approve the construction, maintenance and operation of such housing project. It is the purpose and intent of this act to authorize every authority to do any and all things necessary to secure the financial aid and the cooperation of the federal government in the construction, maintenance and operation of any housing project which the authority is empowered by this act to undertake.

History: En. Sec. 23, Ch. 140, L. 1935.

Collateral References

Municipal Corporations 221, 226, 869.

63 C.J.S. Municipal Corporations §§ 950, 976; 64 C.J.S. Municipal Corporations § 1869.

35-124. (5309.24) Security for funds deposited by authorities. The authority may by resolution provide that (1) all moneys deposited by it shall be secured by obligations of the United States or of the state of a market value equal at all times to the amount of such deposits or (2) by any securities in which savings banks may legally invest funds within their control or (3) by an undertaking with such sureties as shall be approved by the authority faithfully to keep and pay over upon the order of the authority any such deposits and agreed interest thereon, and all banks and trust companies are authorized to give any such security for such deposits.

History: En. Sec. 24, Ch. 140, L. 1935.

Collateral References

Depositories 7.

26 C.J.S. Depositories § 9.

35-125. (5309.25) Additional powers of authority. A housing authority shall have the power (notwithstanding anything to the contrary contained in this act or in any other provision of law) to include in any contract let in connection with a project, stipulations requiring that the contractor and any subcontractor comply with requirements as to minimum wages and maximum hours of labor, and comply with any conditions which the federal government may have attached to its financial aid of the project.

History: En. Sec. 25, Ch. 140, L. 1935;
amd. Sec. 4, Ch. 153, L. 1941.

Collateral References

Municipal Corporations 192.

62 C.J.S. Municipal Corporations § 676.

35-126. (5309.26) **Reports.** The authority shall at least once a year file with the mayor of the city a report of its activities for the preceding year, and shall make any recommendations with reference to any additional legislation or other action that may be necessary in order to carry out the purposes of this act.

History: En. Sec. 26, Ch. 140, L. 1935.

Collateral References

Municipal Corporations 192.
62 C.J.S. Municipal Corporations § 676.

35-127. (5309.27) **Act controlling.** That insofar as the provisions of this act are inconsistent with the provisions of any other law, the provisions of this act shall be controlling.

History: En. Sec. 28, Ch. 140, L. 1935.

Operation and Effect

By virtue of this section, section 35-113, declaring that housing projects shall be subject to the planning, zoning, etc. laws applicable in its locality must mean that such general laws shall be applied only

when their application will not defeat the purpose of the housing act. State ex rel. Great Falls Housing Authority v. City of Great Falls, 110 M 318, 331, 100 P 2d 915.

Collateral References

Statutes 224.
82 C.J.S. Statutes § 362.

35-128. (5309.27A) **Notice, hearing and creation of authority for a county.** (1) Any twenty-five (25) residents of a county may file a petition with the county clerk setting forth that there is a need for an authority to function in the county. Upon the filing of such a petition the county clerk shall give notice of the time, place and purposes of a public hearing at which the board of county commissioners will determine the need for an authority in the count. Such notice shall be given at the county's expense by publishing a notice, at least ten (10) days preceding the day on which the hearing is to be held, in a newspaper having a general circulation in the county or, if there be no such newspaper, by posting such a notice in at least three (3) public places within the county, at least ten (10) days preceding the day on which the hearing is to be held.

(2) Upon the date fixed for said hearing held upon notice as provided herein, an opportunity to be heard shall be granted to all residents and taxpayers of the county and to all other interested persons. After such a hearing, the board of county commissioners shall determine (1) whether unsanitary or unsafe inhabited dwelling accommodations exist in the county, and/or (2) whether there is a lack of safe or sanitary dwelling accommodations in the county available for all the inhabitants thereof. In determining whether dwelling accommodations are unsafe or unsanitary, the board of county commissioners shall take into consideration the following: the physical condition and age of the buildings; the degree of over-crowding; the percentage of land coverage; the light and air available to the inhabitants of such dwelling accommodations; the size and arrangement of the rooms; the sanitary facilities; and the extent to which conditions exist in such buildings which endanger life or property by fire or other causes.

(3) If it shall determine that either or both of the above enumerated conditions exist, the board of county commissioners shall adopt a resolution so finding (which need not go into any detail other than the mere finding) and shall thereupon appoint, as hereinafter provided, five (5) commis-

sioners to act as an authority. Said authority shall be a public body and a body corporate and politic upon the completion of the taking of the following proceedings:

(4) The commissioners of the authority shall present to the secretary of state an application signed by them which shall set forth (without any detail other than the mere recital) (1) that a notice has been given and public hearing has been held as aforesaid, that the board of county commissioners made the aforesaid determination after such hearing and appointed them as commissioners; (2) the name, and official residence of each of the commissioners, together with a certified copy of the appointment evidencing their right to office, the date and place of induction into and taking oath of office, and that they desire the housing authority to become a public body and a body corporate and politic under this act; (3) the term of office of each of the commissioners; (4) the name which is proposed for the corporation; and (5) the location of the principal office of the proposed corporation. The application shall be subscribed and sworn to by each of said commissioners before an officer authorized by the laws of the state to take and certify oaths, who shall certify upon the application that he personally knows the commissioners and knows them to be the officers as asserted in the application, and that each subscribed and swore thereto in the officer's presence. The secretary of state shall examine the application and if he finds that the name proposed for the corporation is not identical with that of a person or of any other corporation of this state or so nearly similar as to lead to confusion and uncertainty he shall receive and file it and shall record it in an appropriate book of record in his office.

(5) When the application has been made, filed and recorded, as herein provided, the authority shall constitute a public body and a body corporate and politic under the name proposed in the application; the secretary of state shall make and issue to the said commissioners, a certificate of incorporation pursuant to this act, under the seal of the state, and shall record the same with the application.

(6) The area of operation of such authority shall include said county, but in no event shall it include any city of the first or second class.

If the board of county commissioners, after a hearing as aforesaid, shall determine that neither of the above enumerated conditions exist, it shall adopt a resolution denying the petition. After three (3) months shall have expired from the date of the denial of any such petitions, subsequent petitions may be filed as aforesaid and new hearings and determinations made thereon.

(7) In any suit, action or proceeding involving the validity or enforcement of, or relating to any contract of the authority, the authority shall be conclusively deemed to have been established in accordance with the provisions of this act upon proof of the issuance of the aforesaid certificate by the secretary of state. A copy of such certificate, duly certified by the secretary of state, shall be admissible in evidence in any such suit, action or proceeding, and shall be conclusive proof of the filing and contents thereof.

35-129. (5309.27B) Commissioners and powers of authority for a county. The commissioners of a housing authority created for a county may be appointed and removed by the board of county commissioners of the county in the same manner as the commissioners of a housing authority created for a city may be appointed and removed by the mayor, and except as otherwise provided herein, each housing authority created for a county and the commissioners thereof shall have the same functions, rights, powers, duties and limitations provided for housing authorities created for cities and the commissioners of such housing authorities; provided, that for such purposes the term "mayor" or "council" as used in the housing authorities law and any amendments thereto shall be construed as meaning "board of county commissioners," the term "city clerk" as used therein shall be construed as meaning "county clerk" and the term "city" as used therein shall be construed as meaning "county" unless a different meaning clearly appears from the context.

History: En. Sec. 5, Ch. 153, L. 1941.

35-130. (5309.27C) Rural housing projects. Housing authorities created for counties are specifically empowered and authorized to borrow money, accept grants and exercise their other powers to provide housing for farmers of low income. In connection with such projects, such housing authorities may enter into such leases or purchase agreements, accept such conveyances and rent or sell dwellings forming part of such projects to or for farmers of low income, as such housing authority deems necessary in order to assure the achievement of the objectives of this act. Such leases, agreements or conveyances may include such covenants as the housing authority deems appropriate regarding such dwellings and the tracts of lands described in any such instrument, which covenants shall be deemed to run with the land where the housing authority deems it necessary and the parties to such instrument so stipulate. Nothing contained in this section shall be construed as limiting any other powers of any housing authority, except that no more than two acres of land per dwelling, together with the dwelling houses thereon provided for under the provisions of this act, shall be exempt from taxation and that upon title to said two acres of land, and the dwelling houses thereon passing to private ownership, the said land and the dwelling houses thereon shall be restored to the tax rolls, and be subject to taxation.

History: En. Sec. 5, Ch. 153, L. 1941.

35-131. (5309.27D) Housing applications by farmers. The owner of any farm operated, or worked upon, by farmers of low income in need of safe and sanitary housing may file an application with a housing authority of a county requesting that it provide for a safe and sanitary dwelling or dwellings for occupancy by such farmers of low income. Such applications shall be received and examined by housing authorities in connection with the formulation of projects or programs to provide housing for farmers of low income.

History: En. Sec. 5, Ch. 153, L. 1941.

35-132. (5309.27E) Definition of farmers of low income. "Farmers of low income" shall mean persons or families who at the time of their admis-

sion to occupancy in a dwelling of the authority: (1) live under unsafe or unsanitary housing conditions; (2) derive their principal income from operating or working upon a farm; and (3) had an aggregate average annual net income for the three (3) years preceding their admission that was less than the amount determined by the authority to be necessary, within its area of operation, to enable them, without financial assistance, to obtain decent, safe and sanitary housing, without overcrowding.

History: En. Sec. 5, Ch. 153, L. 1941.

35-133. (5309.27F) Operation not for profit. It is hereby declared to be the policy of this state that each housing authority shall manage and operate its housing projects in an efficient manner so as to enable it to fix the rentals for dwelling accommodations at the lowest possible rates consistent with its providing decent, safe and sanitary dwelling accommodations, and that no housing authority shall construct or operate any such project for profit, or as a source of revenue to the city or county.

History: En. Sec. 5, Ch. 153, L. 1941.

35-134. Act controlling. Insofar as the provisions of this act are inconsistent with the provisions of any other law, the provisions of this act shall be controlling.

History: En. Sec. 7, Ch. 153, L. 1941.

35-135. (5309.28) Declaration of necessity. It is hereby declared that unsanitary or unsafe dwelling accommodations exist in various areas of the state, and that consequently many persons of low income are forced to reside in such dwelling accommodations; that these conditions cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals and welfare of the citizens of the state and impair economic values; that the clearance, replanning and reconstruction of the areas in which unsanitary or unsafe housing conditions exist and the providing of safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which private property may be acquired; that it is in the public interest that work on such projects be instituted as soon as possible in order to relieve unemployment which now constitutes an emergency; and the necessity in the public interest for the provision hereinafter enacted, is hereby declared as a matter of legislative determination.

History: En. Sec. 1, Ch. 138, L. 1935.

Legislative Finding of Public Necessity Upheld

The legislature having determined and declared by this section the necessity in the public interest for provisions for slum clearance and that such is a public pur-

pose, the court will not interfere with such finding in the absence of a clear showing that such determination was wrong. Held: that the legislative determination was correct. *Rutherford v. City of Great Falls*, 107 M 512, 516, 86 P 2d 656.

35-136. (5309.29) Definitions. The following terms, whenever used or referred to in this act shall have the following respective meanings, unless a different meaning clearly appears from the context:

(1) "Housing authority" shall mean any housing authority organized pursuant to the housing authorities law of this state.

(2) "City" shall mean any city of the first or second class of the state which is, or is about to be, included in the territorial boundaries of a housing authority.

(3) "Municipality" shall mean any city, town or incorporated village of the state.

(4) "Housing project" shall mean any undertaking (a) to demolish, clear, remove, alter or repair unsafe or unsanitary housing, and/or (b) to provide dwelling accommodations for persons of low income, and said term may also include such buildings and equipment for recreational or social assemblies for educational, health or welfare purposes, and such necessary utilities as are designed primarily for the benefit and use of the housing authority and/or the occupants of such dwelling accommodations.

History: En. Sec. 2, Ch. 138, L. 1935.

35-137. (5309.30) Conveyance, lease or agreement in aid of housing project. For the purpose of aiding and cooperating in the planning, construction and operation of housing projects located within their respective territorial boundaries, the state, its subdivisions and agencies, and any county, city, or municipality of the state may, upon such terms, with or without consideration, as it may determine:

(a) grant, sell, convey or lease any of its property to a housing authority or the United States of America or any agency thereof; and

(b) to the extent that it is within the scope of each of their respective functions, (1) cause the services customarily provided by each of them to be rendered for the benefit of the housing authority and/or the occupants of such housing projects, and (2) provide and maintain parks and sewage, water and other facilities adjacent to or in connection with housing projects, and (3) enter into any agreement to open, close, pave, install, or change the grade of streets, roads, roadways, alleys, sidewalks, or other such facilities, to change the city or municipality map, to plan, replan, zone or rezone any part of the city or municipality.

In connection with the exercise of this power, any city or municipality may incur the entire expense of any such public improvements located within its territorial boundaries without assessment against abutting property owners. Any law or statute to the contrary notwithstanding, any gift, grant, sale, conveyance, lease or agreement provided for in this section may be made by the state, its subdivisions and agencies, and any county, city, or municipality of the state without appraisal, public notice, advertisement or public bidding.

History: En. Sec. 3, Ch. 138, L. 1935.

References

State ex rel. Great Falls Housing Authority v. City of Great Falls, 110 M 318, 330, 100 P 2d 915.

Collateral References

Municipal Corporations 225(1), 265.
63 C.J.S. Municipal Corporations §§ 965, 1036.

35-138. (5309.31) Advances and donations by city and municipality. Immediately after the incorporation of the housing authority, the council or other governing body of the city included within the territorial boundaries of such authority shall make an estimate of the amount of money necessary for the administrative expenses and overhead of the housing

authority during the first year following the incorporation of such housing authority, and shall appropriate such amount to the authority out of any moneys in the city treasury not appropriated to some other purposes, and shall cause the moneys so appropriated to be paid the authority as a donation. In addition thereto, the city and any municipality located in whole or in part within the boundaries of a housing authority shall have the power annually and from time to time to make donations or advances to the authority of such sums as the city or municipality in its discretion may determine. The authority, when it has money available therefor, shall reimburse the city or municipality for all advances by way of loan made to it.

History: En. Sec. 4, Ch. 138, L. 1935.

Not an Unconstitutional Donation or Loan of City Credit

A city in advancing money to a housing authority is aiding slum clearance and thereby lightens its own burden of protecting all citizens against disease, crime and immorality; therefore the city is performing indirectly, through a public agency created by the state and sanctioned by its own governing authority, one of the primary functions of municipal government. *Rutherford v. City of Great Falls*, 107 M 512, 519, 86 P 2d 656.

Mandatory in Its Terms

The language of this section is manda-

tory in its terms, and when the authority is created the city shall make an estimate of the amount of money necessary for the first year's expense and shall appropriate the same to the authority. It is the plain legal duty of the city, when the authority is created by its consent, to make an estimate as provided in this section, and make the appropriation. *State ex rel. Helena Housing Authority v. City of Helena*, 108 M 347, 355, 90 P 2d 514.

Collateral References

Municipal Corporations—871.

64 C.J.S. Municipal Corporations § 1845.

35-139. (5309.32) Action of city or municipality by resolution. Except as otherwise provided in this act, all action authorized to be taken under this act by the council or other governing body of any city or of any municipality may be by resolution adopted by a majority of all the members of its council or other governing body, which resolution may be adopted at the meeting of the council or other governing body at which such resolution is introduced and shall take effect immediately upon such adoption, and no such resolution need be published or posted.

History: En. Sec. 5, Ch. 138, L. 1935.

62 C.J.S. Municipal Corporations §§ 416, 442.

Collateral References

Municipal Corporations—106, 120.

35-140. (5309.33) Purpose of act. It is the purpose and intent of this act that the state, its subdivisions and agencies, in any county, city or municipality of the state shall be authorized, and are hereby authorized, to do any and all things necessary to aid and cooperate in the planning, construction and operation of housing projects by the United States of America and by housing authorities.

History: En. Sec. 6, Ch. 138, L. 1935.

35-141. (5309.34) Supplemental nature of act. The powers conferred by this act shall be in addition and supplemental to the powers conferred by any other law.

History: En. Sec. 7, Ch. 138, L. 1935.

References

State ex rel. Great Falls Housing Au-

thority v. City of Great Falls, 110 M 318,
330, 100 P 2d 915.

Collateral References

Municipal Corporations 597.
62 C.J.S. Municipal Corporations § 133.

35-142. (5309.35) Investment by fiduciaries in home owners' loan corporation bonds authorized. Notwithstanding any other provision of law, it shall be lawful for any executor, administrator, guardian, or conservator, trustee or other fiduciary to invest the funds or moneys in their custody or possession, eligible for investment, in bonds of the Home Owners' Loan Corporation or debentures issued by the federal housing administrator, guaranteed as to principal and interest by the United States Government. Notwithstanding other provisions of the law, it shall be lawful for any insurance company, building and loan association, bank, trust company, investment company and other financial institutions operating under the laws of this state to invest the funds or moneys in their custody or possession, eligible for investment, in bonds of the Home Owners' Loan Corporation, in debentures issued by the federal housing administrator and in obligations of National Mortgage Associations.

History: En. Sec. 1, Ch. 5, Ex. L. 1933;
amd. Sec. 1, Ch. 37, L. 1935; amd. Sec. 1,
Ch. 24, L. 1937.

Collateral References

Executors and Administrators 102;

Guardian and Ward 53; Trusts 217
(3).

33 C.J.S. Executors and Administrators
§ 206; 39 C.J.S. Guardian and Ward § 84;
65 C.J. Trusts § 676.

35-143. Housing bonds legal investments and security. The state and all public officers, municipal corporations, political subdivisions, and public bodies, all banks, bankers, trust companies, savings banks and institutions, buildings and loan associations, savings and loan associations, investment companies and other persons carrying on a banking business, all insurance companies, insurance associations and other persons carrying on an insurance business, and all executors, administrators, guardians, trustees and other fiduciaries may legally invest any sinking funds, moneys or other funds belonging to them or within their control in any bonds or other obligations issued by a housing authority established pursuant to the housing authorities law of this state (sections 35-101 to 35-133 and any laws amendatory or supplemental thereto), or issued by any public housing authority or agency in the United States, when such bonds or other obligations are secured by a pledge of annual contributions to be paid by the United States government or any agency thereof, and such bonds and other obligations shall be authorized security for all public deposits and shall be fully negotiable in this state; it being the purpose of this act to authorize any persons, firms, corporations, associations, political subdivisions, bodies and officers, public or private, to use any funds owned or controlled by them, including (but not limited to) sinking, insurance, investment, retirement, compensation, pension and trust funds, and funds held on deposit, for the purchase of any such bonds or other obligations and that any such bonds or other obligations shall be authorized security for all public deposits and shall be fully negotiable in this state; provided, however, that nothing contained in this act shall be construed as relieving any person, firm or corporation from any duty of exercising reasonable care in selecting securities.

History: En. Sec. 1, Ch. 218, L. 1943.

35-144. Act controlling. Insofar as the provisions of this act are inconsistent with the provisions of any other law, the provisions of this act shall be controlling.

History: En. Sec. 3, Ch. 218, L. 1943.

35-145. (5309.36) Home owners' loan corporation bonds as security for deposit of public funds. Subject to such rules and regulations as may be prescribed by the superintendent of banks, the bonds and other obligations herein made eligible for investment, may be used as security for all deposits of public funds or obligations for which depository bonds or any kind of bonds or other securities are required, or may by law be deposited as security.

History: En. Sec. 2, Ch. 5, Ex. L. 1933;
amd. Sec. 2, Ch. 37, L. 1935.

Collateral References

Depositories \hookrightarrow 7.

26 C.J.S. Depositories § 9.

35-146. (5309.37) Housing authorities may be dissolved when and how. If after the lapse of two years from the creation of a housing authority by the filing and recording in the office of the secretary of state of the application as provided in section 35-104, no housing project has been commenced and no contract has been signed by the council or the mayor on behalf of the municipality with the housing authority or United States housing authority providing for contributions by the municipality either in cash or by tax remissions or exemptions in aid or support of any such housing project, such housing authority may be dissolved in the manner following: At any regular meeting of the council, without any previous notice, the council may, in its discretion, adopt a resolution declaring that dwelling accommodations in the city and surrounding area are such that there is no need for the construction of any housing project and that the need for the creation of a housing authority no longer exists, and that the same be disbanded and dissolved, which resolution shall be spread upon the minutes of the meeting of the council. Thereupon a copy of the said resolution shall be duly certified by the mayor and city clerk and filed for record in the office of the secretary of state, whereupon and from thenceforth the said housing authority shall be and become dissolved and all functions thereof cease and the commissioners thereof discharged from any further duties or powers.

History: En. Sec. 1, Ch. 25, L. 1941.

CHAPTER 2

VALIDATION PROCEEDINGS UNDER HOUSING AUTHORITIES LAW

- Section 35-201. Creation and proceedings of housing authorities validated.
- 35-202. Contracts and obligations of housing authorities validated.
- 35-203. Notes and bonds validated.

35-201. Creation and proceedings of housing authorities validated. The creation and establishment of housing authorities in the state of Montana under the provisions of the housing authorities law (chapter 1 of this Title), together with all proceedings, acts and things heretofore undertaken, performed or done with reference thereto, are hereby vali-

dated, ratified, confirmed, approved and declared legal in all respects, notwithstanding any defect or irregularity therein or any want of statutory authority.

History: En. Sec. 1, Ch. 118, L. 1941.

35-202. Contracts and obligations of housing authorities validated.

All contracts, agreements, obligations and undertakings of such housing authorities heretofore entered into relating to financing or aiding in the development, construction, maintenance or operation of any housing project or projects or to obtaining aid therefor from the United States housing authority, including (without limiting the generality of the foregoing) loan and annual contributions contracts with the United States housing authority, agreements with municipalities or other public bodies (including those which are pledged or authorized to be pledged for the protection of the holders of any notes or bonds issued by such housing authorities or which are otherwise made a part of the contract with such holders of notes or bonds) relating to cooperation and contributions in aid of housing projects, payments (if any) in lieu of taxes, furnishing of municipal services and facilities, and the elimination of unsafe and insanitary dwellings, and contracts for the construction of housing projects, together with all proceedings, acts and things heretofore undertaken, performed or done with reference thereto, are hereby validated, ratified, confirmed, approved and declared legal in all respects, notwithstanding any defect or irregularity therein or any want of statutory authority.

History: En. Sec. 2, Ch. 118, L. 1941.

35-203. Notes and bonds validated. All proceedings, acts and things heretofore undertaken, performed or done in or for the authorization, issuance, execution and delivery of notes and bonds by housing authorities for the purpose of financing or aiding in the development or construction of a housing project or projects, and all notes and bonds heretofore issued by housing authorities are hereby validated, ratified, confirmed, approved and declared legal in all respects, notwithstanding any defect or irregularity therein or any want of statutory authority.

History: En. Sec. 3, Ch. 118, L. 1941.

CHAPTER 3

ADDITIONAL WAR POWERS OF HOUSING AUTHORITIES

- Section 35-301. Housing authorities activities authorized in war area.
- 35-302. Cooperation with federal government.
- 35-303. Powers of city, county and other public bodies with respect to projects.
- 35-304. Payment of rentals in lieu of taxes on real property.
- 35-305. Definitions—development project deemed initiated, when.
- 35-306. Act constitutes an independent authorization—powers granted additional.
- 35-307. Termination of authority under act.

35-301. Housing authorities activities authorized in war area. Any housing authority now or hereafter established pursuant to chapter 1 of this Title (herein called the “housing authorities law”) may undertake the development or administration, or both, of projects to provide housing for

persons engaged or to be engaged in war industries or activities if it finds that an acute shortage of housing for such persons exists or impends in the area within the authority's boundaries or any part thereof and that the necessary housing would not otherwise be provided when needed. In the ownership, development or administration of projects under this act, a housing authority shall have all the rights, powers, privileges and immunities that it has under any provision of law relating to the ownership, development or administration of low-rent housing and slum clearance projects, in the same manner as though all the provisions of law applicable thereto were applicable to projects developed or administered hereunder; provided any housing authority now or hereafter established pursuant to chapter 1 of this Title (known as the housing authorities law), and/or the federal government shall make and agree to make, with respect to any project owned and administered by it under this act, such payments for services and facilities furnished for such project by the city, county or other political subdivision of the state in which such project is located as may be agreed upon; and provided further, that a project developed or administered under this act by a housing authority to provide housing for persons engaged or to be engaged in war industries or activities shall not be subject to any provisions of the housing authorities law restricting rentals or tenant selection. As soon after the termination of the present war as it is found to be practicable, all projects owned and administered by a housing authority under this act shall be administered for the purposes and in accordance with all the provisions of the housing authorities law.

History: En. Sec. 1, Ch. 215, L. 1943.

35-302. Cooperation with federal government. A housing authority may exercise any or all of its powers to aid and cooperate with the federal government in making housing available for persons engaged or to be engaged in war industries or activities; may act as agent for the federal government in developing and administering projects undertaken by the federal government to provide such housing; may lease such projects from the federal government; and may arrange with public bodies and private agencies for such services and facilities as may be needed for such projects, subject to the provisions of this act.

History: En. Sec. 2, Ch. 215, L. 1943.

35-303. Powers of city, county and other public bodies with respect to projects. With respect to projects undertaken by a housing authority or the federal government to provide housing for persons engaged or to be engaged in war industries, any city, county or other public body shall have all the rights and powers to aid and cooperate in the development or administration of such projects that it has under any provision of law relating to its aiding or cooperating in the development or administration of low-rent housing and slum clearance projects, in the same manner as though all the provisions of law applicable thereto were applicable to projects undertaken by a housing authority or by the federal government to provide housing for persons engaged or to be engaged in war industries or activities. With respect to projects located outside the territorial boundaries of a city, county or other public body, which are undertaken by a

housing authority or the federal government to provide housing for persons engaged or to be engaged in war industries or activities, such city, county or other public body may furnish or contract to furnish, upon such terms as it deems advisable, public services or facilities for any such project if the governing body of the city or county, as the case may be, in which such project is located, shall, by resolution, consent thereto, subject to the provisions of this act.

History: En. Sec. 3, Ch. 215, L. 1943.

35-304. Payment of rentals in lieu of taxes on real property. Any housing authority now or hereafter established pursuant to chapter 1 of this Title (known as the housing authorities law) and/or the federal government may pay from rentals, annual sums in lieu of taxes, to any state and/or political subdivision thereof, with respect to any real property, including improvements thereon, now owned or hereafter acquired or held either by such housing authority or the federal government. The amount so paid for any year, upon such property, shall not exceed the taxes which would be paid to the state and/or subdivision thereof, as the case may be upon such property, if it were not exempt from taxation, with such allowances as may be considered to be appropriate for expenditures by the government for streets, utilities, or other public services to serve such property.

History: En. Sec. 4, Ch. 215, L. 1943.

35-305. Definitions — development project deemed initiated, when. Wherever used in this act, the term “persons” shall include the families of such persons who are living with them, the term “federal government” shall include any department, agency or instrumentality thereof, and the term “city” shall mean any city or town in the state. The development of a project shall be deemed to have been initiated under this act if a housing authority has issued any bonds, notes or other obligations to finance the cost thereof.

History: En. Sec. 5, Ch. 215, L. 1943.

35-306. Act constitutes an independent authorization—powers granted additional. This act shall constitute an independent authorization for a housing authority to undertake the development or administration of projects to provide housing for persons engaged or to be engaged in war industries or activities and to cooperate with, or act as agent for, the federal government in the development or administration of projects undertaken by the federal government to make housing available for such persons. In acting hereunder, a housing authority shall not be subject to any limitations, restrictions or requirements of other laws (except those relating to land acquisition) prescribing or limiting the procedure or action to be taken in the development or administration of any buildings, property or public works, including, but not limited to low-rent housing and slum clearance projects or undertakings or projects of municipal or public corporations or political subdivisions or agencies of the state. A housing authority may do any and all things necessary or desirable to cooperate with, or act as agent for, the federal government, or to secure financial aid, for the expeditious development or the administration of projects to make housing available for persons engaged or to be engaged in war industries or activities and to

effectuate the purposes of this act. All powers conferred by this act shall be in addition and supplemental to the powers conferred by any other law, and nothing contained herein shall be construed as limiting such other powers, except as herein provided.

History: En. Sec. 6, Ch. 215, L. 1943.

35-307. Termination of authority under act. No housing authority shall initiate the development of any housing project under this act after the termination of the present war.

History: En. Sec. 7, Ch. 215, L. 1943.

CHAPTER 4

EMERGENCY WAR AND VETERANS' HOUSING FACILITIES

Section 35-401. Declaration of purpose.

35-402. Definitions.

35-403. Authority of local agencies to acquire housing.

35-404. Administration of housing facility.

35-405. Rentals and tenant selection exempt from housing authority law.

35-406. Prior acts legalized.

35-407. Termination of operation.

35-401. Declaration of purpose. It is hereby declared that there exists an housing shortage in the state of Montana. That of the hundreds of veterans dismissed from the military service, many of such veterans and other persons are still unable to find adequate housing for themselves or their families, and by reason thereof are being compelled to live in unsafe, unsanitary and congested dwellings. That by virtue of the "Housing Act of 1950," being "title II, chapter 94, Public Law 475 of the laws of the Eighty-first Congress, Second Session," war and veterans housing projects constructed in the state of Montana by the federal government will be destroyed and removed unless otherwise provided for. That the adoption of this act will enable many veterans and their families to maintain their status in the community and conduct their employment without worry as to the health, sanitary conditions and welfare of their families.

History: En. Sec. 1, Ch. 41, L. 1951.

Collateral References

Health 32.

39 C.J.S. Health § 22.

NOTE.—Title II of the Housing Act of 1950, referred to in this section, will be found in United States Code, Tit. 42, secs. 1412, 1523, 1542, 1553, 1561, 1564, 1574, 1576, 1581 to 1590.

35-402. Definitions. The following terms, whenever used or referred to in this act, shall have the following respective meanings, unless a different meaning clearly appears from the context:

(1) "Local agency" means any county, city, town, school district, or housing authority of the state.

(2) "Housing" means any temporary war or veterans' housing owned by the United States of America, available for acquisition under the terms and provisions of the Housing Act of 1950, being title II, chapter 94, Public Law 475, of the laws of the Eighty-first Congress, Second Session, for the

purpose of providing temporary housing for veterans and for families of servicemen, located within the boundaries of any local agency.

(3) "Veterans" includes, insofar as permitted by federal law, any person who has served in the military or naval forces of the United States and has been discharged or released therefrom under conditions other than dishonorable.

(4) "Families of servicemen" includes, insofar as permitted by federal law, the families of any person who is serving in the military or naval forces of the United States, and the unmarried widow of a deceased veteran.

(5) "Families" is limited to the spouse and legal dependents who are members of the household.

History: En. Sec. 2, Ch. 41, L. 1951.

35-403. Authority of local agencies to acquire housing. For the purposes of this act, any local agency may expend or use its funds and employ its personnel to do anything necessary to acquire housing, as defined herein, available for acquisition under the terms of the Federal Public Housing Act of 1950, whether by purchase, lease, or otherwise; and may remodel, repair, or remove and re-erect such housing facilities, but shall not erect or construct new housing facilities. The local agency may also provide for the installation of necessary appurtenances and utilities. For the purposes of this act, any local agency may enter into agreements with the federal government pursuant to the Housing Act of 1950.

History: En. Sec. 3, Ch. 41, L. 1951.

35-404. Administration of housing facility. The local agency shall administer any housing facility acquired pursuant to this act and shall let or lease accommodations therein to veterans and families of servicemen upon such terms and for such rentals as is reasonable, but in such manner as to secure, insofar as practical, a return of the investments made by it; provided, however, that before any return of investments in such housing shall accrue to any housing authority there shall first be paid to any state and/or political subdivision thereof, annual sums in lieu of taxes which amounts so paid for any year, upon such property, shall not exceed the taxes which would be paid to the state and/or subdivision thereof, as the case may be, upon such property if it were not exempt from taxation, with such further allowances as may be considered to be appropriate for expenditures by the government for streets, utilities or other public services to serve such property.

History: En. Sec. 4, Ch. 41, L. 1951.

35-405. Rentals and tenant selection exempt from housing authority law. In providing housing for veterans and their families, single veterans, and families of servicemen, pursuant to the provisions of this act, a housing authority shall not be subject to any of the provisions of the housing authority law relating to rentals and tenant selection.

History: En. Sec. 5, Ch. 41, L. 1951.

35-406. Prior acts legalized. Any and all contracts, undertakings, and commitments, together with acts and proceedings in respect thereto, here-

tofore done or undertaken by any local agency for the provisions of housing for veterans and their families or single veterans and families of servicemen are hereby validated and declared legal.

History: En. Sec. 6, Ch. 41, L. 1951.

35-407. Termination of operation. The operation and maintenance of any housing facility acquired pursuant to this act may be terminated at any time if consistent with the terms of the federal act under which it was acquired, or if the legislature determines that the necessity therefor no longer exists, but in no event shall such housing facility be operated and maintained by any local agency after the first day of May, 1955.

When any housing facility is discontinued, in whole or in part, it shall be liquidated in such manner as will secure the greatest return to the local agency; provided, however, that any lands acquired under this act may be retained by the local agency.

History: En. Sec. 7, Ch. 41, L. 1951.

TITLE 36

HUSBAND AND WIFE

Chapter 1. Husband and wife—mutual obligations, powers and property rights, 36-101 to 36-131.

CHAPTER 1

HUSBAND AND WIFE—MUTUAL OBLIGATIONS, POWERS AND PROPERTY RIGHTS

- Section 36-101. Mutual obligations of husband and wife.
36-102. Rights of husband as head of family.
36-103. Duties of husband to wife as to support.
36-104. In other respects their interests separate.
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separation agreement.
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36-111. Separate property of wife.
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36-120. Husband not liable when abandoned by wife.
36-121. When wife must support husband.
36-122. Rights of husband and wife—how governed.
36-123. Marriage settlement contracts—how executed.
36-124. To be acknowledged and recorded.
36-125. Effect of recording.
36-126. Minors may make marriage settlement.
36-127. Married woman may act as executrix, guardian or trustee.
36-128. May sue and be sued.
36-129. Liable for her own contracts.
36-130. May make contracts.
36-131. Tenancy by courtesy not allowed.

36-101. (5782) Mutual obligations of husband and wife. Husband and wife contract toward each other obligations of mutual respect, fidelity, and support.

History: En. Sec. 210, Civ. C. 1895;
re-en. Sec. 3690, Rev. C. 1907; re-en. Sec.
5782, R. C. M. 1921. Cal. Civ. C. Sec.
155. Field Civ. C. Sec. 75.

Marriage, secs. 48-101 to 48-206.
Married woman as witness against hus-
band, sec. 93-701-4.

Cross-References

Divorce, secs. 21-101 to 21-149.
Dower, secs. 22-101 to 22-117.
Husband and wife testifying against
each other, privileges, secs. 93-701-4, 94-
8802.

Operation and Effect

A wife may purchase her husband's
real estate at execution or foreclosure
sale and hold it as her separate property,
if the transaction is bona fide and pay-
ment is made with her own money. Mar-
cellus v. Wright, 51 M 559, 564, 154 P 714.

Held, under the rules below, that the common-law doctrine under which one spouse may not sue the other for a personal tort is in force in Montana, and that, therefore, the complaint of a wife against her husband for damages resultant from personal injuries sustained by reason of the alleged negligence of defendant's chauffeur while plaintiff was riding in defendant's car, was vulnerable to a demurrer. *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922.

Id. The primary purpose of the Married Women's Act (secs. 36-101 to 36-131) was to free the wife from certain disabilities imposed upon her by the common law, under which her legal personality and property were merged in the husband, i.e., to place the wife upon an equal footing with the husband as to the ownership, control and enjoyment of property, as to

contractual rights in general, with an equal right to resort to the courts, nothing appearing therein to disturb the marital unity otherwise.

References

Cited or applied as section 3690, Revised Codes, in *State ex rel. Robison v. District Court et al.*, 56 M 592, 186 P 335; *Betor v. National Biscuit Co.*, 85 M 481, 488, 280 P 641; *Bingham v. National Bank of Montana*, 105 M 159, 167, 72 P 2d 90; *In re Marsh's Estate*, 125 M 239, 234 P 2d 459, 461.

Collateral References

Husband and Wife ⇨ 1, 4.
41 C.J.S. *Husband and Wife* §§ 4, 15, 16.
26 Am. Jur. 634, *Husband and Wife*, § 5.

36-102. (5783) Rights of husband as head of family. The husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto.

History: En. Sec. 211, Civ. C. 1895; re-en. Sec. 3691, Rev. C. 1907; re-en. Sec. 5783, R. C. M. 1921. Cal. Civ. C. Sec. 156. Field Civ. C. Sec. 76.

Cross-Reference

Residence of husband presumptively residence of wife, sec. 83-303.

Operation and Effect

Husband as head of the family has right to manage his property, including an apartment house, and his wife is required to conform to his exercise of such right. *Crenshaw v. Crenshaw*, 120 M 190, 182 P 2d 477, 490.

Venue for Divorce Trial

Where husband had taken up his residence and rented a farm in C county and invited his wife and children, then living in the adjoining county of L to join him,

which invitation the wife accepted, and later she returned to L county where she filed her complaint for divorce, the proper place of trial was in C county, the place of residence of the defendant husband, and error was committed in refusing his motion for change of venue to C county. *Archer v. Archer*, 106 M 116, 118, 75 P 2d 783.

References

Gates v. Powell, 77 M 554, 562, 252 P 377; *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922; *Emery v. Emery*, 122 M 201, 200 P 2d 251, 263.

Collateral References

Husband and Wife ⇨ 3.
41 C.J.S. *Husband and Wife* §§ 9, 10.
26 Am. Jur. 638, *Husband and Wife*, § 10.

36-103. (5784) Duties of husband to wife as to support. The husband must support himself and wife out of his property or by his labor. If he is unable to do so she must assist him as far as she is able.

History: En. Sec. 212, Civ. C. 1895; re-en. Sec. 3692, Rev. C. 1907; re-en. Sec. 5784, R. C. M. 1921. Field Civ. C. Sec. 77.

Cross-Reference

Abandonment of wife, penalty, secs. 94-301 to 94-303.

Ability of Husband to Support

The fact that person has no property does not relieve him of his obligation to support his wife and children when it is shown that he has the ability to provide

such support by his labor. *State ex rel. Houtchens v. District Court*, 122 M 76, 199 P 2d 272, 275.

Action Against Third Persons for Wrongful Death

Where the wife and children have been deprived of this support by the death of the father, caused by the wrongful act or neglect of another, they do not have a cause of action under section 93-2810 against such other person, irrespective of whether the father, if death had not en-

sued, could have maintained an action in his own behalf. *Melville v. Butte-Balaklava Copper Co.*, 47 M 1, 5, 130 P 441.

Husband Liable for Necessities

This section makes it the duty of the husband to support his wife out of his property or labor, and by the provisions of section 36-119, if he neglects to do so (unless the wife has abandoned him without justification), any person may in good faith supply her with articles necessary for her support and recover value therefor from him. *State ex rel. La Point v. District Court*, 69 M 29, 37, 220 P 88.

Where the husband fails or refuses to furnish the wife the things necessary for her support, she may, while living with him or while living separate from him because of his misconduct, bind him by her contracts with third persons for such necessities; under such circumstances the law creates an implied agency on the part of the wife, his consent being implied by reason of the marital relationship. *McQuay et al. v. McQuay*, 86 M 535, 537, 284 P 532.

Operation and Effect

The services which a wife owes her husband do not create for her a joint interest in his estate. *In re Marsh's Estate*, 125 M 239, 234 P 2d 459, 462.

36-104. (5785) In other respects their interests separate. Neither husband nor wife has any interest in the property of the other, except as mentioned in the preceding section, but neither can be excluded from the other's dwelling.

History: En. Sec. 213, Civ. C. 1895; re-en. Sec. 3693, Rev. C. 1907; re-en. Sec. 5785, R. C. M. 1921. Cal. Civ. C. Sec. 157. Field Civ. C. Sec. 78.

Exclusion from Dwelling in Divorce Action

In a divorce action, under the facts of the case, the husband could not lawfully be excluded from the family dwelling. *Emery v. Emery*, 122 M 201, 200 P 2d 251, 266.

References

Crowley et al. v. Rorvig, 61 M 245, 203

When Entitled to Support

The law imposes upon the husband the legal duty of supporting his wife out of his property or by his labor, if he is able to do so (this section), and a mere showing that the parties are married may raise a presumption that the wife is legally entitled to be supported by the husband. *State ex rel. Robison v. District Court*, 56 M 592, 186 P 335; *Goodwin v. Elm Orlu Min. Co. et al.*, 83 M 152, 159, 269 P 403.

References

Cited or applied as section 3692, Revised Codes, in *State ex rel. Robison v. District Court et al.*, 56 M 592, 186 P 335; *Giebler v. Giebler*, 69 M 347, 352, 222 P 436; *In re Mahaffay's Estate*, 79 M 10, 17, 18, 254 P 875; *Yates v. Commercial Bank & Trust Co. et al.*, 79 M 100, 107, 255 P 8; *Betor v. National Biscuit Co.*, 85 M 481, 488, 280 P 641; *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922; *Bingham v. National Bank of Montana*, 105 M 159, 167, 72 P 2d 90; *Tabor v. Industrial Acc. Fund*, 126 M 240, 247 P 2d 472, 474, 475.

Collateral References

Husband and Wife—4.

41 C.J.S. Husband and Wife §§ 15, 16.
26 Am. Jur. 934, Husband and Wife, § 337 et seq.

P 496; *In re Mahaffay's Estate*, 79 M 10, 17, 18, 254 P 875; *Murray Hospital v. Angrove*, 92 M 101, 107, 10 P 2d 577; *In re Marsh's Estate*, 125 M 239, 234 P 2d 459, 462.

Collateral References

Husband and Wife—1, 6, 8.

41 C.J.S. Husband and Wife, §§ 4, 18, 21.
26 Am. Jur. 663, Husband and Wife, §§ 34-125.

36-105. (5786) Husband and wife may make contracts. Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might, if unmarried, subject in transactions between themselves to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the provisions of this code relative to trusts.

History: En. Sec. 214, Civ. C. 1895; re-en. Sec. 3694, Rev. C. 1907; re-en. Sec. 5786, R. C. M. 1921. Cal. Civ. C. Sec. 158. Field Civ. C. Sec. 79.

Cross-References

Acknowledgments by married women, secs. 39-108, 39-109, 39-111, 39-113, 67-1603.

Corporate dividends may be received by married woman, sec. 15-604.

Transfers of corporate stock by married woman valid, sec. 15-604.

Contract of Separation

Under this section and the next two succeeding, husband and wife may agree, in writing, to an immediate separation, making provision for the support of either of them, the mutual consent of the parties being a sufficient consideration; and, if fairly made and executed, free from fraud or imposition, coercion, or duress, courts will uphold and enforce such an agreement. *Lee v. Lee*, 55 M 426, 431, 178 P 173.

Contracts of Persons Occupying Confidential Relations With Each Other

While transfers of property by a husband to his wife should when charged as being fraudulent be very closely scrutinized on account of the opportunities afforded by the confidential relation of the parties for the perpetration of fraud, yet a husband honestly indebted to his wife may give her a valid preference, either by transfer of money or property in payment, or by giving security to the same extent as he may prefer any other creditor, and such a preference is not of itself fraudulent as to other creditors of the husband. *Lambrecht v. Patten*, 15 M 260, 38 P 1063; *Koopman v. Mansolf*, 51 M 48, 149 P 491; *Harrison v. Riddell et al.*, 64 M 466, 479, 210 P 460.

Where a wife's intention to convey property owned by her in her own right to an only daughter was, through the influence of the husband, made possible by reason of the confidential relations between them, so changed as to cause her to convey to him instead, upon his promise to make a will devising such property, as well as his own, to the daughter and a son in equal shares, which promise was after the wife's death broken and the will, theretofore made, destroyed, the husband was rightfully declared an involuntary trustee of the property, in favor of the daughter, the intended beneficiary. *Huffine v. Lincoln*, 52 M 585, 593, 160 P 820.

Where under a contract made by defendant land owner with plaintiffs (two individuals and a corporation) jointly, which authorized them to sell his property at a fixed price on a commission basis, a sale made to four persons, two of whom were the wives of the individual plaintiffs, was voidable at defendant's option, the fact that the two other purchasers bore no relation whatever to such plaintiffs not altering the rule condemning the sale. *Crowley et al. v. Rorvig*, 61 M 245, 203 P 496.

In an action in conversion of personal property seized under attachment, in which defendants alleged that the property seized belonged to the plaintiff's husband, that she and he had conspired to defraud his creditors and for that purpose the husband had fraudulently transferred his property to plaintiff who paid no consideration therefor, and that other property had been purchased by her with the husband's money, held that the verdict in plaintiff's favor was supported by the evidence. *Yates v. Commercial Bank & Trust Co. et al.*, 79 M 100, 107, 255 P 8.

Purpose of Act

The primary purpose of the Married Women's Act (secs. 36-101 to 36-131) was to free the wife from certain disabilities imposed upon her by the common law, under which her legal personality and property were merged in the husband, i. e., to place the wife upon an equal footing with the husband as to the ownership, control and enjoyment of property, as to contractual rights in general, with an equal right to resort to the courts, nothing appearing therein to disturb the marital unity otherwise. *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922.

Wife May Not Sue Husband for Personal Tort.

Held, that the common-law doctrine under which one spouse may not sue the other for a personal tort is in force in Montana, and that, therefore, the complaint of a wife against her husband for damages resultant from personal injuries sustained by reason of the alleged negligence of defendant's chauffeur while plaintiff was riding in defendant's car, was vulnerable to a demurrer. *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922.

References

Cited or applied as section 3694, Revised Codes, in *Marcellus v. Wright*, 51 M 559, 564, 154 P 714; *State ex rel. Robison v. District Court et al.*, 56 M 592, 186 P 335; *In re Mahaffay's Estate*, 79 M 10, 17, 18, 254 P 875; *State ex rel. Towne v. District Court*, 114 M 1, 7, 132 P 2d 161; *Emery v. Emery*, 122 M 201, 20 P 2d 251, 263.

Collateral References

Husband and Wife—36, 68.
41 C.J.S. Husband and Wife §§ 120, 194.
26 Am. Jur., Husband and Wife, p. 752, §§ 126 et seq.; p. 858, §§ 252 et seq.

Validity of partnership agreement between husband and wife. 20 ALR 1304.

Gift of services or labor to wife as fraud on husband's creditors. 28 ALR 1048.

Part performance of oral contract to convey predicated upon possession or improvement by one spouse of real property of other. 74 ALR 218.

36-106. (5787) Extent to which their legal relation may be altered by contract—separation agreement. A husband and wife cannot, by any contract with each other, alter their legal relation, except as to property and except that they may agree, in writing, to an immediate separation, and may make provision for the support of either of them and of their children during such separation.

History: En. Sec. 215, Civ. C. 1895; re-en. Sec. 3695, Rev. C. 1907; re-en. Sec. 5787, R. C. M. 1921. Cal. Civ. C. Sec. 159. Based on Field Civ. C. Sec. 80.

Agreement Must Be In Writing

An agreement between husband and wife providing for a property settlement between them must, under this section, be in writing. *Clary v. Fleming*, 60 M 246, 249, 198 P 546.

Agreement No Bar to Divorce

An agreement by husband and wife for immediate separation, making provision for the support of either and of their children, authorized by this section, if fairly made and executed and free from fraud or imposition, coercion or duress, will be enforced, and is not ordinarily a bar to an action for divorce for cause then existing or arising subsequently thereto, in the absence of a covenant, express or implied, not to sue for past offenses. *Sherman v. Sherman*, 65 M 227, 229, 211 P 321.

Attachment Lies Where Obligations Contractual and Not Decretal

Where the court approved a property settlement contract entered into during the pendency of a divorce action, and defendant ceased payments on the agreed \$150 per month support money when the minor child reached majority, held, that the rights and obligations of the parties were contractual and not decretal and that therefore attachment lay, against his contention that the sum payable was not for a certain sum; held further that such agreements regulate the rights and obligations inter sese, and his remedy was for reformation of the agreement, until which time the contract must stand. *State ex rel. Towne v. District Court*, 114 M 1, 3, 132 P 2d 161.

Burden of Proof As to Compliance With Provisions

Where the husband, on application by his wife for temporary alimony pending determination of an action for divorce, relied upon a separation agreement as a bar to her right to relief, the burden rested upon him to allege and prove that the agreement complied in all respects with

this section. *State ex rel. Robison v. District Court et al.*, 56 M 592, 186 P 335.

Collusion

An agreement between husband and wife, whereby the latter promised to convey a lot to the former in consideration of his failure to fight a divorce action instituted by her, was collusive and void as against public policy. *Clary v. Fleming*, 60 M 246, 198 P 546.

An agreement of the nature of the above entered into with the intent of bringing about or facilitating a divorce is void. *Sherman v. Sherman*, 65 M 227, 229, 211 P 321.

Effect of Contract

It is the duty of the court to enforce a contract, even though the complaining party may have made a bad bargain. *Viers v. Webb*, 76 M 38, 41, 245 P 257.

Id. Where under a separation agreement the wife accepted certain real property in full satisfaction of her rights in the property of the husband, and the latter granted her permission to use household furniture owned by him until he should want it, the transaction constituted a bailment for the benefit of the wife for an indefinite period—a loan within the meaning of section 47-101.

Essentials of Contracts Generally

Tested by the rules of the common law, an agreement between husband and wife providing for a separation, an adjustment of their respective interests in property and for the support of the wife, is valid only when it is to take effect at once and is immediately complied with, and when the marital relations are of such a character as to render a separation necessary for the health or happiness of one or the other. *Stebbins v. Morris*, 19 M 115, 120, 122, 47 P 642. See *State ex rel. Giroux v. Giroux*, 19 M 149, 158, 47 P 798; *Lee v. Lee*, 55 M 426, 433, 178 P 173.

An agreement between husband and wife whereby the former is absolved from the legal obligation to support the latter should, in the absence of a compliance with the provisions of this section, be held void as against public policy. *State*

ex rel. Robison v. District Court et al., 56 M 592, 186 P 335.

Remedy is Reformation Where Contract Does Not Provide for Modifications

Where a contract entered into between husband and wife pending divorce suit, approved by the court, provided for modification upon remarriage of the wife, but nothing was said as to modification in payments upon the daughter reaching the age of majority, the latter matter can be cured only by an appropriate action in equity for reformation or some other suitable proceeding to obtain suitable adjustment, until which time the contract is one for a sum certain and therefore attachment lies. State ex rel. Towne v. District Court, 114 M 1, 8, 132 P 2d 161.

Successive Suits on Delinquent Alimony Installments

Held, that there is nothing in section 93-8704, nor in any other section of the codes, to prevent the bringing of successive suits for recovery of delinquent alimony installments fixed by an agreement

36-107. (5788) Consideration for separation. The mutual consent of the parties is a sufficient consideration for such an agreement as mentioned in the last section.

History: En. Sec. 216, Civ. C. 1895; re-en. Sec. 3696, Rev. C. 1907; re-en. Sec. 5788, R. C. M. 1921. Cal. Civ. C. Sec. 160. Field Civ. C. Sec. 81.

References

Cited or applied as section 216, Civil Code, in Stebbins v. Morris, 19 M 115, 118, 47 P 642; as section 3696, Revised Codes,

36-108. (5789) May be joint tenants. A husband and wife may hold real or personal property together, jointly or in common.

History: En. Sec. 217, Civ. C. 1895; re-en. Sec. 3697, Rev. C. 1907; re-en. Sec. 5789, R. C. M. 1921. Cal. Civ. C. Sec. 161. Field Civ. C. Sec. 82.

References

In re Mahaffay's Estate, 79 M 10, 18, 254 P 875; Conley v. Conley, 92 M 425, 434, 15 P 2d 922; Emery v. Emery, 122 M 201, 200 P 2d 251, 263; Shaw v. Shaw, 122 M 593, 208 P 2d 514, 524; In re

between the parties, in different departments of the same court. State ex rel. Towne v. District Court, 114 M 1, 25, 132 P 2d 161.

When Contract Against Public Policy

Provision of antenuptial agreement that, in event either party shall institute divorce action, covenants to pay all expenses and covenants that other party shall never be called on to pay alimony, separate maintenance, costs of suit, or any other expense incurred by party bringing action, is contrary to public policy and void, and court was justified in awarding alimony and suit money to wife instituting divorce action. Stefonick v. Stefonick, 118 M 486, 167 P 2d 848, 854, 164 ALR 1211.

References

Conley v. Conley, 92 M 425, 434, 15 P 2d 922.

Collateral References

Husband and Wife—36, 277, 278.
41 C.J.S. Husband and Wife § 120; 42 C.J.S. Husband and Wife § 593.

in Lee v. Lee, 55 M 426, 431, 178 P 173; Conley v. Conley, 92 M 425, 433, 15 P 2d 922; State ex rel. Towne v. District Court, 114 M 1, 7, 132 P 2d 161.

Collateral References

Husband and Wife—278(5).
42 C.J.S. Husband and Wife § 596.

Marsh's Estate, 125 M 239, 234 P 2d 459, 461.

Collateral References

Husband and Wife—14.
41 C.J.S. Husband and Wife § 33.
Creation of right of survivorship by instrument ineffective to create estate by entirety. 1 ALR 2d 247.

36-109. (5790) Liability for acts or debts of each other. Neither husband nor wife, as such, is answerable for the acts of the other, or liable for the debts contracted by the other; provided, however, that the expenses for necessities of the family and of the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately.

History: En. Sec. 218, Civ. C. 1895; re-en. Sec. 3698, Rev. C. 1907; amd. Sec. 1, Ch. 129, L. 1915; re-en. Sec. 5790, R. C. M. 1921.

Applies to College Education of Children

On application of wife for modification of divorce decree to compel defendant father to contribute \$35.00 per month toward minor son's expenses in attending college, held that this section makes education of the child the responsibility of both parents and extends to college education of a child so that modification of decree was proper and father compelled to pay. *Refer v. Refer*, 102 M 121, 129, 56 P 2d 750.

Support of Children

A court which severs the marriage ties by granting a divorce possesses the necessary power to compel the ex-husband to support his minor children. *State ex rel. Lay v. District Court*, 122 M 61, 198 P 2d 761, 767.

When Joining Husband and Wife Sharp Practice

Joining of husband and wife by collection agency in all actions where a

36-110. (5791) Married women may prosecute actions. A married woman in her own name may prosecute action for injuries to her reputation, person, property, and character, or for the enforcement of any legal or equitable right, and may in like manner defend any action brought against herself.

History: En. Sec. 219, Civ. C. 1895; re-en. Sec. 3699, Rev. C. 1907; re-en. Sec. 5791, R. C. M. 1921.

Operation and Effect

Held, that neither this section, nor section 36-128, declaring that a married woman may sue and be sued in the same manner as if she were single, when read in connection with other sections of the Married Women's Act, confers upon the wife the right to sue her husband for a

claim against either was involved, although the facts in nowise justified the practice under this section or the necessity of life theory, held at least to amount to sharp practice. *State ex rel. Freebourn v. Merchants' Credit Service, Inc.*, 104 M 76, 102, 66 P 2d 337.

References

In re Mahaffay's Estate, 79 M 10, 18, 254 P 875; *Yates v. Commercial Bank & Trust Co. et al.*, 79 M 100, 107, 255 P 8; *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922; *Bingham v. National Bank of Montana*, 105 M 159, 167, 72 P 2d 90.

Collateral References

Husband and Wife ¶19-25.
41 C.J.S. *Husband and Wife* §§ 50-66.
26 Am. Jur. 928, *Husband and Wife*, §§ 329-336; 27 Am. Jur. 73, *Husband and Wife*, § 476-490.

Personal tort liability of spouse. 10 ALR 2d 988.

personal tort, a right denied to her under the common law. *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922; *Kelly v. Williams*, 94 M 19, 21 P 2d 58.

References

In re Mahaffay's Estate, 79 M 10, 18, 254 P 875.

Collateral References

Husband and Wife ¶203.
41 C.J.S. *Husband and Wife* § 389.

36-111. (5792) Separate property of wife. All the property of the wife owned before her marriage and that acquired afterwards is her separate property. The wife may, without consent, agreement and signature of her husband, convey and transfer her separate property, real or personal, including the fee simple title to real property or execute a power of attorney for the conveyance and transfer thereof.

History: En. Sec. 220, Civ. C. 1895; re-en. Sec. 3700, Rev. C. 1907; re-en. Sec. 5792, R. C. M. 1921; amd. Sec. 1, Ch. 63, L. 1923. Cal. Civ. C. Sec. 162.

References

Isom v. Larson, 78 M 395, 255 P 1049; *In re Mahaffay's Estate*, 79 M 10, 21, 254 P 875; *Conley v. Conley*, 92 M 425, 433, 12 P 2d 922; *Emery v. Emery*, 122 M 201, 200 P 2d 251, 263; *Shaw v. Shaw*, 122 M 593, 208 P 2d 514, 524; *Baird v. Baird*,

125 M 122, 232 P 2d 348, 354; *Battleson v. Commissioner of Internal Revenue*, 62 F 2d 125.

Collateral References

Husband and Wife ¶110-133½, 179-202.
41 C.J.S. *Husband and Wife* §§ 226-277, 367-388.
26 Am. Jur. 663, *Husband and Wife*, §§ 34-54.

Oral promise of husband or wife as grantee to other as grantor as giving rise to trust. 35 ALR 311.

Part performance of oral contract to

convey predicated upon possession or improvement by one spouse of real property of other. 74 ALR 218.

36-112. (5793) Inventory of separate property of wife. A full and complete inventory of the separate personal property of the wife may be made out and signed by her, acknowledged or proved in the same manner required by law for the acknowledgment or proof of a grant of real property by an unmarried woman, and recorded in the office of the county clerk of the county in which the parties reside.

History: En. Sec. 221, Civ. C. 1895; re-en. Sec. 3701, Rev. C. 1907; re-en. Sec. 5793, R. C. M. 1921. Cal. Civ. C. Sec. 165.

Operation and Effect

A statute providing for the recording by a married woman of a list of her separate property, in order to exempt the same from liability for her husband's debts, is substantially complied with though such list be recorded by a woman in her maiden name, provided it contains a notification of her approaching marriage and the name of her intended husband. *Palmer v. Murray*, 6 M 125, 128, 9 P 896. See *Palmer v. Murray*, 8 M 174, 19 P 553.

The inventory of the separate property of the wife is necessary to protect such property only when it is in the exclusive possession of the husband, and third persons deal with him on the credit thereof without knowledge of the claim of the wife. *Chan v. Slater*, 33 M 155, 165, 82 P 657.

36-113. (5794) Effect of filing inventory. The filing of the inventory in the clerk's office is notice and prima facie evidence of the title of the wife.

History: En. Sec. 222, Civ. C. 1895; re-en. Sec. 3702, Rev. C. 1907; re-en. Sec. 5794, R. C. M. 1921. Cal. Civ. C. Sec. 166.

References

Cited or applied as section 222, Civil

36-114. (5795) Earnings and accumulations of wife. The earnings and accumulations of the wife are not liable for the debts of the husband.

History: En. Sec. 223, Civ. C. 1895; re-en. Sec. 3703, Rev. C. 1907; re-en. Sec. 5795, R. C. M. 1921. Cal. Civ. C. Sec. 168.

Operation and Effect

Property acquired by the wife subsequent to the contracting of a debt by the husband cannot be held liable for such debt. *Chan v. Slater*, 33 M 155, 166, 82 P 657.

Evidence in an action for the conversion of restaurant fixtures claimed by the wife of a judgment debtor as her separate property and seized by the attaching creditor with constructive notice of plaintiff's claim by reason of an inventory filed by her under section 36-113, over plaintiff's protests and objections, thus destroying a prosperous business in an effort to coerce her to pay her husband's debt, held sufficient to warrant an award of exemplary damages. *Wray v. Great Falls Paper Co.*, 72 M 461, 468, 234 P 486.

References

Yates v. Commercial Bank & Trust Co. et al., 79 M 100, 108, 255 P 8; *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922.

Collateral References

Husband and Wife §149(1).
41 C.J.S. *Husband and Wife* § 307.

Code, in *Chan v. Slater*, 33 M 155, 164, 165, 82 P 657; *Wray v. Great Falls Paper Co.*, 72 M 461, 468, 234 P 486; *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922.

References

In re *Mahaffay's Estate*, 79 M 11, 18, 254 P 875; *Yates v. Commercial Bank & Trust Co.*, 79 M 100, 107, 255 P 8; *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922.

Collateral References

Husband and Wife §149.
41 C.J.S. *Husband and Wife* § 307.
27 Am. Jur. 61, *Husband and Wife*, §§ 463 et seq.

36-115. (5796) Same, when separated. The earnings and accumulations of the wife, and of her minor children living with her or in her

custody, while she is living separate from her husband, are the separate property of the wife.

History: En. Sec. 224, Civ. C. 1895; re-en. Sec. 3704, Rev. C. 1907; re-en. Sec. 5796, R. C. M. 1921. Cal. Civ. C. Sec. 169.

References

Cited or applied as section 224, Civil Code, in *Chan v. Slater*, 33 M 155, 164, 82 P 657; In re *Mahaffay's Estate*, 79 M

11, 18, 254 P 875; *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922.

Collateral References

Husband and Wife \Rightarrow 126.
41 C.J.S. Husband and Wife § 258.
27 Am. Jur. 65, Husband and Wife, § 467.

36-116. (5797) Work and labor of wife. All work and labor performed by a married woman for a person other than her husband and children shall, unless there is a written agreement on her part to the contrary, be presumed to be performed on her separate account.

History: En. Sec. 1442, 5th Div. Comp. Stat. 1887; re-en. Sec. 225, Civ. C. 1895; re-en. Sec. 3705, Rev. C. 1907; re-en. Sec. 5797, R. C. M. 1921.

Operation and Effect

A married woman, who works for a corporation with the permission of its officers, may recover such compensation for her services as they are reasonably worth. *Trogon v. Hanson Sheep Co.*, 49 M 1, 6, 139 P 792.

The common-law rule that the wife owes the duty to the husband to attend to all ordinary household duties and labor in the advancement of the husband's interests without compensation was not changed, but is recognized, by this section, in providing that all work and labor performed by a married woman for a person other

than her husband and children is presumed to be performed for her own account. *Gates v. Powell*, 77 M 554, 562, 252 P 377.

References

Cited or applied as section 225, Civil Code, in *Chan v. Slater*, 33 M 155, 164, 82 P 657; In re *Mahaffay's Estate*, 79 M 11, 18, 254 P 875; *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922; *Stefonick v. Stefonick*, 118 M 486, 167 P 2d 848, 855, 164 ALR 1211; In re *Marsh's Estate*, 125 M 239, 234 P 2d 459, 462.

Collateral References

Husband and Wife \Rightarrow 131(6).
41 C.J.S. Husband and Wife § 273.
27 Am. Jur. 61, Husband and Wife, §§ 463 et seq.

36-117. (5798) Debts of wife contracted before marriage. The property of the husband is not liable for the debts of the wife contracted before marriage.

History: En. Sec. 226, Civ. C. 1895; re-en. Sec. 3706, Rev. C. 1907; re-en. Sec. 5798, R. C. M. 1921. Cal. Civ. C. Sec. 170.

References

Conley v. Conley, 92 M 425, 433, 15 P 2d 922.

Collateral References

Husband and Wife \Rightarrow 18.
41 C.J.S. Husband and Wife §§ 47-49, 331.
26 Am. Jur. 930, Husband and Wife, §§ 333-336.

36-118. (5799) Separate property of wife—how far liable. The separate property of the wife shall be exempt from all debts and liabilities of the husband, unless for necessary articles procured for the use and benefit of herself and her children under the age of eighteen years, but such exemption shall extend only to such property of such wife as shall be mentioned in an inventory thereof, as provided in sections 36-112 and 36-113. And in no case shall any of the separate property of the wife be liable for the debts of the husband, unless such property is in the sole and exclusive possession of the husband, and then only to such persons as deal with the husband in good faith on the credit of such property, without knowledge or notice that the property belongs to the wife. But the separate property of the wife is liable for her own debts, contracted before or after marriage.

History: Ap. p. Sec. 1, p. 369, Bannack Stat.; re-en. Sec. 1, p. 521, Cod. Stat. 1871; re-en. Sec. 866, 5th Div. Rev. Stat. 1879; re-en. Sec. 1432, 5th Div. Comp. Stat. 1887; amd. Sec. 227, Civ. C. 1895; re-en. Sec. 3707, Rev. C. 1907; re-en. Sec. 5799, R. C. M. 1921. Cal. Civ. C. Sec. 171.

Operation and Effect

A section of the Compiled Statutes of 1887 somewhat similar to the above was held to free the duly listed property of a married woman from debts and liabilities of the husband, unless contracted for necessary articles for the wife and minor children, but not to give a married woman, in reference to such property, complete status as a femme sole, and not to deprive a husband of courtesy in such property. *Allen v. Roush*, 15 M 446, 449, 39 P 459.

If a sale of personal property is sufficient to pass title from the husband to the wife, as between themselves, the property actually becomes the separate property of the wife. *Webster v. Sherman*, 33 M 448, 457, 84 P 878.

Where it does not appear in a complaint or otherwise in an action against a husband and wife on an account stated that the articles were of the character mentioned in this section, for which the separate property of the wife would be liable, no account was stated as to her and a

judgment against her was unwarranted. *O'Hanlon Co. v. Jess*, 58 M 415, 419, 193 P 65.

Proper Instruction

In an action by wife for conversion of her separate property by means of a levy of execution instruction that if jury found she actually owned the property, verdict should go in her favor was not erroneous as against contention it failed to advise jury as to a creditor's right to levy on it for husband's debt where creditor misled to believing it belonged to her husband. *Brennan v. Mayo*, 100 M 439, 446, 50 P 2d 245.

References

Cited or applied as section 227, Civil Code, in *Chan v. Slater*, 33 M 155, 165, 82 P 657; *Wray v. Great Falls Paper Co.*, 72 M 461, 468, 234 P 486; *Yates v. Commercial Bank & Trust Co. et al.*, 79 M 100, 108, 255 P 8; *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922; *Bingham v. National Bank of Montana*, 105 M 159, 167, 72 P 2d 90.

Collateral References

Husband and Wife—146½-178.
41 C.J.S. *Husband and Wife* §§ 305-366.
26 Am. Jur. 933, *Husband and Wife*, § 336.

36-119. (5800) Support of wife. If the husband neglect to make adequate provision for the support of his wife, except in the cases mentioned in the next section, any other person may in good faith supply her with articles necessary for her support and recover the reasonable value thereof from her husband.

History: En. Sec. 244, Civ. C. 1895; re-en. Sec. 3724, Rev. C. 1907; re-en. Sec. 5800, R. C. M. 1921. Cal. Civ. C. Sec. 174. Field Civ. C. Sec. 84.

Operation and Effect

An action of the nature of the above is not maintainable under this section, impliedly conferring authority upon the wife to charge her husband, as his agent, for the value of articles necessary for her support, a want of funds with which to prosecute a suit for a divorce not being a "necessary" as that term is employed in that section. *Grimstad et al. v. Johnson et al.*, 61 M 19, 22 et seq., 201 P 314.

Contracts made by the wife for necessities under authority of this section, where the husband fails or refuses to furnish them, are his contracts and the obligations arising thereunder are his obligations; the agency referred to above is statutory but the husband's obligations are contractual; therefore attachment may

issue in an action to recover for necessities furnished the wife as upon contracts "express or implied, for the direct payment of money" within the meaning of section 93-4301. *McQuay et al. v. McQuay*, 86 M 535, 284 P 532.

Id. Under the last above rule, held, in an action by the assignee of claims against defendant to recover the reasonable value of medical and surgical attention and hospital care provided for his wife during her last illness, that the claims were based upon contracts, for the direct payment of money, authorizing attachment of funds belonging to defendant. (Mr. Justice Angstman, dissenting.)

References

Cited or applied as section 244, Civil Code, in *Dahlman v. Dahlman*, 28 M 373, 374, 72 P 748; *State ex rel. La Point v. District Court*, 69 M 29, 37, 220 P 88; *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922.

Collateral References

Husband and Wife↪19.

41 C.J.S. Husband and Wife §§ 50-64.

26 Am. Jur. 934, Husband and Wife,
§§ 337 et seq.

36-120. (5801) Husband not liable when abandoned by wife. A husband abandoned by his wife is not liable for her support until she offers to return, unless she was justified, by his misconduct, in abandoning him; nor is he liable for her support when she is living separate from him by agreement, unless such support is stipulated in the agreement.

History: En. Sec. 245, Civ. C. 1895; re-en. Sec. 3725, Rev. C. 1907; re-en. Sec. 5801, R. C. M. 1921. Cal. Civ. C. Sec. 175. Based on Field Civ. C. Sec. 85.

Operation and Effect

A mere showing that parties are married may raise a presumption that the wife is legally entitled to be supported by the husband, but where the evidence showed that at the time the husband was injured in the course of his employment she was and had been for four years living apart from him and had refused to return to the home provided by him because he declined to also receive as a member of the household her son by a former marriage who was capable of earning for himself, which the husband was

not required to do under section 61-117, her refusal was unreasonable and constituted desertion on her part, and under this section he was not liable for her support. *Goodwin v. Elm Orlu Min. Co. et al.*, 83 M 152, 161, 269 P 403.

References

Grimstad et al. v. Johnson et al., 61 M 18, 24, 201 P 314; *McQuay et al. v. McQuay*, 86 M 535, 284 P 532; *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922.

Collateral References

Husband and Wife↪4, 279.
41 C.J.S. Husband and Wife §§ 15, 598.
26 Am. Jur. 939, Husband and Wife,
§ 340.

36-121. (5802) When wife must support husband. The wife must support the husband, when he has not deserted her, out of her separate property, when he has no separate property, and he is unable, from infirmity, to support himself.

History: En. Sec. 246, Civ. C. 1895; re-en. Sec. 3726, Rev. C. 1907; re-en. Sec. 5802, R. C. M. 1921. Cal. Civ. C. Sec. 176.

References

Cited or applied as section 3726, Revised Codes, in *Mennell v. Wells*, 51 M 141, 148, 149 P 954; *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922.

Collateral References

Husband and Wife↪4.
41 C.J.S. Husband and Wife § 16.
26 Am. Jur. 940, Husband and Wife,
§ 341.

36-122. (5803) Rights of husband and wife—how governed. The property rights of the husband and wife are governed by this chapter, unless there is a marriage settlement containing stipulations contrary thereto.

History: En. Sec. 247, Civ. C. 1895; re-en. Sec. 3727, Rev. C. 1907; re-en. Sec. 5803, R. C. M. 1921. Cal. Civ. C. Sec. 177.

P 377; *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922.

Collateral References

Husband and Wife↪31.
41 C.J.S. Husband and Wife § 99.

36-123. (5804) Marriage settlement contracts—how executed. All contracts for marriage settlements must be in writing, and executed and acknowledged or proved in like manner as a grant of land is required to be executed and acknowledged or proved.

History: En. Sec. 248, Civ. C. 1895; re-en. Sec. 3728, Rev. C. 1907; re-en. Sec. 5804, R. C. M. 1921. Cal. Civ. C. Sec. 178.

References

Stefonick v. Stefonick, 118 M 486, 167 P 2d 848, 853, 164 ALR 1211.

Collateral References

Husband and Wife—29(7), 30.
41 C.J.S. Husband and Wife §§ 86, 90.
26 Am. Jur. 881, Husband and Wife,
§§ 274 et seq.

Validity of antenuptial contract as affected by provision for post-mortem payment or performance. 1 ALR 2d 1260.

Setting aside antenuptial contract or marriage settlement on ground of failure of spouse to make proper disclosure of property owned. 27 ALR 883.

36-124. (5805) To be acknowledged and recorded. When such contract is acknowledged or proved it must be recorded in the office of the county clerk of every county in which any real estate may be situated which is granted or affected by such contract.

History: En. Sec. 249, Civ. C. 1895;
re-en. Sec. 3729, Rev. C. 1907; re-en. Sec.
5805, R. C. M. 1921. Cal. Civ. C. Sec. 179.

Collateral References

Husband and Wife—29(8), 30.
41 C.J.S. Husband and Wife §§ 87, 90.

References

Stefonick v. Stefonick, 118 M 486, 167
P 2d 842, 853, 164 ALR 1211.

36-125. (5806) Effect of recording. The recording or nonrecording of such contract has a like effect as the recording or nonrecording of a grant of real property.

History: En. Sec. 250, Civ. C. 1895;
re-en. Sec. 3730, Rev. C. 1907; re-en. Sec.
5806, R. C. M. 1921. Cal. Civ. C. Sec. 180.

References

Stefonick v. Stefonick, 118 M 486, 167
P 2d 848, 853, 164 ALR 1211.

36-126. (5807) Minors may make marriage settlement. A minor capable of contracting marriage may make a valid marriage settlement, as herein provided.

History: En. Sec. 251, Civ. C. 1895;
re-en. Sec. 3731, Rev. C. 1907; re-en. Sec.
5807, R. C. M. 1921. Cal. Civ. C. Sec. 181.

41 C.J.S. Husband and Wife § 75.
26 Am. Jur. 883, Husband and Wife,
§ 276.

Collateral References

Husband and Wife—26.

36-127. (5808) Married woman may act as executrix, guardian or trustee. A married woman may be an executrix, administratrix, guardian, or trustee, and may bind herself and the estate she represents without any act or assent on the part of her husband.

History: En. Sec. 1443, 5th Div. Comp.
Stat. 1887; re-en. Sec. 252, Civ. C. 1895;
re-en. Sec. 3732, Rev. C. 1907; re-en. Sec.
5808, R. C. M. 1921.

Married woman may be guardian, sec.
91-4605.

Collateral References

Husband and Wife—55, 59.
41 C.J.S. Husband and Wife §§ 6, 166,
172, 175.

Cross-References

Married woman may be administratrix,
sec. 91-1406.

36-128. (5809) May sue and be sued. A married woman may sue and be sued in the same manner as if she were sole.

History: En. Sec. 1144, 5th Div. Comp.
Stat. 1887; re-en. Sec. 253, Civ. C. 1895;
re-en. Sec. 3733, Rev. C. 1907; re-en. Sec.
5809, R. C. M. 1921.

Wife may defend action in own right,
sec. 93-2804.

Operation and Effect

Held, that neither section 36-110, granting the right to a married woman to prosecute actions for injury to person, property, etc., in her own name, nor this section, when read in connection with other sections of the Married Women's Act, con-

Cross-References

Judgments for or against married women, sec. 93-4707.

Married women may sue and be sued,
sec. 93-2803.

fers upon the wife the right to sue her husband for a personal tort, a right denied her under the common law. *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922; *Kelly v. Williams*, 94 M 19, 21 P 2d 58.

References

Cited or applied in *Emery v. Emery*, 122 M 201, 200 P 2d 251, 263.

Collateral References

Husband and Wife ⇨ 203.

41 C.J.S. Husband and Wife § 389.

Right of one spouse to maintain an action against the other for assault and battery. 6 ALR 1038.

Right of one spouse to maintain action against other for personal injury. 29 ALR 1482.

Right of husband or wife to maintain replevin against other. 41 ALR 1054.

Action against husband or his estate for causing death of wife, or vice versa. 104 ALR 1271.

Conflict of laws as to right of action between husband and wife. 108 ALR 1126.

Right of one spouse to maintain action at law against other based on tort in respect of property for damages or recovery of possession. 109 ALR 882.

Public policy against actions between persons in relationship of husband and wife, as affecting action for injury to one against estate of other. 130 ALR 889.

Personal tort liability of spouse. 10 ALR 2d 988.

36-129. (5810) Liable for her own contracts. The contracts made by a married woman, in respect to her separate property, labor, or services, shall not be binding upon her husband, nor render him nor his property liable therefor; but she and her separate property shall be liable on such contracts in the same manner as if she were sole.

History: En. Sec. 1446, 5th Div. Comp. Stat. 1887; re-en. Sec. 254, Civ. C. 1895; re-en. Sec. 3734, Rev. C. 1907; re-en. Sec. 5810, R. C. M. 1921.

References

Conley v. Conley, 92 M 425, 433, 15 P 2d 922.

Collateral References

Husband and Wife ⇨ 79.

41 C.J.S. Husband and Wife § 176.

Personal liability of married woman for domestic or household services. 36 ALR 392.

36-130. (5811) May make contracts. A married woman may make contracts, oral or written, sealed or unsealed, and may waive or relinquish any right or interest in any real estate, either in person or by attorney, in the same manner, to the same extent, and with the like effect as if she were a single woman.

History: En. Sec. 1448, 5th Div. Comp. Stat. 1887; re-en. Sec. 256, Civ. C. 1895; re-en. Sec. 3736, Rev. C. 1907; re-en. Sec. 5811, R. C. M. 1921.

Operation and Effect

This section clothes the wife with liberty to contract with her husband as well as any other person; but their dealings with each other will in every case be closely scrutinized. *Lambrecht v. Patten*, 15 M 260, 266, 38 P 1063; *Koopman v. Mansolf*, 51 M 48, 54, 149 P 491.

The wife being competent to contract, obviously transactions between her and strangers stand upon the same footing as if she were single, and are not subject to the same scrutiny as those had with her husband. Where one who had attacked a conveyance of property to a married woman by a stranger, on the ground that the consideration had been paid by her husband, he had the burden of showing

such fact, a mere suspicion that it was fraudulent being insufficient to overturn it. *Koopman v. Mansolf*, 51 M 48, 55, 149 P 491.

When a married woman joins her husband in the making of a note and mortgage she makes the debt her own and assumes a personal liability and she may not thereafter assert that in attaching her signature she merely did so for the purpose of hypothecating her inchoate right of dower in the mortgaged property, or that she signed because she was told to do so because she was the wife of the maker and mortgagor. *Ferrell v. Elling*, 84 M 384, 390, 276 P 432.

References

Cited or applied as section 1448, Fifth Division, Compiled Statutes of 1887, in *Kennelly v. Savage*, 18 M 119, 122, 44 P 400; *Conley v. Conley*, 92 M 425, 434, 15 P 2d 922; *Emery v. Emery*, 122 M

201, 200 P 2d 251, 263; Baird v. Baird, 125 M 122, 232 P 2d 348, 354; Battleson v. Commissioner of Internal Revenue, 62 F 2d 125.

Collateral References

Husband and Wife \Rightarrow 69, 79.
41 C.J.S. Husband and Wife §§ 176, 196.

36-131. (5812) Tenancy by courtesy not allowed. No estate is allowed the husband as tenant by courtesy upon the death of his wife.

History: En. Sec. 257, Civ. C. 1895; re-en. Sec. 3737, Rev. C. 1907; re-en. Sec. 5812, R. C. M. 1921. Cal. Civ. C. Sec. 173.

Estate, 79 M 10, 18, 254 P 875; Conley v. Conley, 92 M 425, 433, 15 P 2d 922.

References

Cited or applied as section 3737, Revised Codes, in Marcellus v. Wright, 51 M 559, 564, 154 P 714; In re Mahaffay's

Collateral References

Curtesy \Rightarrow 2.

25 C.J.S. Curtesy § 2.

15 Am. Jur. 272, Curtesy, §§ 5 et seq.

TITLE 37
INITIATIVE AND REFERENDUM

Chapter 1. Initiative and referendum, 37-101 to 37-110.

CHAPTER 1
INITIATIVE AND REFERENDUM

- Section 37-101. Form of petition for referendum.
37-102. Form of petition for initiative.
37-103. County clerk to verify signatures.
37-104. Notice to governor and proclamation.
37-105. Certification and numbering of measures—constitutional amendments.
37-106. Manner of voting—ballot.
37-107. Printing and distribution of measures.
37-108. Canvass of votes.
37-109. Who may petition—false signature—penalties.
37-110. Referred bills not effective until approved.

37-101. (99) Form of petition for referendum. The following shall be substantially the form of petition for the referendum to the people on any act passed by the legislative assembly of the state of Montana:

Warning.

Any person signing any name other than his own to this petition, or signing the same more than once for the same measure at one election, or who is not, at the time of signing the same, a legal voter of this state, is punishable by a fine not exceeding five hundred dollars (\$500.00), or imprisonment in the penitentiary not exceeding two years, or by both such fine and imprisonment.

Petition for referendum.

To the Honorable, Secretary of State of the state of Montana:

We, the undersigned citizens and legal voters of the state of Montana, respectfully order that Senate (House) Bill Number, entitled (title of act), passed by the legislative assembly of the state of Montana, at the regular (special) session of said legislative assembly, shall be referred to the people of the state for their approval or rejection, at the regular, general, or special election to be held on the day of, 19...., and each for himself says: I have personally signed this petition; I am a legal voter of the state of Montana; and my residence, postoffice address, and voting precinct are correctly written after my name.

Name Residence
Postoffice address
If in city, street and number
Voting precinct

(Here follow numbered lines for signatures.)

History: En. Sec. 1, Ch. 62, L. 1907; Sec. 106, Rev. C. 1907; re-en. Sec. 99, R. C. M. 1921.

Cross-Reference

Initiative and referendum in cities and towns, secs. 11-1101 to 11-1114.

References

Sawyer Stores, Inc. v. Mitchell et al., 103 M 148, 154, 62 P 2d 342.

Collateral References

Statutes 344.

82 C.J.S. Statutes § 122.

28 Am. Jur. 162, Initiative, Referendum, and Recall, §§ 18 et seq.

Inclusion in single initiative or referendum petition of proposed constitutional or statutory enactments covering different and distinct subjects. 90 ALR 572.

Construction and application of constitutional or statutory provisions expressly excepting certain laws from referendums. 146 ALR 284.

37-102. (100) Form of petition for initiative. The following shall be substantially the form of petition for any law of the state of Montana proposed by the initiative:

Warning.

Any person signing any name other than his own to this petition, or signing the same more than once for the same measure at one election, or who is not, at the time of signing the same, a legal voter of this state, is punishable by a fine not exceeding five hundred dollars (\$500.00), or imprisonment in the penitentiary not exceeding two years, or by both such fine and imprisonment.

Petition for Initiative.

To the Honorable _____, Secretary of State of the State of Montana:

We, the undersigned legal voters of the state of Montana, respectfully demand that the following proposed law shall be submitted to the legal electors of the state of Montana, for their approval or rejection, at the regular, general, or special election to be held on the _____ day of _____, 19____, and each for himself says:

I have personally signed this petition, and my residence, postoffice address, and voting precinct are correctly written after my name.

Name _____ Residence _____
Postoffice address _____
If in city, street and number _____
Voting precinct _____

(Numbered lines for names on each sheet.)

Every such sheet for petitioner's signature shall be attached to a full and correct copy of the title and text of the measure so proposed by initiative petition; but such petition may be filed with the secretary of state in numbered sections, for convenience in handling, and referendum petitions may be filed in sections in like manner.

History: En. Sec. 2, Ch. 62, L. 1907; Sec. 107, Rev. C. 1907; re-en. Sec. 100, R. C. M. 1921.

Attaching Title and Text Mandatory

This section requiring that the sheets provided for signatures shall be attached to a full and correct copy of the title and text thereof, must be held mandatory and

not directory, because its purpose is to advise signers as to the contents of the proposed law, especially where question of noncompliance is raised prior to election. Ford v. Mitchell, 103 M 99, 107, 61 P 2d 815.

Difference in Text of Petitions

Where two petitions differ in text of the

proposed law, one correct but the other at variance with it, the latter held invalid. *Ford v. Mitchell*, 103 M 99, 107, 61 P 2d 815.

References

State ex rel. Bonner v. Dixon et al., 59 M 58, 91, 195 P 841; referred to as Sec. 107, R. C. M. 1907; *Sawyer Stores, Inc. v. Mitchell et al.*, 103 M 148, 154, 62 P 2d 342.

Collateral References

Statutes 304.
82 C.J.S. Statutes § 122.
28 Am. Jur. 162, Initiative, Referendum, and Recall, §§ 18 et seq.

Inclusion in single initiative or referendum petition of proposed constitutional or statutory enactments covering different and distinct subjects. 90 ALR 572.

37-103. (101) County clerk to verify signatures. The county clerk of each county in which any such petition shall be signed shall compare the signatures of the electors signing the same with their signatures on the registration books and blanks on file in his office, for the preceding general election, and shall thereupon attach to the sheets of said petition containing such signatures his certificate to the secretary of state, substantially as follows:

State of Montana, }
County of } ss.
To the Honorable, Secretary of State for Montana:

I,, county clerk of the county of, hereby certify that I have compared the signatures on (number of sheets) of the referendum (initiative) petition, attached hereto, with the signatures of said electors as they appear on the registration books and blanks in my office; and I believe that the signatures of (names of signers), numbering (number of genuine signatures), are genuine. As to the remainder of the signatures thereon, I believe that they are not genuine, for the reason that; and I further certify that the following names (.....) do not appear on the registration books and blanks in my office.

Signed:

(Seal of Office) By, County Clerk.
Deputy

Every such certificate shall be prima facie evidence of the facts stated therein, and of the qualifications of the electors whose signatures are thus certified to be genuine, and the secretary of state shall consider and count only such signatures on such petitions as shall be so certified by said county clerks to be genuine; provided, that the secretary of state may consider and count such of the remaining signatures as may be proved to be genuine, and that the parties so signing were legally qualified to sign such petitions, and the official certificate of a notary public of the county in which the signer resides shall be required as to the fact for each of such last-named signatures; and the secretary of state shall further compare and verify the official signatures and seals of all notaries so certifying with their signatures and seals filed in his office. Such notaries' certificate shall be substantially in the following form:

State of Montana, }
 County of _____ } ss.

I, _____, a duly qualified and acting notary public in and for the above-named county and state, do hereby certify: that I am personally acquainted with each of the following named electors whose signatures are affixed to the annexed petition, and I know of my own knowledge that they are legal voters of the state of Montana, and of the county and precincts written after their several names in the annexed petition, and that their residence and postoffice address is correctly stated therein, to-wit: (Names of such electors.)

In Testimony Whereof, I have hereunto set my hand and official seal this _____ day of _____, 19....

Notary Public, in and for _____ County,
 State of Montana.

The county clerk shall not retain in his possession any such petition, or any part thereof, for a longer period than two days for the first two hundred signatures thereon, and one additional day for each two hundred additional signatures, or fraction thereof, on the sheets presented to him, and at the expiration of such time he shall forward the same to the secretary of state, with his certificate attached thereto, as above provided. The forms herein given are not mandatory, and if substantially followed in any petition, it shall be sufficient, disregarding clerical and merely technical errors.

History: En. Sec. 3, Ch. 62, L. 1907; Sec. 108, Rev. C. 1907; re-en. Sec. 101, R. C. M. 1921.

Challenge to an Insufficient Petition Must Be Made Prior to Election

When the charge is made that the secretary of state counted signatures not properly certified, and that if the signatures so disputed were not counted there would not have been the required number for the petition to be certified, such charge must be made before the election and becomes immaterial after the general election. *State ex rel. Graham v. Board of Examiners*, 125 M 419, 239 P 2d 283, 288.

Challenging Qualifications of Signers

Section 37-103 does not purport to make the county clerk's certificate conclusive and the qualifications of persons signing the petition may be inquired into by the courts if the question is presented before the election. *Martin v. State Highway Commission et al.*, 107 M 603, 614, 88 P 2d 41.

Invalid Provision

The provision of this section requiring county clerks to compare the signatures on a petition for referendum with their signatures on the registration books and blanks for the preceding general election

and certify them to the secretary of state as legal voters, is invalid as excluding all persons who had become legal voters in the interim between the last general election and the time of signing such petition. *State ex rel. Gleason v. Stewart*, 57 M 397, 188 P 904.

Listing of Names of Signers in the Certification to the Secretary of State Not Necessary

It is sufficient compliance with this section when the county clerk lists the number of genuine signatures and also those not acceptable in the body of the certification, if he also states that the genuine signatures are marked with a certain identifying symbol and the rejected signatures with a different identifying symbol. The only purpose of listing the names is so that anyone wishing to challenge the sufficiency of the petition can identify the names. This can be done in the petition in question by an examination of the identifying symbols. *State ex rel. Graham v. Board of Examiners*, 125 M 419, 239 P 2d 283, 287.

Manner of Withdrawal of Signatures

Certification of petitions for the withdrawal of signatures appearing on petitions for initiation of a measure, in the form prescribed by this section for certification of original petitions, is *prima facie*

sufficient to show qualification and genuineness of signatures. *Ford v. Mitchell*, 103 M 99, 114, 61 P 2d 815.

Petitions Once Lodged With Clerk, Not Returnable

After referendum petitions have been lodged with the county clerk they may not be returned by him to the persons delivering them, he being required under this section to forward them, with certificate attached, to secretary of state. *State ex rel. Holloran v. McGrath*, 104 M 490, 496, 67 P 2d 838.

Referendum Petitions Open to Inspection by Public

Held, on application for writ of mandate, that irrespective of whether or not referendum petitions constitute public records and as such are open to inspection,

they are "other matters" within the meaning of section 59-512, declaring that "public records and other matters in the office of any officer" are open to the inspection of any person during office hours, and mandamus lies to compel such clerk to permit inspection. *State ex rel. Holloran v. McGrath*, 104 M 490, 498, 67 P 2d 838.

Collateral References

Statutes 312, 352.

82 C.J.S. Statutes § 124.

28 Am. Jur. 164, Initiative, Referendum, and Recall, §§ 22, 23.

Withdrawal of names from petition for initiative, referendum, or recall petition. 85 ALR 1373.

Time within which officer must perform duty to pass on sufficiency of petition for initiative or referendum. 102 ALR 51.

37-104. (102) Notice to governor and proclamation. Immediately upon the filing of any such petition for the referendum or the initiative with the secretary of state, signed by the number of voters and filed within the time required by the constitution, he shall notify the governor in writing of the filing of such petition, and the governor shall forthwith issue his proclamation, announcing that such petition has been filed, with a brief statement of its tenor and effect. Said proclamation shall be published four times for four consecutive weeks in one daily or weekly paper in each county of the state of Montana.

History: En. Sec. 4, Ch. 62, L. 1907; re-en. Sec. 109, Rev. C. 1907; re-en. Sec. 102, R. C. M. 1921.

"Immediately"

The expression "immediately upon the filing" means not at once, but within sufficient time reasonably and accurately to perform the duties. *Ford v. Mitchell*, 103 M 99, 116, 61 P 2d 815.

Not Applying to Measures Put to People by Legislature

Contention that because of failure to have the governor's proclamation that Ch. 168, Laws 1939 (omitted) would be submitted to the electors at the general election of 1940 published in newspapers as required by this section and section 23-105, the act is invalid, held not meritorious, these sections applying only to measures put before the people by their own petition, and not by the legislature, and notice amply met by distribution of copies of the law. *Nordquist v. Ford*, 112 M 278, 283, 114 P 2d 1071.

Signatures May be Withdrawn When

Any person signing the petition has absolute right to withdraw his name at any time before the person or body created by law to determine the matter

submitted by the petition has finally acted, and when for the initiation of a measure such time expires when the secretary of state finally determines the petition sufficient. *Ford v. Mitchell*, 103 M 99, 114, 61 P 2d 815.

Signers May Withdraw Names Until Petition Determined Sufficient

Held, on application for writ of mandate to compel the secretary of state to notify the governor of the filing of a petition for submission of an initiative measure to the electorate of the state, asked for on the ground that the secretary is without power to consider petitions for the withdrawal of names of signers from the petition after it had been forwarded to him by the county clerks, that the right exists until he has finally determined that the petition is sufficient, in the absence of legislative expression to the contrary. *State ex rel. O'Connell v. Mitchell*, 111 M 94, 95, 106 P 2d 180.

References

Cited as section 109, R. C. M. 1907, in *State ex rel. Gleason v. Stewart*, 57 M 397, 405, 188 P 904; *State ex rel. Bonner v. Dixon et al.*, 59 M 58, 71, 89, 195 P 841; referred to as 109, R. C. M. 1907; *State ex rel. Haynes v. District Court*, 105 M

604, 86 P 2d 4; State ex rel. Graham v. Board of Examiners, 125 M 419, 239 P 2d 283, 287.

82 C.J.S. Statutes § 136.
28 Am. Jur. 171, Initiative, Referendum, and Recall, § 33.

Collateral References

Statutes 319, 359.

37-105. (103) Certification and numbering of measures—constitutional amendments. The secretary of state, at the same time that he furnishes to the county clerk of the several counties certified copies of the names of the candidates for office, shall also furnish the said county clerks his certified copy of the titles and numbers of the various measures to be voted upon at the ensuing general or special election, and he shall use for each measure a title designated for that purpose by the legislative assembly, committee, or organization presenting and filing with him the act, or petition for the initiative or the referendum, or in the petition or act; provided, that such title shall in no case exceed one hundred words, and shall not resemble any such title previously filed for any measure to be submitted at that election which shall be descriptive of said measure, and he shall number such measures. All measures shall be numbered with consecutive numbers beginning with the number immediately following that on the last measure filed in the office of the secretary of state. The affirmative and negative of each measure shall bear the same number, and no two measures shall be numbered alike. It shall be the duty of the several county clerks to print said titles and numbers on the official ballot prescribed by section 23-1102, in the numerical order in which the measures have been certified to them by the secretary of state. Measures proposed by the initiative shall be designated and distinguished from measures proposed by the legislative assembly by the heading "proposed petition for initiative."

All constitutional amendments submitted to the qualified electors of the state shall likewise be placed upon the official ballot prescribed by said section 23-1102 and no such amendment shall hereafter be submitted on a separate ballot. Nothing herein contained shall be deemed to change the existing laws of the state regulating in other respects the manner of submitting such proposed amendments.

History: En. Sec. 5, Ch. 62, L. 1907; re-en. Sec. 110, Rev. C. 1907; amd. Sec. 1, Ch. 66, L. 1913; re-en. Sec. 103, R. C. M. 1921; amd. Sec. 1, Ch. 52, L. 1927.

"Descriptive"

The term "descriptive" as used in this section means a fair portrayal of the chief features of the proposed law in words of plain meaning, complete enough to convey an intelligible idea of its scope and import, free from any misleading tendency, so that intelligent and enlightened judgment may be exercised by the ordinary person in voting. *Sawyer Stores, Inc. v. Mitchell*, 103 M 148, 159, 62 P 2d 342.

Legal Requirements Mandatory—Injunction

The law having prescribed the neces-

sary steps for submission of an initiative measure to the voters such steps are mandatory, and must be followed, and the title attached to the proposed initiative measure No. 39, the "chain store law," under the facts presented not being "descriptive" but deceptive for various reasons, the supreme court has jurisdiction to entertain proceeding to enjoin the secretary of state from certifying the measure to the county clerks, and writ granted. *Sawyer Stores, Inc. v. Mitchell*, 103 M 148, 163, 175, 176, 62 P 2d 342.

"One Hundred Words"

Held, that though this section limits the title of an act referred to the people to 100 words, the fact that Ch. 168, Laws 1939 (omitted) contains 138 words, a point not raised until after the people had approved the act, was merely a pro-

cedural defect and as such insufficient to invalidate it, particularly so in view of Ch. 45, Laws 1941 (omitted), validating all bond issues theretofore authorized, thus including the issue for erection of buildings at the state hospital for the insane. *Nordquist v. Ford*, 112 M 278, 282, 114 P 2d 1071.

References

Cited or applied as section 110, Revised

Codes 1907, as amended, in *State ex rel. Hay v. Alderson*, 49 M 387, 388, 142 P 210; *State ex rel. Bonner v. Dixon et al.*, 59 M 58, 71, 195 P 841; referred to as sec. 110, R. C. M. 1907.

Collateral References

Statutes 320, 360.

82 C.J.S. Statutes § 137.

28 Am. Jur. 167, Initiative, Referendum, and Recall, §§ 27 et seq.

37-106. (104) Manner of voting—ballot. The manner of voting on measures submitted to the people shall be by marking the ballot with a cross in or on the diagram opposite and to the left of the proposition for which the voter desires to vote. The form of ballot to be used on measures submitted to the people shall be submitted to and determined by the attorney general of the state of Montana. The following is a sample ballot representing negative vote:



For Initiative Measure No. 6
Relating to Duties of Sheriffs.



Against Said Measure No. 6.



For Referendum Measure No. 7
Relating to Purchase of Insane Asylum.



Against Said Measure No. 7.

History: En. Sec. 6, Ch. 62, L. 1907; Sec. 111, Rev. C. 1907; amd. Sec. 2, Ch. 66, L. 1913; re-en. Sec. 104, R. C. M. 1921; amd. Sec. 1, Ch. 18, L. 1937.

Cross-Reference

Ballots, secs. 23-1105, 23-1109.

Operation and Effect

Requirements of this and preceding section are mandatory and must be complied with. Where proposed ballot for an initiative measure does not meet these requirements, the secretary of state may be enjoined from certifying the measure to

the county clerks. *Sawyer Stores, Inc. v. Mitchell*, 103 M 148, 159, 62 P 2d 342.

References

State ex rel. Bonner v. Dixon et al., 59 M 58, 71, 195 P 841; referred to as sec. 111, R. C. M. 1907; *Sawyer Stores, Inc. v. Mitchell*, 103 M 148, 152, 154, 159, 175, 62 P 2d 342.

Collateral References

Statutes 320, 360.

82 C.J.S. Statutes § 138.

28 Am. Jur. 172, Initiative, Referendum, and Recall, § 34.

37-107. (105) Printing and distribution of measures. The secretary of state shall furnish a copy of each of the proposed measures to be submitted to the people and make requisition on the state purchasing agent for the printing and delivery to him of all proposed constitutional amendments, initiative and referendum measures to be submitted to a vote of the people.

The state purchasing agent, shall, not later than the first Monday of the third month next before any general or special election, at which any proposed law is to be submitted to the people, cause to be printed a true copy of the title and text of each measure to be submitted, with the number and form in which the question will be printed on the official ballot.

It shall be the duty of the state purchasing agent to call for bids and contract with the lowest responsible bidder for the printing of the proposed law to be submitted to the people. Any measure proposed to be submitted to the people and which concerns the creation of any state levy, debt or liability, including the issuance of state bonds or debentures other than refunding bonds or debentures, shall be submitted to the eligible voters as defined by section 23-303, upon a separate official ballot and no such measure shall be submitted on a general ballot. All other measures proposed to be submitted to the people including constitutional amendments and initiative and referendum measures which do not concern the creation of any state levy, debt or liability, may be submitted on the general ballot as provided by section 23-1105.

The proposed law to be submitted shall be printed in news type, each page to be six inches wide by nine inches long, and when such proposed measure constitutes less than six pages, it shall be printed flat and forwarded to the county clerk and recorder of each of the several counties in that form.

When the proposed measure constitutes more than six pages, said measure shall be printed in pamphlet form, securely stapled, without cover. No proposed measure, hereafter, to be submitted to the people of the state, as provided for in this section shall be bound. The quality of the paper to be used for the proposed measure shall be left to the discretion of the state purchasing agent. The number of said proposed measures to be printed shall be five per cent (5%) more than the number of registered voters, as shown by the registration lists of the several counties of the state at the last preceding general election.

The secretary of state shall distribute to each county clerk before the second Monday in the third month next preceding such regular general election, a sufficient number of said pamphlets to furnish one copy to every voter in his county. And each county clerk shall be required to mail to each registered voter in each of the several counties in the state at least one copy of the same within thirty (30) days from the date of his receipt of the same from the secretary of state. The mailing of said pamphlets to electors shall be a part of the official duty of the county clerk of each of the several counties, and his official compensation shall be full compensation for this additional service.

History: En. Sec. 7, Ch. 62, L. 1907; Sec. 112, Rev. C. 1907; re-en. Sec. 105, R. C. M. 1921; amd. Sec. 1, Ch. 137, L. 1927; amd. Sec. 2, Ch. 104, L. 1945; amd. Sec. 1, Ch. 67, L. 1947.

Objection Must Be Raised before Election

The objection that a measure creates a state debt, levy or liability, and that therefore it should have been placed upon a separate ballot as required by this section and section 23-303, is waived if not

raised before the election. State ex rel. Graham v. Board of Examiners, 125 M 419, 239 P 2d 283, 290.

References

State ex rel. Bonner v. Dixon et al., 59 M 58, 74, 88, 195 P 841; Nordquist v. Ford, 112 M 278, 284, 114 P 2d 1071.

Collateral References

Statutes 319, 359.
82 C.J.S. Statutes § 137.

37-108. (106) Canvass of votes. The votes on measures and questions shall be counted, canvassed, and returned by the regular boards of judges, clerks, and officers as votes for candidates are counted, canvassed, and re-

turned, and the abstract made by the several county clerks of votes on measures shall be returned to the secretary of state on separate abstract sheets in the manner provided by sections 23-1812 and 23-1813 for abstracts of votes for state officers. It shall be the duty of the state board of canvassers to proceed within thirty days after the election, and sooner if the returns be all received, to canvass the votes given for each measure, and the governor shall forthwith issue his proclamation, which shall be published in two daily newspapers printed at the capital, giving the whole number of votes cast in the state for and against each measure and question, and declaring such measures as are approved by a majority of those voting thereon to be in full force and effect as the law of the state of Montana from the date of said proclamation, designating such measures by their titles.

History: En. Sec. 8, Ch. 62, L. 1907; Sec. 113, Rev. C. 1907; re-en. Sec. 106, R. C. M. 1921.

Collateral References

Statutes—309, 349.
82 C.J.S. Statutes § 143.

References

State ex rel. Bonner v. Dixon et al., 59 M 58, 74 et seq., 195 P 841.

37-109. (107) Who may petition—false signature—penalties. Every person who is a qualified elector of the state of Montana may sign a petition for the referendum or for the initiative. Any person signing any name other than his own to such petition, or signing the same more than once for the same measure at one election, or who is not, at the time of signing the same, a legal voter of this state, or any officer or any person wilfully violating any provision of this statute, shall, upon conviction thereof, be punished by a fine not exceeding five hundred dollars, or by imprisonment in the penitentiary not exceeding two years, or by both such fine and imprisonment, in the discretion of the court before which such conviction shall be had.

History: En. Sec. 9, Ch. 62, L. 1907; Sec. 114, Rev. C. 1907; re-en. Sec. 107, R. C. M. 1921.

Collateral References

Statutes—311, 351.
81 C.J.S. Statutes § 123.

37-110. (108) Referred bills not effective until approved. A bill passed by the legislative assembly and referred to popular vote at the next general election, or at a special election, shall not be in effect until it is approved at such general or special election by a majority of those voting for and against it.

History: En. Sec. 10, Ch. 62, L. 1907; Sec. 115, Rev. C. 1907; re-en. Sec. 108, R. C. M. 1921.

Codes, in State ex rel. Eagye v. Bawden, 51 M 357, 362, 152 P 761.

Collateral References

Statutes—365.
82 C.J.S. Statutes § 146.

References

Cited or applied as section 115, Revised

TITLE 38

INSANE AND FEEBLE MINDED

- Chapter 1. The Montana state hospital—management, 38-101 to 38-119.
2. Examination of persons mentally deranged—commitment, 38-201 to 38-214.
 3. Transfer of state hospital patients to state training school at Boulder, 38-301 to 38-304.
 4. Examination and commitment of person as mentally deranged but not dangerous—voluntary application for admission, 38-401 to 38-409.
 5. Parole of patients, 38-501 to 38-507.
 6. Eugenical sterilization law, 38-601 to 38-608.
 7. State hospital for inebriates, 38-701 to 38-711.
 8. Montana state training school, 38-801 to 38-819.
 9. Leases of farm land for state hospital and state penitentiary authorized, 38-901, 38-902.
 10. State department of mental hygiene, 38-1001 to 38-1003.
 11. Home for senile men and women, 38-1101 to 38-1112.

CHAPTER 1

THE MONTANA STATE HOSPITAL—MANAGEMENT

- Section 38-101. Name of Warm Springs institution changed to Montana state hospital.
- 38-102. Management—board of commissioners for insane.
- 38-103. Powers and duties of board.
- 38-104. Superintendent of state hospital and assistant—appointment, removal and salary.
- 38-105. Control in superintendent—additional medical assistants.
- 38-106. Oath of office and bonds.
- 38-107. Board may send patient to friends.
- 38-108. May contract with some other institution.
- 38-109. Discharge of patients.
- 38-110. Maintenance of indigent persons on discharge.
- 38-111. Periodic medical examination.
- 38-112. Postal rights of insane patients.
- 38-113. Same.
- 38-114. Postoffice box must be provided.
- 38-115. Name of correspondent must be posted.
- 38-116. Copy of law posted in asylum.
- 38-117. Insane convicts.
- 38-118. Nonresident insane must not be received.
- 38-119. Insane person not indigent must be paid for.

38-101. Name of Warm Springs institution changed to Montana state hospital. The institution located at Warm Springs, in Deer Lodge County, state of Montana, heretofore referred to and usually known and designated as the "state insane asylum" shall hereafter be known and designated as the "Montana state hospital," and wherever the terms "state insane asylum" or "insane asylum" may appear or be used in any section of the Revised Codes of Montana, or in any act amendatory thereof, or supplemental thereto, they shall be deemed and construed to refer to and mean the "Montana state hospital"; provided, that such change in name shall not be construed so as to, in any manner whatever, impair or work a forfeiture of any property, rights or grants made to such institution, or to the state of Montana, for its use or benefit.

History: En. Sec. 1, Ch. 76, L. 1943.

38-102. (1413) Management—board of commissioners for insane. The management, control, and supervision of the Montana state hospital located at Warm Springs, county of Deer Lodge, state of Montana, is hereby vested in the state board of commissioners for the insane, which consists of the governor, the secretary of state, and the attorney general, of which the governor is president and the secretary of state the secretary.

History: Ap. p. Secs. 2260, 2261, Pol. C. 1895; re-en. Secs. 1111, 1112, Rev. C. 1907; amd. Sec. 1, Ch. 57, L. 1913; re-en. Sec. 1413, R. C. M. 1921. Cal. Pol. C. Secs. 2136-2199.

Collateral References

Hospitals 6.

41 C.J.S. Hospitals § 5.

26 Am. Jur. 587, Hospitals and Asylums, generally.

References

State ex rel. Dunn v. Ayers, 112 M 120, 124, 113 P 2d 785.

38-103. (1414) Powers and duties of board. The powers and duties of such board are as follows:

1. To make rules and regulations for its own government not inconsistent with the laws of the state.

2. To prescribe the duties of the superintendent of the Montana state hospital.

3. To provide for the care, custody, maintenance, and treatment of the insane in a safe and suitable building or buildings for that purpose, to be known as the Montana state hospital.

4. To make inquiry into the condition of the asylum, and to see that the inmates are properly cared for in respect to clothing, food, and medical attendance, and that they have proper apartments.

5. To make a report biennially to the legislative assembly, giving a statement of the receipts and expenditures, the conditions of the asylum, the number of inmates under treatment, and such other matters as may be advisable.

6. To keep a record of their proceedings, which must be open at all times to the inspection of any citizen.

History: Ap. p. Sec. 2262, Pol. C. 1895; 2, Ch. 57, L. 1913; re-en. Sec. 1414, R. C. re-en. Sec. 1113, Rev. C. 1907; amd. Sec. M. 1921.

38-104. (1415) Superintendent of state hospital and assistant—appointment, removal and salary. A superintendent of the state hospital who shall be a competent and qualified physician having had special and advanced training and experience in the treatment and care of mental disorders and diseases and an assistant superintendent, shall be appointed by the governor and such appointments must be transmitted to and approved by the senate. The tenure of office of the appointees shall be for a period of four (4) years from the date of the appointment and until their successors have been appointed and qualified. The annual salary of the superintendent and assistant shall be fixed by the state board of examiners, payable in monthly installments of one-twelfth (1/12) each at the end of each and every month.

The superintendent and the assistant superintendent in addition to the salaries above provided for shall be entitled to draw from the hospital commissary food supplies for their respective families, not to exceed, however, in value the sum of fifteen hundred dollars (\$1,500.00) per year for each

family. Such food supplies so drawn shall be accounted for to the board of commissioners for the hospital, in the same manner as other supplies used at the state hospital.

They shall be subject to removal by the state board of commissioners for the insane at any time for misfeasance, nonfeasance, or malfeasance in office, but before the superintendent or the assistant superintendent be so removed, formal charges in writing must be preferred, and the superintendent or the assistant charged shall be given opportunity to appear and defend himself against any such charges. When charges shall have been preferred asking the removal of the superintendent or the assistant superintendent notice of the time and place of hearing of said charges shall be served upon the accused at least five (5) days prior to the day set for the hearing; provided, however, that when such charges have been preferred, the state board of commissioners for the insane shall have the power and authority to suspend the accused until after the determination of the charges preferred against him.

History: En. Sec. 3, Ch. 57, L. 1913; re-en. Sec. 1415, R. C. M. 1921; amd. Sec. 1, Ch. 42, L. 1923; amd. Sec. 1, Ch. 149, L. 1929; amd. Sec. 1, Ch. 268, L. 1947.

Applicable to Removal of Assistant Superintendent, and Not Repealed by Later Act

In a proceeding in mandamus directed against the state board of examiners to compel reinstatement of the assistant superintendent of the state hospital for the insane, allegedly dismissed by the governor contrary to the provisions of this section declaring that before he be re-

moved formal charges in writing must be preferred and he be given an opportunity to be heard, held, that this section applies, was not repealed by sections 273 and 275 R. C. M. 1935 (since repealed), and that he is a public officer whose office is created by the legislature and not an "assistant" with employee status as used in the latter sections. *State ex rel. Dunn v. Ayers*, 112 M 120, 123, 113 P 2d 785.

Collateral References

Hospitals \hookrightarrow 4.
41 C.J.S. Hospitals § 9.

38-105. (1416) Control in superintendent—additional medical assistants. The superintendent shall have immediate control and charge of the Montana state hospital and the inmates thereof, subject, however, to the orders, rules, and regulations made and prescribed by the state board of commissioners for the insane, and not inconsistent with this act; and said superintendent shall appoint additional medical assistants, whose appointment shall be subject to the approval of the state board of commissioners for the insane, and whose salaries shall be fixed by said board.

History: En. Sec. 4, Ch. 57, L. 1913; re-en. Sec. 1416, R. C. M. 1921.

38-106. (1417) Oath of office and bonds. The superintendent and assistant superintendent, before entering upon the discharge of the duties of their respective positions, shall take the constitutional oath of office and file bonds in such sums as shall be fixed by the state board of commissioners for the insane, to be approved by the said board.

History: En. Sec. 5, Ch. 57, L. 1913; re-en. Sec. 1417, R. C. M. 1921.

References

State ex rel. Dunn v. Ayers, 112 M 120, 123, 113 P 2d 785.

Collateral References

Hospitals \hookrightarrow 4.
41 C.J.S. Hospitals § 9.

38-107. (1418) Board may send patient to friends. The board may, at the expense of the state, when satisfied it will be for the best interest of any insane person, send him to friends outside of the state.

History: En. Sec. 2280, Pol. C. 1895; **Collateral References**
re-en. Sec. 1121, Rev. C. 1907; re-en. Sec. Hospitals 5.
1418, R. C. M. 1921. 41 C.J.S. Hospitals § 7.

38-108. (1419) May contract with some other institution. The board may, when satisfied it will be for the best interest of any insane person in the state, send him to some other institution, with its consent, outside the state, and the expense of sending and supporting him at such institution must be paid by the state, providing such person is indigent.

History: En. Sec. 2281, Pol. C. 1895;
re-en. Sec. 1122, Rev. C. 1907; re-en. Sec.
1419, R. C. M. 1921.

38-109. (1421) Discharge of patients. The board must cause to be discharged from the Montana state hospital for the insane any patient upon the written report of the hospital medical staff, that such patient is in satisfactory mental condition to be discharged. Such written report must be filed and kept in the office of the board, and every inmate on recovery must be ordered released, without requiring a sponsor.

History: En. Sec. 2283, Pol. C. 1895; **Collateral References**
re-en. Sec. 1124, Rev. C. 1907; re-en. Sec. Insane Persons 51.
1421, R. C. M. 1921; amd. Sec. 1, Ch. 165, 44 C.J.S. Insane Persons § 72.
L. 1943. Cal. Pol. C. Sec. 2189. 28 Am. Jur. 679, Insane and Other Incompetent Persons, §§ 36 et seq.

38-110. Maintenance of indigent persons on discharge. Upon discharge of any patient of the Montana state hospital in addition to the financial aid required by section 1422, the board shall notify the board of public welfare of the county from which such patient was committed, and the said county board of public welfare shall at once ascertain whether the discharged patient is in financial need, and if such patient is found to be in financial need the county board of public welfare shall properly care for and maintain the discharged patient under the provision of the public welfare act until such patient is able to care for himself or other provision has been made for such care.

History: En. Sec. 2, Ch. 165, L. 1943. **NOTE.**—Section 1422, referred to above, was repealed by Sec. 8, Ch. 145, Laws 1941.

38-111. Periodic medical examination. It shall be the duty of the hospital medical staff to examine the patients who have curable diseases every six months and file a written report with the board giving the name of the patient and the name of the place from which the patient was committed, and the name and address of at least one of the relations of the patient if such can be ascertained.

History: En. Sec. 3, Ch. 165, L. 1943.

38-112. (1423) Postal rights of insane patients. The patients of all insane asylums, or any place where the insane are kept or confined in this state, must each be allowed to choose one person, in no way connected with such asylums or place, to whom he may write whenever and whatever he

may desire, and over the letters to such person there must be no censorship exercised or allowed by any asylum official, contractor, employee, or other person. The postal rights of such patients as to the persons chosen by them must be as free and unrestricted as are those of any resident of the state. Every patient has the right, once in three months, to choose a different person for his correspondent.

History: En. Sec. 2285, Pol. C. 1895;
re-en. Sec. 1126, Rev. C. 1907; re-en. Sec.
1423, R. C. M. 1921.

38-113. (1424) Same. The contractor or person in charge of every asylum or other place where the insane are confined in this state must furnish to every patient thereof, suitable material for writing, inclosing, sealing, stamping, and mailing letters at least twice a week.

History: En. Sec. 2286, Pol. C. 1895;	Collateral References
re-en. Sec. 1127, Rev. C. 1907; re-en. Sec.	Hospitals 6.
1424, R. C. M. 1921.	41 C.J.S. Hospitals § 6.

38-114. (1425) Postoffice box must be provided. All such letters must be dropped by the writers thereof, accompanied by an attendant when necessary, into a postoffice box provided by the state at the insane asylum, and kept in some place easy of access to all patients; the attendant is required in all cases to see that these letters are directed to the patient's correspondent, and if they are not so directed they must be held subject to the disposal of the person in charge, and the contents of these boxes must be collected once every week by an authorized person, and by him placed in the United States mail for delivery.

History: En. Sec. 2287, Pol. C. 1895;
re-en. Sec. 1128, Rev. C. 1907; re-en. Sec.
1425, R. C. M. 1921.

38-115. (1426) Name of correspondent must be posted. The contractor, or person in charge, must register and post in some place in the asylum the name of the person chosen as the patient's correspondent, and by what patient chosen, and the contractor or the person in charge must inform each of the persons chosen of that fact, and request him to write on the outside of the envelope of every letter he writes the patient, his name, and all the letters bearing such superscription on the envelope must be delivered without opening or reading to the patient.

History: En. Sec. 2288, Pol. C. 1895;
re-en. Sec. 1129, Rev. C. 1907; re-en. Sec.
1426, R. C. M. 1921.

38-116. (1427) Copy of law posted in asylum. A printed copy, in large type, of the next preceding four sections must be kept posted in every room of every asylum or other place where the insane are confined in this state.

History: En. Sec. 2289, Pol. C. 1895;
re-en. Sec. 1130, Rev. C. 1907; re-en. Sec.
1427, R. C. M. 1921.

38-117. (1428) Insane convicts. Insane convicts must be received into the asylum and returned to the state prison again, as provided in Title 94.

History: En. Sec. 2290, Pol. C. 1895; re-en. Sec. 1131, Rev. C. 1907; re-en. Sec. 1428, R. C. M. 1921.

Collateral References

Insane Persons—86.

44 C.J.S. Insane Persons § 130.

4 Am. Jur. 73, Arrest, §§ 116 et seq.;

14 Am. Jur. 788, Criminal Law, §§ 32 et seq.

Test of present insanity preventing trial or punishment. 3 ALR 94.

Constitutionality of statute which provides for commitment of accused acquitted on ground of insanity to hospital for insane without examination of present mental condition. 145 ALR 892.

Test or criterion of mental condition within contemplation of statute providing for commitment of persons because of mental condition. 158 ALR 1220.

38-118. (1429) Nonresident insane must not be received. No insane person, nonresident of this state, must be received into the asylum unless he became insane within this state.

History: En. Sec. 2291, Pol. C. 1895; re-en. Sec. 1132, Rev. C. 1907; re-en. Sec. 1429, R. C. M. 1921.

38-119. (1430) Insane person not indigent must be paid for. None but indigent persons must be received into the Montana state hospital unless their care and maintenance is paid or guaranteed by the parents, children, or guardians of such person, and all money received by the contractor for the care and maintenance of such persons must be accounted for in his settlement with the board.

History: En. Sec. 2292, Pol. C. 1895; re-en. Sec. 1133, Rev. C. 1907; re-en. Sec. 1430, R. C. M. 1921.

Collateral References

Insane Persons—52.

44 C.J.S. Insane Persons §§ 74, 76.

Liability of husband for support and care of insane wife. 4 ALR 1109.

Constitutionality of statute imposing liability upon estate or relatives of insane person for his support in asylum. 48 ALR 733.

Labor or services performed by one while inmate of a government institution as basis of deduction or setoff in respect of the liability of his estate or his relatives. 114 ALR 981.

CHAPTER 2

EXAMINATION OF PERSONS MENTALLY DERANGED—COMMITMENT

- Section 38-201. Examination before magistrate—affidavit and warrant for apprehension.
- 38-202. Subpoenas for witnesses.
- 38-203. Subpoenas for physicians.
- 38-204. Witnesses, duty of.
- 38-205. Physicians, duty of.
- 38-206. Certificate of physicians.
- 38-207. Forms of certificates.
- 38-208. Commitment.
- 38-208.1. Admission of patients prior to legal commitment—when authorized.
- 38-208.2. Legal commitment within 5 days after emergency admission.
- 38-208.3. Cost of commitment proceedings.
- 38-209. Delivery of insane person at state hospital.
- 38-210. Moneys of insane person—disposal of.
- 38-211. Fees of physicians.
- 38-212. Cost of examination and commitment.
- 38-213. Dissatisfied persons—procedure on question of insanity.
- 38-214. Hearing and examination of insane person—maintenance—contribution by relatives—when had.

38-201. (1431) Examination before magistrate—affidavit and warrant for apprehension. (1) Whenever it appears by affidavit to the satisfaction of a magistrate of a city or county, that any person therein is so far disordered in his mind as to endanger health, person, or property, he must issue and deliver to some peace officer, for service, a warrant directing that such person be apprehended and taken before a judge of the district court of the county, for a hearing and examination on such charge. Such officer must thereupon apprehend and detain such person until a hearing and examination can be had, as hereinafter provided. Pending the examination and hearing, such order may be made relative to the care, custody or confinement of the alleged insane person as the judge shall see fit. At the time of the apprehension a copy of said affidavit and warrant of apprehension must be personally delivered to said person.

(2) Such affidavit and warrant shall be in substantially the following form:

IN THE.....COURT
OF.....
COUNTY OF.....STATE OF MONTANA

AFFIDAVIT OF INSANITY

In the matter of....., an alleged insane person.

State of Montana,

} ss.

County of

....., being duly sworn, deposes and says that there is now in said county, in the city or town of a person named, who is insane, and is so far disordered in mind as to endanger the health, person, or the property of h.....self, or of others, and that he, at in said county, on the day of 19..., threatened and attempted (state actions, etc.)

That by reason of such insanity, said person is dangerous to be at large:

Wherefore, affiant prays that such action may be had as the law requires in the cases of persons who are so far disordered in mind as to endanger health, person and property.

Subscribed and sworn to before me this day of, 19....

WARRANT OF APPREHENSION

IN THE COURT, COUNTY OF
STATE OF MONTANA

In the matter of, an alleged insane person.

The State of Montana, to any sheriff, constable, marshal, policeman, or peace officer, in this State:

The affidavit of _____, having been presented this day to me, a _____ (here state office or title of magistrate, e.g. police judge, justice of the peace, district judge, etc.,) in the county of _____, State of Montana, from which it appears that there is now in this county, at _____ a person by the name of _____, who is insane, and who is so disordered in mind as to endanger h..... own health, person and property (or the person, lives and property of others), and that it is dangerous for said person to be at large;

And it satisfactorily appearing to me that said _____ is insane, and so far disordered in h..... mind as to endanger health, person, and property;

Now, therefore, you are commanded forthwith to apprehend the above named person, and take h..... before a judge of the district court of the _____ judicial district in and for the county of _____ for a hearing and examination on the said charge of insanity.

And I hereby direct that a copy of this warrant, together with a copy of said affidavit, be delivered to said _____ at the time of h..... apprehension; and I further direct that this warrant may be served at any hour of the day or night.

Witness my hand this _____ day of _____, 19....

RETURN SHOWING SERVICE OF WARRANT

I hereby certify that I received the above warrant of apprehension on the _____ day of _____ 19...., and served the said warrant by apprehending, in the county of _____ on the _____ day of _____, 19...., the said _____, alleged to be insane, and bringing h..... before _____, judge of the district court of said _____ county on the _____ day of _____, 19....; and I further certify that I delivered a copy of said warrant of apprehension, together with a copy of the affidavit of insanity, as directed in said warrant, personally to said _____, at the time of the apprehension.

(3) He must be taken before a judge of the district court, to whom said affidavit and warrant of apprehension must be delivered to be filed with the clerk. The judge must then inform him that he is charged with being insane, and inform him of his rights to make a defense to such charge and produce any witnesses in relation thereto. The judge must by order fix such time and place for the hearing and examination in open court as will give reasonable opportunity for the production and examination of witnesses; provided, however, that if the patient is too ill to appear in court, or if it would be detrimental to the mental or physical health of the patient, the judge may hold the necessary hearing at the bedside of the patient. Said order must be entered at length in the minute book of the court or must be signed by the judge and filed and a certified copy of the same served on such person. The judge must also order that notice of apprehension of such person and the hearing

on such charge of insanity be served on such relatives of said person known to be residing in the county as the court may deem necessary or proper.

History: Ap. p. Sec. 2300, Pol. C. 1895; amd. Sec. 1, p. 163, L. 1897; re-en. Sec. 1134, Rev. C. 1907; re-en. Sec. 1431, R. C. M. 1921; amd. Sec. 1, Ch. 117, L. 1939.

Cross-References

Actions by or against insane person, secs. 93-2805, 93-2806.

Cruel treatment, penalty, sec. 94-3541.
Guardianship of insane persons, secs. 91-4701 to 91-4706.

Service of summons on insane person, sec. 93-3007.

Use of force in managing insane person, penalty, sec. 94-605.

Hearings before Chairman of Board of County Commissioners

On application for writ of certiorari to review an insanity proceeding heard before the chairman of a board of county commissioners in the absence of the district judge of the county, under this and the following sections, held, that since such chairman sits as a tribunal of very limited power, no presumption may be indulged that he had jurisdiction to enter an order of commitment, but his jurisdiction must be made to appear affirmatively in the record, otherwise the proceedings had are void. (Decided under statute prior to 1939 amendment.) State ex rel. Leonidas v. Larson, 109 M 70, 73, 92 P 2d 774.

38-202. (1432) Subpoenas for witnesses. When the person is taken before the judge, the judge must issue subpoenas to two or more witnesses best acquainted with said insane person, to appear before him and testify at such examination.

History: Ap. p. Sec. 2301, Pol. C. 1895; amd. Sec. 2, p. 163, L. 1897; re-en. Sec. 1135, Rev. C. 1907; re-en. Sec. 1432, R. C. M. 1921; amd. Sec. 2, Ch. 117, L. 1939. Cal. Pol. C. Sec. 2169.

References

State ex rel. Hoatson v. District Court, 95 M 174, 178, 26 P 2d 172.

38-203. (1433) Subpoenas for physicians. The judge must also issue subpoenas for at least two graduates of medicine to appear and attend such examination.

History: Ap. p. Sec. 2302, Pol. C. 1895; amd. Sec. 3, p. 163, L. 1897; re-en. Sec. 1136, Rev. C. 1907; re-en. Sec. 1433, R. C. M. 1921; amd. Sec. 3, Ch. 117, L. 1939.

38-204. (1434) Witnesses, duty of. At the examination the persons subpoenaed must appear and answer all questions pertinent to the matter under investigation.

Presumption of Insanity Rebuttable

By virtue of section 64-112, an adjudication of insanity under sections 38-201 to 38-208 does not establish a conclusive, but a rebuttable presumption of insanity. Section 64-112 substitutes for the presumption of sanity the presumption of insanity until the certificate provided for is obtained. State v. Bucy, 104 M 416, 419, 66 P 2d 1049.

Quaere

Under this section and the sections following, must a person alleged to be of unsound mind be personally present in court at the inquisition in all cases, or must he, regardless of his mental or physical condition, be given notice of the hearing and an opportunity to defend? State ex rel. Hoatson v. District Court, 95 M 174, 177, 26 P 2d 172. (Decided under statute prior to 1939 amendment.)

Collateral References

Insane Persons—12, 13.

44 C.J.S. Insane Persons §§ 17, 18.

28 Am. Jur. 661, Insane and Other Incompetent Persons, §§ 9 et seq.

Action for false imprisonment or malicious prosecution predicated upon institution of, or conduct in connection with, lunacy proceedings. 145 ALR 711.

Collateral References

Insane Persons—19.

44 C.J.S. Insane Persons § 19.

References

State ex rel. Hoatson v. District Court, 95 M 174, 178, 26 P 2d 172.

History: En. Sec. 2303, Pol. C. 1895; re-en. Sec. 1137, Rev. C. 1907; re-en. Sec. 1434, R. C. M. 1921.

Substantial Compliance with Statutory Provisions Mandatory

In a proceeding to determine the sanity of a person at least substantial compliance with the statutory provisions (this section through section 38-208) is manda-

tory, and in determining whether such a person was denied his rights, the supreme court is governed by the substance and not the mere form of things. *State ex rel. Hoatson v. District Court*, 95 M 174, 178, 26 P 2d 172.

Collateral References

Insane Persons ⇐ 20.
44 C.J.S. Insane Persons § 25.

38-205. (1435) Physicians, duty of. The physicians must hear such testimony, and must make a personal examination of the alleged insane person.

History: En. Sec. 2304, Pol. C. 1895; re-en. Sec. 1138, Rev. C. 1907; re-en. Sec. 1435, R. C. M. 1921.

Substantial Compliance with Statutory Provisions Mandatory

In a proceeding to determine the sanity of a person at least substantial compliance with the statutory provisions (secs. 38-204 to 38-208) is mandatory, and in

determining whether such a person was denied his rights, the supreme court is governed by the substance and not the mere form of things. *State ex rel. Hoatson v. District Court*, 95 M 174, 178, 26 P 2d 172.

Collateral References

Insane Persons ⇐ 21.
44 C.J.S. Insane Persons § 24.

38-206. (1436) Certificate of physicians. The physicians, after hearing the testimony and making the examination, must, if they believe such person to be dangerously insane, make a certificate, under their hand, showing as near as possible:

1. That such person is so far disordered in his mind as to endanger health, person, or property.
2. The premonitory symptoms, apparent cause or class of insanity, the duration and condition of the disease.
3. The nativity, age, residence, occupation, and previous habits of the person.
4. The place from whence the person came, and the length of time he has resided in this state.

History: En. Sec. 2305, Pol. C. 1895; re-en. Sec. 1139, Rev. C. 1907; re-en. Sec. 1436, R. C. M. 1921. Cal. Pol. C. Sec. 2170.

Operation and Effect

The statutory requirement that two physicians shall hear the evidence introduced at an insanity hearing, examine the person said to be of unsound mind and make the certificate called for by this section, is jurisdictional; hence where by reason of the disqualification of one of such physicians, an order declaring the person under investigation insane was based upon the certificate of but one physician, it was void for lack of jurisdiction. *State ex rel. Hoatson v. District Court*, 95 M 174, 178, 26 P 2d 172.

Substantial Compliance with Statutory Provisions Mandatory

In a proceeding to determine the sanity of a person at least substantial compliance with the statutory provisions (secs. 38-204 to 38-208) is mandatory, and in determining whether such a person was denied his rights, the supreme court is governed by the substance and not the mere form of things. *State ex rel. Hoatson v. District Court*, 95 M 174, 178, 26 P 2d 172.

References

State v. Bucy, 104 M 416, 418, 66 P 2d 1049.

38-207. (1437) Forms of certificates. The certificate must be made in the form prescribed by, and, if they can be had, upon blanks furnished by the board of the commissioners for the insane.

History: En. Sec. 2306, Pol. C. 1895; re-en. Sec. 1140, Rev. C. 1907; re-en. Sec. 1437, R. C. M. 1921.

Substantial Compliance with Statutory Provisions Mandatory

In a proceeding to determine the sanity of a person at least substantial compli-

ance with the statutory provisions (secs. 38-204 to 38-208) is mandatory, and in determining whether such a person was denied his rights, the supreme court is governed by the substance and not the mere form of things. *State ex rel. Hoatson v. District Court*, 95 M 174, 178, 26 P 2d 172.

38-208. (1438) Commitment. The judge, after such examination and certificate made, if he believes the person so far disordered in his mind as to endanger health, person, or property, must make an order that the party be confined in the Montana state hospital, and a copy of such order must be filed with and recorded by the clerk of the district court of the county. The clerk must also keep in convenient form an index book, showing the name, age, and sex of each person so ordered to be confined in the Montana state hospital, with the date of the order and the name of the insane asylum in which the person is ordered to be confined. No fees must be charged by the clerk for performing any of the duties provided for by this section or in this chapter.

History: Ap. p. Sec. 2307, Pol. C. 1895; amd. Sec. 4, p. 163, L. 1897; re-en. Sec. 1141, Rev. C. 1907; re-en. Sec. 1438, R. C. M. 1921; amd. Sec. 4, Ch. 117, L. 1939. Cal. Pol. C. Sec. 2171.

NOTE.—See in connection with this section, section 82-402.

Operation and Effect

A complaint alleging that an insane person was "so declared by a court of competent jurisdiction," and "was duly committed to the insane asylum," does not show the duty of the keeper of the asylum to receive and keep him, since the allegation does not show the name of the court, or that any order was made or delivered to such keeper. *Walter v. Mitchell*, 25 M 385, 388, 65 P 5.

Substantial Compliance with Statutory Provisions Mandatory

In a proceeding to determine the sanity

of a person at least substantial compliance with the statutory provisions (secs. 38-204 to 38-208) is mandatory, and in determining whether such a person was denied his rights, the supreme court is governed by the substance and not the mere form of things. *State ex rel. Hoatson v. District Court*, 95 M 174, 178, 26 P 2d 172.

References

Cited or applied as section 2307, Political Code, before amendment, in *Walter v. Mitchell*, 25 M 385, 388, 65 P 5; *State v. Buey*, 104 M 416, 418, 66 P 2d 1049.

Collateral References

Insane Persons ⇐ 49.
44 C.J.S. *Insane Persons* § 65.
28 Am. Jur. 672, *Insane and Other Incompetent Persons*, §§ 26 et seq.

38-208.1. Admission of patients prior to legal commitment—when authorized. That the superintendent, or acting superintendent, of the Montana state hospital shall have the right and authority to accept and admit patients to the Montana state hospital who have not been legally committed to the hospital, when a patient is presented for admission accompanied by a certificate from the county physician in the county in which the patient resides, stating that to the best of his knowledge and belief this patient is suffering from acute mania or circular insanity and requires immediate hospitalization and who, by reason of the absence of the district judge from the county of the patients' residences, have not been legally committed to the Montana state hospital.

History: En. Sec. 1, Ch. 182, L. 1953.

Collateral References

Insane Persons ⇐ 49.
44 C.J.S. *Insane Persons* § 64.

38-208.2. Legal commitment within 5 days after emergency admission.

Within five (5) days after the admission to the state hospital of patients who have not been legally committed as hereinbefore provided, the superintendent or acting superintendent of said hospital shall have such patients legally committed thereto by the district court of the third judicial district of the state of Montana in and for the county of Deer Lodge or shall release and discharge such patients from said hospital.

History: En. Sec. 2, Ch. 182, L. 1953.

38-208.3. Cost of commitment proceedings. In all cases provided for by this act the costs of commitment proceedings shall be paid by the county of the patients' residences.

History: En. Sec. 3, Ch. 182, L. 1953.

38-209. (1439) Delivery of insane person at state hospital. The insane person, together with the order of the judge, and the certificate of the physicians must be delivered to the sheriff of the county, and by him must be delivered to the officer in charge of the Montana state hospital. The superintendent or person in charge of the state hospital for the insane may refuse to receive any person upon any order, if the papers presented do not comply with the provisions of this chapter.

History: Ap. p. Sec. 2308, Pol. C. 1895; amd. Sec. 5, p. 164, L. 1897; re-en. Sec. 1142, Rev. C. 1907; re-en. Sec. 1439, R. C. M. 1921; amd. Sec. 5, Ch. 117, L. 1939. Cal. Pol. C. Sec. 2172.

Collateral References

Insane Persons—49.

44 C.J.S. Insane Persons § 69.

38-210. (1440) Moneys of insane person—disposal of. When any person is adjudged to be insane and ordered committed to the Montana state hospital, or is adjudged to be in such a condition of mind that he should be placed in such hospital for observation, all moneys found on him at the time he is taken into custody must be certified to by the judge, and sent with such person to the hospital, to be delivered to the superintendent thereof, whose receipt therefor shall be taken by the officer or other person delivering him to the hospital, who must file such receipt with the clerk of the district court of the county in which the proceedings were had. If the amount exceeds one hundred dollars (\$100.00), the excess must be applied to the payment of the expenses of such person while in the hospital. If the amount is one hundred dollars (\$100.00) or less it must be kept and delivered to the person when discharged or released from the hospital or applied in payment of funeral expenses if such person dies while in such hospital. If any amount standing to the credit of any person paroled, discharged or released, or after payment of the funeral expenses of such person who dies while in such hospital, shall remain unclaimed for one (1) year after such parole, discharge, release or death, fifty per centum (50%) of such amount, but not in any event exceeding fifty dollars (\$50.00) shall be withdrawn from such account and placed in the "patients' deposit account, special account," to be expended for indigent patients at such times and in such manner and for such purposes as may be prescribed by the superintendent of such hospital. Any balance remaining to the credit of any such person, shall be transmitted to the county treasurer of the county from which said person was sent, and if any sum remains after

paying the costs of hearing, and transportation to the hospital, the balance shall be paid into the state treasury to the credit of the general fund.

History: Ap. p. Sec. 2309, Pol. C. 1895; M. 1921; amd. Sec. 6, Ch. 117, L. 1939; amd. Sec. 6, p. 164, L. 1897; re-en. Sec. 1143, Rev. C. 1907; re-en. Sec. 1440, R. C. amd. Sec. 2, Ch. 76, L. 1943.

38-211. (1441) Fees of physicians. The physicians attending each examination of an insane person are allowed five dollars and in addition their actual traveling expenses, not to exceed the sum of ten cents for each and every mile actually and necessarily traveled by said physician in attending said examination, and in returning to his home therefrom, to be paid by the county treasurer of the county, where the examination was had, on the order of the judge.

The clerk of the district court must give to such physician a certificate, under seal, of travel and attendance, which shall entitle him to receive the amount therein stated from the county treasurer.

History: Ap. p. Sec. 2310, Pol. C. 1895; re-en. Sec. 1144, Rev. C. 1907; amd. Sec. 1, Ch. 84, L. 1911; re-en. Sec. 1441, R. C. M. 1921; amd. Sec. 7, Ch. 117, L. 1939.

Collateral References

Insane Persons—21.
44 C.J.S. Insane Persons § 24.

38-212. (1442) Cost of examination and commitment. The cost of the examination, committal, and taking an insane person to the asylum must be paid by the county in which he resides at the time he is adjudged insane. The sheriff must be allowed the actual expenses incurred in taking an insane person to the asylum, as provided by section 16-2723 of this code.

History: En. Sec. 2311, Pol. C. 1895; re-en. Sec. 1145, Rev. C. 1907; re-en. Sec. 1442, R. C. M. 1921. Cal. Pol. C. Sec. 2175.

ical Code, in Proctor v. Cascade County, 20 M 315, 317, 50 P 1017.

Collateral References

Insane Persons—28.
44 C.J.S. Insane Persons § 34.

NOTE.—This section changed to harmonize with section 3137, Revised Codes 1907 (16-2723).

References

Cited or applied as section 2311, Polit-

38-213. (1443) Dissatisfied persons—procedure on question of insanity.
(1) If a person ordered to be committed, or any friend in his behalf, is dissatisfied with the order of the judge committing him, he may, within five days after the making of such order, demand that the question of his sanity be tried by a jury before the district court of the county in which he was committed. Thereupon that court must cause a jury to be summoned and to be in attendance at a date stated, not less than five nor more than ten days from the date of the demand for a jury trial.

(2) At such trial the cause against the alleged insane must be represented by the county attorney of the county, and the trial must be had as provided by law for the trial of civil causes before a jury, and the alleged insane person must be discharged unless a verdict that he is insane is found by at least three-fourths of the jury.

(3) If the verdict of the jury is that he is insane, the judge must adjudge that fact and make an order of commitment as upon the original hearing. Such order must be presented, at the time of commitment of such insane person, to the superintendent or person in charge of the hospital

to which the insane person is committed, and a copy thereof be forwarded by such superintendent to the board of the commissioners for the insane and filed in its office.

(4) Proceedings under the order must not be stayed, pending the proceedings for determining the question of sanity by a jury, except upon the order of a district judge, with provision made therein for such temporary care and custody of the alleged insane person as may be deemed necessary. If the district judge, by the order granting the stay, commits the accused insane to the custody of any person other than a peace officer, he may, by such order, require a bond for his appearance at the trial. If a judge refuses to grant an application for an order of commitment of an insane person alleged to be dangerous to himself and others, if at large, he must state his reasons for such refusal, and any person aggrieved thereby may demand a trial of the question of the insanity of such accused insane, in the manner hereinbefore provided for a jury trial when demanded by or on behalf of the accused insane.

(5) If the person sought to be committed is not a poor or indigent person, the costs of the proceedings are a charge upon his estate, or must be paid by persons legally liable for his maintenance, unless otherwise ordered by the judge. If the alleged insane person is adjudged not to be insane, the judge may, in his discretion, charge the costs of the proceedings to the person making the application for an order of commitment, and judgment may be entered against him for the amount thereof and enforced by execution.

History: En. Sec. 7, p. 164, L. 1897; re-en. Sec. 1146, Rev. C. 1907; re-en. Sec. 1443, R. C. M. 1921; amd. Sec. 8, Ch. 117, L. 1939.

Where Statute Disregarded, Commitment Held Nullity

In an insanity proceeding heard before the chairman of a board of county commissioners, where service of a warrant of arrest was not affirmatively shown by a return thereof, and no transcript of the proceedings filed in the office of the clerk of the district court and entered on the minutes of the probate proceedings until long after the examination, and the matter not called to the attention of the

district judge at the first term of court thereafter for his approval, the order of commitment, held, a nullity. (Decided under statute prior to 1939 amendment.) State ex rel. Leonidas v. Larson, 109 M 70, 73, 92 P 2d 774.

Collateral References

Insane Persons \Rightarrow 24, 28.

44 C.J.S. Insane Persons §§ 28, 30, 34.

28 Am. Jur. 679, Insane and Other Incompetent Persons, §§ 36 et seq.

Constitutional right to jury trial in proceeding for adjudication of incompetency or insanity or for restoration. 33 ALR 2d 1145.

38-214. (1444) Hearing and examination of insane person—maintenance—contribution by relatives—when had. (1) When the judge has fixed the time for hearing and examination, as provided in section 38-201, the clerk of the court must immediately deliver to the county board of public welfare a written notice giving the name of person named in the affidavit and warrant, his place of residence, and the name of the person making the affidavit, and some member of the staff of such board must, without delay, make an investigation to ascertain and determine the financial condition of the person named in such affidavit and warrant, the property and value thereof, if any be owned by such person, the income, if any, therefrom, names of relatives, if any, legally liable for the support and maintenance of such person, and their financial condition and ability

to pay the costs of such proceeding, transportation to the Montana state hospital, and care and maintenance of such person therein, and shall make a written report of such investigation and file the same with the clerk of the court prior to the time set for such hearing and examination.

(2) On the hearing and examination, if the person is adjudged to be insane and an order is made committing him to the state hospital, or if it is adjudged that there is reason to believe that his mind is disordered to such an extent that he should be placed in hospital for observation for the purpose of ascertaining and determining his condition of mind and whether he should be committed to such hospital and an order is made therefor, it shall be the duty of the judge before whom the hearing is had to take evidence as to the financial worth of said person, the property and value thereof owned by him, if any, and the income, if any therefrom, and the financial condition and ability of any and all persons legally liable for his support and maintenance to pay the costs of such proceeding, transportation to the state hospital and care and maintenance of such person therein, and the report of the member of the staff of the county public welfare board making the aforesaid investigation and filed in the office of the clerk of the court shall be considered and deemed a part of such evidence. All evidence introduced shall be reduced to writing and filed in the office of the clerk of said court, together with all orders, subpoenas, affidavits, complaints, warrants and papers used on said hearing or made by said judge, and said clerk shall enter upon the journal of the minutes of probate proceedings a record of all proceedings had, in the same manner as proceedings in probate.

(3) If it appears from said evidence that such person has any means, money or property out of which the costs of the proceeding, transportation to the state hospital and his maintenance therein, or any part thereof could be paid, it shall be the duty of the judge before whom such hearing is had, to issue a citation to any person or persons in possession of such property, or any thereof, and to the relatives of such person, if any there be in the county of which such person is a resident, citing them to appear and show cause why a guardian should not be appointed for such person, and why said guardian should not be ordered to pay the costs of such proceeding, transportation to the state hospital and cost of the maintenance of such person, or so much thereof as his means will permit, which citation shall be served and all proceedings thereunder conducted as provided by sections 91-4301 to 91-4322, and if it appears to the court that such person has property that can be applied towards the payment of the costs of the proceeding, transportation to the state hospital and his maintenance therein, it shall be the duty of the court to make an order to that effect, stating how much of such person's property shall be so applied, the amount to be fixed with due regard to the proper preservation of the estate of such person, provided that the amount fixed for the maintenance of such person in such hospital shall not, in any event, exceed one dollar (\$1.00) per day. If it appears to the court that such person has no means, money or property, or not sufficient means, money or property, to pay the costs of the proceeding, transportation to the state hospital and his maintenance therein, but has relatives who are legally liable for his maintenance

and support, and upon whom citation has been served as herein provided, who are financially able to pay such costs of proceedings, transportation and maintenance, or a part thereof, it shall be the duty of the court to make an order to that effect, stating therein the names of such relatives, and requiring them to pay such costs of proceedings, transportation and maintenance in such hospital, or so much thereof as may be fixed in such order; provided that the amount fixed for the maintenance of such person in such hospital shall not, in any event, exceed one dollar (\$1.00) per day.

(4) If it appears to the court that such person is an indigent and has no relatives legally liable for his support and maintenance the court shall make an order so stating and that such person is to be received at such hospital as an indigent person. Whenever any order is made by the court directing the payment of the costs of proceeding, transportation and maintenance or any part thereof of any person out of the estate of such person, or by any relatives thereof legally liable for his support and maintenance, such order must be filed in the office of the clerk of the court, and such court must make duplicate certified copies thereof, delivering one thereof to the board of county commissioners of such county and transmitting the other thereof to the superintendent of the Montana state hospital.

History: En. Sec. 8, p. 165, L. 1897; re-en. Sec. 1147, Rev. C. 1907; re-en. Sec. 1444, R. C. M. 1921; amd. Sec. 9, Ch. 117, L. 1939; amd. Sec. 3, Ch. 76, L. 1943. Cal. Pol. C. Secs. 2179-2180.

Presentation of State Hospital's Claim For Care Against Patient's Estate Not Required

The statute of nonclaim section 91-2704 is limited to contract obligations and does not include one imposed by statute. Held, in action by state against administrator of estate of person confined in state hospital at private expense by court order under authority of this section, presentation of claim was not required as a prerequisite to right to bring action. *State v. Pahnish*, 116 M 340, 342, 151 P 2d 1001.

Collateral References

Insane Persons \Rightarrow 52, 53.

44 C.J.S. Insane Persons §§ 73, 74.

28 Am. Jur. 682, Insane and Other Incompetent Persons, §§ 42 et seq.

Liability of husband for support and care of insane wife. 4 ALR 1109.

Constitutionality of statute imposing liability upon estate or relatives of insane person for his support in asylum. 48 ALR 733.

Labor or services performed by one while inmate of a government institution as basis of deduction or setoff in respect of the liability of his estate or his relatives. 114 ALR 981.

Liability of incompetent's estate for care and maintenance furnished by public institution or hospital before incompetent's acquisition of any estate or property. 33 ALR 2d 1257.

CHAPTER 3

TRANSFER OF STATE HOSPITAL PATIENTS TO STATE TRAINING SCHOOL AT BOULDER

- Section 38-301. Transfer of patients to Montana state training school at Boulder.
 38-302. Admission of certain inmates at Montana state hospital to state training school.
 38-303. Expenses of examination and transportation.
 38-304. Expenses of clothing.

38-301. (1444.1) Transfer of patients to Montana state training school at Boulder. (1) When any person has been heretofore, or may be hereafter committed to the Montana state hospital as an insane person, and

the superintendent and physicians of such hospital shall determine and conclude from examination, tests and observation of such person, that he is not a proper person to be confined in such hospital but should properly be placed in the Montana state training school at Boulder, the superintendent of the state hospital shall ascertain from the superintendent, or person in charge of the state training school, whether or not there is room and accommodations for such person at such training school.

(2) If there is room and accommodations for such person at such training school, then the superintendent of the state hospital shall make a certificate in triplicate, which shall give the name of the person to be transferred, the county from which committed to such hospital, date of commitment and date received at such state hospital, and state as fully as possible therein the reasons why such person should be transferred from the state hospital to the state training school, and all three copies of such certificate shall be signed by the superintendent and all physicians of the hospital who have examined and observed such person while in said hospital. One copy of such certificate shall be retained in the files of the hospital and one copy thereof shall be transmitted to the clerk of the district court of the county from which such person was committed to the state hospital.

(3) The clerk of said district court, upon receiving such copy of certificate, shall immediately give written notice to the relatives or guardian whose names are shown in the proceedings for the commitment of such person to the state hospital, or disclosed by any guardianship proceedings with regard to such person in such court, stating briefly the contents of such certificate and purpose thereof.

(4) Any such relative or guardian may make and file with the clerk of such court, within ten (10) days after the date of such notice, written protest or objection to the proposed transfer. If any such written protest or objection is filed within such time, the clerk of the court shall notify the district judge thereof, and such judge shall fix such time and place for the hearing of such protest and objection in open court as will give reasonable opportunity for the production and examination of witnesses. If no such protest or objection is filed within such time, or if a protest or objection is filed within such time and after a hearing thereon the judge shall make an order approving such transfer, the transfer may be made, but if such protest or objection is filed and after a hearing thereon the judge makes an order disapproving such transfer then the transfer shall not be made.

(5) The clerk of the court shall, if no protest or objection is filed within the time provided, transmit a written notice, in duplicate to the superintendent of the state hospital that no protest or objection has been filed, and if a protest or objection has been filed and a hearing had thereon such clerk shall immediately after the making of any order approving or disapproving such transfer, make a certified copy of such order, in duplicate, and transmit both thereof to the superintendent of such hospital.

(6) Upon receiving such written notices that no protest or objection has been filed, or upon receiving certified copies of an order approving such transfer, one of such notices or certified copy of order shall be placed

in the files of the state hospital, and the superintendent of such hospital may then have an attendant of the hospital take such person and deliver him to the superintendent or person in charge of such training school, together with a copy of such certificate with a copy of such notice or certified copy of order attached thereto, to the superintendent or person in charge of such training school and the same shall be his authority for receiving and keeping such person, and shall take the place of any commitment thereto. The cost of transporting such person from the hospital to the training school shall be paid out of funds appropriated for the maintenance of the state hospital.

History: En. Sec. 4, Ch. 76, L. 1943.

38-302. Admission of certain inmates at Montana state hospital to state training school. If any inmate of the Montana state hospital is not so far disordered in mind as to endanger health, person or property but by reason of being feeble-minded is a proper person for admission to the Montana state training school, such person may be admitted to the Montana state training school by proceedings in the district court of the county in which said Montana state hospital is located, such proceedings to be in compliance with the laws relating to the admission to said Montana state training school.

History: En. Sec. 1, Ch. 10, L. 1943.

38-303. Expenses of examination and transportation. The expenses of examination and transportation of such person shall be paid by the Montana state hospital.

History: En. Sec. 2, Ch. 10, L. 1943.

38-304. Expenses of clothing. The expenses of clothing of such person, after admission to the Montana state training school, shall be paid by the county from which such person was committed to the Montana state hospital, upon the rendering of a sworn itemized account of said expenses and the county in turn shall collect in its own name from the parents, guardian or estate of such person, provided they are financially able to meet such expenses. Such person, whether a minor or adult, shall remain such county charge as long as he or she is in the Montana state training school.

History: En. Sec. 3, Ch. 10, L. 1943.

CHAPTER 4

EXAMINATION AND COMMITMENT OF PERSON AS MENTALLY DERANGED BUT NOT DANGEROUS—VOLUNTARY APPLICATION FOR ADMISSION

- Section 38-401. Examination of person mentally deranged but not dangerous—physician's certificate.
- 38-402. Judge's order—observation and examination.
- 38-403. Supplemental order when more time for observation necessary.
- 38-404. Release—certificate by superintendent.
- 38-405. If commitment advisable, procedure—disposition of certificates.
- 38-406. Voluntary application for admission to state hospital—procedure.
- 38-407. Trial by jury, when.
- 38-408. Duty of clerk of district court.
- 38-409. Investigation by board of public welfare—order by district judge.

38-401. Examination of person mentally deranged but not dangerous—physician's certificate. When an affidavit has been made, warrant issued, hearing had thereon and examination made of the person named in such affidavit and warrant, in accordance with the provisions of sections 38-201 to 38-205, inclusive, the physicians attending such hearing and making such examination, if they conclude that there is reason to believe that such person is disordered in his mind to some extent, but not to such an extent as to endanger health, person or property, must make a certificate on a form prescribed by the superintendent of the Montana state hospital, showing as near as possible:

1. That while they do not believe such person to be disordered in his mind to such extent as to endanger health, person or property, they do believe that such person may be disordered in his mind to such an extent that he should be admitted to the Montana state hospital for further examination and observation.

2. The premonitory symptoms, apparent cause of such disordered mind and the extent and duration thereof.

3. The nativity, age, residence, occupation and previous habits of such person.

4. The place from whence he came, and the length of time he has resided in this state.

5. The names of the nearest relatives, if known, and the name of any guardian of such person, if there be one, with their names and post office addresses.

Such certificate must be filed in the office of the clerk of the district court of the county in which such hearing is held.

History: En. Sec. 1, Ch. 157, L. 1943.

38-402. Judge's order—observation and examination. If the physicians' certificate provided for in section 38-401 is made and filed, the judge shall make an order directing that a person named therein shall be placed in the Montana state hospital for such time as he may deem necessary, but which shall not be less than two (2) nor more than four (4) weeks, for observation and for further examination for the purpose of determining whether he is disordered in his mind, and if so, whether or not his mind is disordered to such an extent as to require that he should be committed to such hospital, which order shall designate the person to take him to such hospital. Certified copies of the physicians' certificate and of such order shall be given the person designated in such order, and the person so designated shall deliver such person to the Montana state hospital and shall at the same time deliver to the superintendent thereof said certified copies of physicians' certificate and order and the same shall be the authority of such superintendent for receiving, keeping and detaining such person in such hospital for the time specified in said order.

History: En. Sec. 2, Ch. 157, L. 1943.

38-403. Supplemental order when more time for observation necessary. When any person is received at the Montana state hospital for observation under any order of a district judge made in accordance with the provisions of section 38-402, such person may be kept in such hospital not exceeding

the maximum length of time specified in said order, during which time the superintendent and physicians of such hospital shall give the person such examinations, tests, and observation and such treatment, if any, as they may deem necessary and required in order to ascertain and determine and improve his mental condition; provided, that if it shall appear to such superintendent and physicians, before the expiration of such maximum time specified in such order, that such time is not sufficient for them to determine or improve the mental condition of such person, the superintendent shall so notify in writing the district judge who made such order, and such district judge or any district judge sitting or acting in his place, shall then make a supplemental order authorizing the keeping and detention of such person in such hospital for such additional length of time, not exceeding four (4) weeks in addition to the time specified in the original order. Such written notice from the superintendent and such order shall be filed in the office of the clerk of the district court, and such clerk must immediately make a certified copy thereof and transmit the same to the superintendent of said hospital and such certified copy of order shall be the authority for such superintendent to keep and detain such person in said hospital for the time specified in such order.

History: En. Sec. 3, Ch. 157, L. 1943.

38-404. Release—certificate by superintendent. If, while any person is being kept and detained in the Montana state hospital under any order, or orders, made in accordance with the provisions of sections 38-402 and 38-403, the superintendent and physicians at such hospital, from their examinations, tests and observations of such person, shall conclude and determine either that he is not disordered in his mind, or that he is disordered in his mind but not to such an extent as to justify or require that he be ordered committed to such hospital, the superintendent shall release and discharge him from said hospital, and a certificate, in duplicate, shall be made so stating and reciting, and further stating and reciting that for the reasons stated in such certificate the person named therein has been released and discharged from such hospital, with the date of such discharge and release, each of which copies shall be dated and signed by such superintendent. One (1) copy of such certificate shall be retained in the files of the hospital and the other copy thereof shall be transmitted to the clerk of the district court of the county in which the hearing of such person was had and by such clerk filed as a part of the records of such proceeding.

History: En. Sec. 4, Ch. 157, L. 1943.

38-405. If commitment advisable, procedure—disposition of certificates. (1) If, while any person is being kept and detained in the Montana state hospital under any order or orders, made in accordance with the provisions of sections 38-402 and 38-403, the superintendent and physicians of the hospital, from their examinations, tests and observations of such person shall conclude and determine that such person is disordered in his mind to such an extent as to justify and require that he be ordered committed to such hospital, the superintendent shall make out, in duplicate, a certificate so stating and also stating in as much detail as may be deemed neces-

sary and proper, the apparent cause or class of such disorder, its progress, the probable duration and condition of the disease and the probable result of any treatment which may be given him in such hospital. Each copy of such certificate shall be signed by the superintendent and by each physician of the hospital who has taken part in the examinations, tests and observations of such person.

(2) One (1) of said certificates shall be retained in the files of the hospital and the other copy shall be transmitted to the clerk of the district court of the county in which the hearing was held. Upon receipt of such certificate by said clerk of the district court he shall file such certificate and call the same to the attention of the district judge who made the order for such person to be placed in said hospital for observation, or to the attention of any district judge of the judicial district in which such county is situated, or to the attention of any district judge who is sitting or acting in place of the judge who made the order directing that such person be placed in said hospital for observation, and as soon as possible thereafter such district judge must make an order in duplicate that such person be committed to and retained and confined in the Montana state hospital. Both copies of such order must be delivered to the clerk of the court who must file and record one (1) thereof and transmit the other to the superintendent of such hospital which shall be the authority of such superintendent to keep, detain and confine such person in such hospital. All of the provisions and requirements of section 38-208 applicable thereto shall apply to all orders made under the provisions of this section.

History: En. Sec. 5, Ch. 157, L. 1943.

38-406. Voluntary application for admission to state hospital—procedure. (1) Any resident of this state may make voluntary application for admission to the Montana state hospital in order to have examinations, tests and observations and treatment of his mental condition. Such application shall be in writing and made in duplicate on a form prescribed by the superintendent of such hospital, and if approved by any physician licensed to practice medicine in this state, both copies thereof shall be presented to a judge of a district court who shall enter his written approval on each thereof upon the condition that the applicant, if admitted to such hospital, may be received and kept and retained therein for observation for a period of at least four (4) months, unless sooner released therefrom by the superintendent thereof. No entry with regard thereto shall be made in any of the court's records. Upon presentation of both copies of such application to the superintendent of such hospital such superintendent shall cause such person to be examined by the physicians connected with the hospital, and if it shall appear to such physicians, from such examinations, that such person is in such mental condition, or condition of mind as to warrant the placing of such person under observation and giving him such further examination and tests, and such treatment, if any, as may be deemed necessary, the superintendent shall receive such person into the hospital and keep and detain him therein for such purposes for a period of not exceeding four (4) months.

(2) If at any time before the expiration of such four (4) months period the superintendent and physicians making and giving him such examina-

tions, tests, observation, and treatment, if any, shall determine and conclude that such person is not disordered in his mind, or is disordered in his mind but not to such an extent as to justify or require his commitment to such hospital, the superintendent shall return both copies of such application to him and release him from the hospital. But if at any time before the expiration of such four (4) months period the superintendent and physicians of the hospital making and giving such person such examinations, tests, observations, and treatments, if any, shall determine and conclude that such person is disordered in his mind to such an extent as to justify and require that he be committed to such hospital, the superintendent shall make and prepare a certificate, in duplicate, in substantially the same form and containing substantially the same statements, particulars and information as required by the certificate provided for in section 38-405, and signed in the same manner. One (1) copy thereof shall be retained in the files of the hospital and the other copy, together with a copy of the original application, shall be transmitted to the clerk of the district court of the county from which such person was received, who shall file the same, and immediately call the same to the attention of a district judge of such county, or to a judge sitting and acting in his place. Such district judge shall then make an order in duplicate that such person be committed to and retained and confined in the Montana state hospital. Both copies of such order shall be delivered to the clerk of the district court who must file and record one (1) thereof and transmit the other to the superintendent of such hospital which shall be the authority of such superintendent to keep, detain and confine such person to such hospital. All of the provisions and requirements of section 38-208, applicable thereto, shall apply to all orders made under the provisions of this section. The copy of application and the certificate of the superintendent of such hospital shall take the place and be in lieu of and equivalent in every respect to the affidavit and physicians' certificate provided for in sections 38-201 and 38-206.

History: En. Sec. 6, Ch. 157, L. 1943;
amd. Sec. 1, Ch. 33, L. 1953.

38-407. Trial by jury, when. Whenever any order is made under the provisions of section 38-405 or of section 38-406 committing any person to the Montana state hospital, if such person, or any relative, or friend, or guardian of such person, if there be one, is dissatisfied with such order he may, within ten (10) days after the making of such order, demand that the question of his sanity be tried by a jury, before the district court of the county from which he was committed, such demand must be made in writing, served upon the county attorney, and filed with the clerk of the district court of such county. Upon such demand being made, served and filed a trial must be had in the manner provided by section 38-213, and all of the provisions of such section applicable thereto shall apply to such trial and proceedings in connection therewith.

History: En. Sec. 7, Ch. 157, L. 1943.

Collateral References

Constitutional right to jury trial in

proceeding for adjudication of incompetency or insanity or for restoration. 33 ALR 2d 1145.

38-408. Duty of clerk of district court. Whenever any order made by a district judge under the provisions of either section 38-405 or section 38-406 has been filed by a clerk of the court, such clerk must immediately notify in writing the county board of public welfare of such county, of the making of such order.

History: En. Sec. 8, Ch. 157, L. 1943.

38-409. Investigation by board of public welfare—order by district judge. As soon as any order made by a district judge under the provisions of either section 38-405 or section 38-406 has been filed by the clerk of the district court, such clerk must immediately transmit or deliver to the county board of public welfare of such county a copy of such order. Upon receipt of such copy of order it shall be the duty of some member of the staff of such county board of public welfare to make an investigation for the purpose of ascertaining the financial condition of the person named in such order, the property, value thereof, and income therefrom, if any, if such person be the owner of any property, and the names of the persons, if any, legally liable for the care, support and maintenance of such person, and make a written report to the district judge who made such order. Upon receiving such report the district judge shall make such order as he may deem proper with regard to payment to the Montana state hospital for maintenance, care and treatment of the person named in such order while such person remains in said hospital, but if such order direct that such payment be made out of any estate of such person, or by persons legally liable for his care and maintenance the amount fixed therein shall not exceed one dollar (\$1.00) per day.

History: En. Sec. 9, Ch. 157, L. 1943.

CHAPTER 5

PAROLE OF PATIENTS

- Section 38-501. Exception as to application of act.
38-502. Parole of patients from Montana state hospital.
38-503. Permitting patient to leave.
38-504. Termination of parole.
38-505. Report by person to whom patient paroled.
38-506. Support of patient while on parole, discharged by lapse of time.
38-507. Clothing for paroled or discharged patient.

38-501. Exception as to application of act. The provision of this act shall not apply to any patient held upon an order of court or judge in a proceeding arising out of a criminal act.

History: En. Sec. 1, Ch. 145, L. 1941.

38-502. Parole of patients from Montana state hospital. The superintendent of the Montana state hospital may grant a parole to a patient under general conditions prescribed by the state board of commissioners for the insane.

History: En. Sec. 2, Ch. 145, L. 1941.

38-503. Permitting patient to leave. A patient of the Montana state hospital may be permitted by the superintendent to leave the institution

on parole and remain in the custody of a parent, relative, legal guardian or other person.

History: En. Sec. 3, Ch. 145, L. 1941.

38-504. Termination of parole. All such patients, while on parole, shall remain in the legal custody and under the control of the state board of commissioners for the insane, and at any time during such parole, upon evidence satisfactory to the superintendent or to the state board of commissioners for the insane, that the parole should terminate, such patient must be returned to the Montana state hospital. The written order of the state board of commissioners for the insane, certified by the superintendent of the hospital, shall be sufficient warrant to any officer to retake and return such patient to actual custody in the Montana state hospital.

History: En. Sec. 4, Ch. 145, L. 1941.

38-505. Report by person to whom patient paroled. The person to whom such person shall be paroled shall report the physical, moral and mental condition of the patient to the superintendent either in person or by writing as often and as fully as the superintendent may require, and subject to such recommendations and regulations as the state board of commissioners for the insane may determine. In case of failure so to report on request, the inmate may be returned to the Montana state hospital. The patient shall be accessible to representatives of the hospital.

History: En. Sec. 5, Ch. 145, L. 1941.

38-506. Support of patient while on parole, discharged by lapse of time. The Montana state hospital paroling a patient as aforesaid shall not be liable for his support while on parole. Such liability shall devolve upon the legal guardian, parent, or person or persons to whose care the patient is paroled, or upon any other person legally liable for his support. The public welfare officials of the county where the patient resides or is found, shall be responsible for providing relief and care for such patient on parole who is unable to maintain himself, or who is unable to secure support from the person in whose care he was paroled, as for any other person in need of relief and care, under the provisions of the public welfare laws. The person in whose care the patient is paroled or any other person legally liable for his support, shall, if such parole be revoked, be liable for any expense incurred by the state or county in procuring the return of such patient to the hospital.

The superintendent of the Montana state hospital shall have the power and it shall be his duty to parole any patient under his control when he believes it to be for the best interests of such patient and society to do so. If any patient so paroled shall not be returned to said institution within a period of two (2) years thereafter, he shall be deemed discharged therefrom and entry shall be made accordingly in the records of the institution; and if any patient who has escaped from said institution shall not be returned thereto within two (2) years thereafter, he shall be deemed discharged therefrom and an entry made accordingly in the records of said institution. Whenever a patient shall be discharged whether by parole continuing for a period of two (2) years or by having escaped and not having been returned within two (2) years, the superin-

tendent of the Montana state hospital shall immediately notify in writing the judge of the court by which said patient was committed and no person so discharged shall be recommitted to the state hospital except by court order and upon proceedings as required by law for commitment in the first instance. Provided, however, that nothing herein contained shall be construed as a restoration of civil rights of persons so discharged or as a restoration to sanity, or to relieve the superintendent of the Montana state hospital from the obligation of supervising patients on parole to the extent of available facilities and finances.

History: En. Sec. 6, Ch. 145, L. 1941;
amd. Sec. 1, Ch. 149, L. 1953.

38-507. Clothing for paroled or discharged patient. No patient or inmate shall be discharged or paroled from the Montana state hospital without suitable clothing adapted to the season in which he is discharged.

History: En. Sec. 7, Ch. 145, L. 1941.

CHAPTER 6


EUGENICAL STERILIZATION LAW

- Section 38-601. Eugenical sterilization law.
 38-602. Definitions.
 38-603. State board of eugenics created.
 38-604. Duties of the state board of eugenics.
 38-605. Responsibility for sterilization.
 38-606. Consent of guardian or kin required before sterilization.
 38-607. Liability of persons concerned in execution of act—penalty for unauthorized sterilization.
 38-608. Purpose of acts not punitive.

38-601. (1444.1) Eugenical sterilization law. This act shall be known as the "Eugenical Sterilization Law."

History: En. Sec. 1, Ch. 164, L. 1923.

Collateral References

Insane Persons  47.
44 C.J.S. Insane Persons § 58.

Asexualization or sterilization of criminals or defectives. 40 ALR 535.

Legal aspects of voluntary sterilization of man or woman. 93 ALR 573.

38-602. (1444.2) Definitions. For the purpose of the act the following terms (a) heredity, (b) procreate, (c) custodial institution, (d) inmate, (e) eugenical sterilization, are hereby defined as follows:

(a) "Heredity" in the human species is the transmission, through spermatozoon and ovum, of physical, physiological, and psychological qualities from parents to offspring.

(b) "Procreate" means to beget or to conceive offspring, and applies equally to males and females.

(c) "Custodial institution" is a habitation which provides food and lodging, restraint, treatment, training, care or residence for inmates declared mentally delinquent through constituted legal channels.

(d) An "inmate" is an idiot, feebleminded, insane or epileptic person who is treated, trained, or cared for within a custodial institution.

(e) "Eugenical sterilization" is herein defined as vasectomy, or salpingectomy, or such adequate medical treatment which will surely and

permanently nullify the power to procreate offspring, to achieve permanent sexual sterility and the highest therapeutic benefits to the patient.

History: En. Sec. 2, Ch. 164, L. 1923.

38-603. (1444.3) State board of eugenics created. The state board of eugenics is hereby created and established for the state of Montana. It shall consist of: The chief physician of each custodial institution, the president of the state medical association, a female member named by the state medical association, and the secretary of the state board of health, the last named to be chairman of the board.

History: En. Sec. 3, Ch. 164, L. 1923.

Collateral References

Insane Persons \Rightarrow 50.

44 C.J.S. Insane Persons § 71.

38-604. (1444.4) Duties of the state board of eugenics. It shall be the duty of this board to approve or disapprove certificate of sterilization submitted to them by the chief physician of custodial institution of inmate as provided in section 38-605 and to review the decision of the said chief physician in case of non-consent on the part of the guardian, or best friend as provided in section 38-606. This board is also hereby empowered to exercise general supervision of matters pertaining to sterilization, over the chief physician and assistants in custodial institutions, and require from them proper records and data for the determination of the efficiency, benefits and specific efforts of eugenical sterilization.

History: En. Sec. 4, Ch. 164, L. 1923.

38-605. (1444.5) Responsibility for sterilization. The sterilization shall be performed by, or under the supervision of the chief physician of the custodial institution of said inmate, whenever he, by his competent examination, and upon the approval of the state board of eugenics finds the said inmate or inmates, to fall within the above named class or classes; provided, however, that before this sterilization takes place it shall be the duty of the said chief physician to fill out appropriate certificate of said inmate or inmates to be sterilized and present same to the state board of eugenics and secure that board's approval thereof, (the approval to be evidenced by the appropriate endorsement on the back of said certificate by the secretary of said board).

History: En. Sec. 5, Ch. 164, L. 1923.

38-606. (1444.6) Consent of guardian or kin required before sterilization. Before making out the certificate mentioned in the above paragraph it shall be the duty of the physician to secure the consent of the legal guardian of said inmate and in case such inmate has no legal guardian, then the consent of his or her nearest known kin within the state of Montana and if such inmate has no known kin within the state of Montana, then the consent of the custodial guardian of such inmate. In all cases when this consent is refused, it should be noted on the certificate by the chief physician, and it then becomes his duty to notify the inmate and his guardian, or nearest known kin within the state of Montana, and in case such inmate has no known kin within the state of Montana, then the cus-

todial guardian of such inmate, of the proposed sterilization, setting a date for him or them to appear before the state board of eugenics and to show cause why the sterilization should not take place. It shall then be the duty of the state board of eugenics to withhold the approval of the sterilization of said inmate until the said board has heard and passed upon the merits of the objection. At the hearing it shall be the duty of the state board of eugenics either to approve or disapprove the sterilization.

Failure of complainants to appear at the hearing after due notice shall be considered as a waiver of all objections.

Upon the approval of the state board of eugenics, the secretary thereof shall indorse the approval on the back of the sterilization certificate of the inmate, and the chief physician shall cause sterilization to proceed as though consent were given.

All decisions of the state board of eugenics shall be appealable to the district court of the district in which the custodial institution of the inmate is located by the objecting party or parties hereinbefore mentioned filing a petition against the state board of eugenics in the said court, in which case sterilization proceedings shall be suspended until final disposition of the case by the court.

History: En. Sec. 6, Ch. 164, L. 1923.

38-607. (1444.7) Liability of persons concerned in execution of act—penalty for unauthorized sterilization. Neither the members of the state board of eugenics, the chief physicians, nor assistants concerned, nor any other persons legally participating in the execution of the provisions of this act, shall be liable either civilly or criminally on account of said participation provided, however, that sterilization of the said inmate or inmates, by the chief physician of the custodial institution or his assistants, for other than the purpose named in the act, or by fraud or duress, or without the approval of the state board of eugenics, shall constitute a felony punishable by a fine of not more than \$1,000, or imprisonment in the state prison for no more than five years, or both.

History: En. Sec. 7, Ch. 164, L. 1923.

Collateral References

Insane Persons—55.

44 C.J.S. Insane Persons § 75.

38-608. (1444.8) Purpose of acts not punitive. The purpose of said findings and orders of said board and any operation performed thereunder, shall be for the betterment of the physical, mental, neural or psychic condition of said inmate, or to protect society from the menace of procreation by said inmate, and not in any manner as a punitive measure.

History: En. Sec. 8, Ch. 164, L. 1923.

CHAPTER 7

STATE HOSPITAL FOR INEBRIATES

- Section 38-701. Establishment of hospital for inebriates.
 38-702. Commissioners for insane to control hospital.
 38-703. Patients that may be admitted.
 38-704. Applications for commitment to hospital.

- 38-705. Examination of applicant and commitment—dismissal of patient.
- 38-706. Costs of examination and commitment.
- 38-707. Charges for maintenance and treatment of patient.
- 38-708. Financial condition of patient—liability of relatives.
- 38-709. Detention and release of patient—arrest and return of patient.
- 38-710. Rules and regulations of hospital.
- 38-711. Furnishing liquor or drugs to patient a felony—penalty.

38-701. (1445) Establishment of hospital for inebriates. There shall be established at the Montana state hospital at Warm Springs a department of said institution, which shall be called the state hospital for inebriates, and shall be used for the detention, care, and treatment of all persons suffering from mental affliction occasioned by the use of drugs or intoxicants.

History: En. Sec. 1, Ch. 139, L. 1911;
re-en. Sec. 1445, R. C. M. 1921.

Collateral References

Hospitals \Rightarrow 2.
41 C.J.S. Hospitals § 4.

38-702. (1446) Commissioners for insane to control hospital. The state board of commissioners for the insane shall have supervision and control of said state hospital for inebriates, and the officers, contractors, and employees of the Montana state hospital shall constitute the officers, contractors, and employees of said hospital for inebriates, and shall receive no additional compensation for their services in connection with said hospital.

History: En. Sec. 2, Ch. 139, L. 1911;
re-en. Sec. 1446, R. C. M. 1921.

38-703. (1447) Patients that may be admitted. Said hospital for inebriates shall receive all patients regularly committed to it who are dipsomaniacs, inebriates, or who are addicted to the excessive use of morphine, cocaine, or other narcotic drugs, and who shall have been regularly examined and found of unsound mind as a result of the use of any such intoxicant or drug.

History: En. Sec. 4, Ch. 139, L. 1911;
re-en. Sec. 1447, R. C. M. 1921.

Collateral References

Drunkards \Rightarrow 4.
28 C.J.S. Drunkards § 7.

38-704. (1448) Applications for commitment to hospital. Applications for commitment to said hospital for inebriates shall be made to the judge of the district court of the district which embraces the county in which the person whom it is proposed to commit resides, and said application may be made in person by any dipsomaniac, inebriate, or user to excess of morphine, cocaine, or other narcotic drug, or may be made against any such person by any other person.

History: En. Sec. 5, Ch. 139, L. 1911;
re-en. Sec. 1448, R. C. M. 1921.

Collateral References

28 Am. Jur. 673, 678, Insane and Other Incompetent Persons, §§ 27, 35.

38-705. (1449) Examination of applicant and commitment—dismissal of patient. On presentation of the application provided for in the preceding section, unless made in person by an inebriate, dipsomaniac, or user to excess of a narcotic drug, the judge shall issue an order, which may be served by any peace officer, directing him to bring the accused person before him for examination, and on the appearance of the accused the judge shall

proceed in the manner now provided by law for the examination of insane persons. The accused may be represented by counsel, and the judge may, if he deems it necessary, require the county attorney of the county where the hearing is had to attend and assist in such hearing. In case said application be voluntarily or involuntarily made, and said judge shall determine that the accused is a proper person to be committed to said hospital for inebriates, he shall make the order committing him thereto; otherwise he shall be discharged. The term of detention and treatment shall be until the patient is cured; provided, however, that the superintendent of such hospital may discharge any person committed to said hospital when satisfied that such person is not receiving substantial benefit from further hospital treatment.

History: En. Sec. 6, Ch. 139, L. 1911;
re-en. Sec. 1449, R. C. M. 1921.

38-706. (1450) Costs of examination and commitment. All costs and expenses incurred in the arrest and examination, and the costs and expenses incurred in taking the accused to said hospital, shall be paid in the manner now provided by law for the arrest, examination, and commitment of persons to the Montana state hospital.

History: En. Sec. 7, Ch. 139, L. 1911;
re-en. Sec. 1450, R. C. M. 1921.

38-707. (1451) Charges for maintenance and treatment of patient. The board of commissioners for the insane shall fix the per capita monthly allowance, which may be charged by said hospital for the care, treatment, and maintenance of each patient therein, which shall be certified by the superintendent to said board of commissioners for the insane and paid out in the manner now provided by laws applicable to the Montana state hospital, unless provisions shall be made for the conduct of said institution exclusively as a state institution, in which event such patients shall be cared for at the expense of the state and as directed by the state board of commissioners for the insane.

History: En. Sec. 8, Ch. 139, L. 1911;
re-en. Sec. 1451, R. C. M. 1921.

Collateral References

28 Am. Jur. 682, Insane and Other Incompetent Persons, §§ 42 et seq.

38-708. (1452) Financial condition of patient—liability of relatives.
(1) Whenever an examination or hearing for committal to the state hospital for inebriates is had before the judge, or chairman of the board of county commissioners, and the person adjudged and ordered to be confined in the state hospital for inebriates, it shall be the duty of the judge or person before whom the hearing is had to take evidence as to the financial worth of said person committed to the state hospital for inebriates, which evidence shall be reduced to writing and filed as provided in the preceding section, and if it appears from said evidence that said person committed to the state hospital for inebriates has any means, money, or property out of which the expenses of his maintenance in the state hospital for inebriates, or any part thereof, could be paid, it shall be the duty of the judge or person before whom the hearing is had to issue a citation to the parties in possession of his property, and to the relatives of said person committed to the state hospital for inebriates, if any there be, in the county

where said person committed to the state hospital for inebriates resided, citing them to appear and show cause why a guardian should not be appointed for said person committed to the state hospital for inebriates, and why said guardian should not be ordered to pay the costs of the maintenance of said person committed to the state hospital for inebriates, or so much thereof as his means will permit, which citation shall be served and all proceedings thereunder conducted as provided by sections 91-4301 to 91-4322, and if it appear to the court that said person committed to the state hospital for inebriates has property that can be applied towards his maintenance, it shall be the duty of the court to appoint a guardian whose duty it shall be to apply such property, or so much thereof as may from time to time be necessary, to the cost of the care and maintenance of such person committed to the state hospital for inebriates while an inmate of the state hospital for inebriates, and it shall be the duty of the court to make an order to that effect, and to cause certified copies of such order appointing a guardian, and of the final report of such guardian when made, to be by the clerk of the court forthwith forwarded to the state board of commissioners for the insane.

(2) The husband, wife, father, grandfather, mother, grandmother, children, grandchildren, brothers, or sisters of a person committed to the state hospital for inebriates, if they or either of them be of sufficient ability, in the order named, shall be liable for the care, support, and maintenance of such person committed to the state hospital for inebriates in the said state hospital for inebriates to which he has been or may be hereafter committed. And it shall be the duty of the judge, or the chairman of the board of county commissioners if the hearing be had before him, during any such examination of any person, to ascertain the name and addresses of the husband, wife, father, grandfather, mother, grandmother, children, grandchildren, brothers, or sisters of such person, and at the conclusion of such examination to cause such names and addresses to be certified to the state board of commissioners for the insane.

History: En. Sec. 9, Ch. 139, L. 1911;
re-en. Sec. 1452, R. C. M. 1921.

insanity hearings, so much of this section as relates to hearings before the chairman of the board of county commissioners, is apparently superseded by sections 38-201 to 38-214.

NOTE.—Since section 38-705 requires that inebriety hearings must be heard like

38-709. (1453) Detention and release of patient—arrest and return of patient. All persons so committed may be detained in said hospital two years; but when it shall appear to the superintendent of said hospital for inebriates that any person held in said hospital will not continue to be subject to dipsomania or inebriety, or will be sufficiently provided for by himself or his guardian, relatives, or friends, the superintendent may issue to such person a permit to be at liberty, upon such conditions as he may deem best, and he may revoke said permit at any time previous to its expiration. The violation by the holder of such permit of any of the terms or conditions of the same shall of itself make said permit void.

When any permit granted under the provisions of this section has become void in any manner, the superintendent may issue an order authorizing the arrest of the holder or holders of such permit and their return to the hospital, and such order of arrest may be served by any officer

authorized to serve criminal process in any county in this state. Any person at liberty from the hospital upon a permit, as aforesaid, may voluntarily return to the hospital and put himself in the custody of the superintendent. The holder of such permit, when returned to said hospital as aforesaid, whether voluntarily or otherwise, shall be detained therein according to the term of his original commitment.

History: En. Sec. 10, Ch. 139, L. 1911;
re-en. Sec. 1453, R. C. M. 1921.

38-710. (1454) Rules and regulations of hospital. The rules and regulations in force at the Montana state hospital shall be the rules and regulations for said state hospital for inebriates.

History: En. Sec. 11, Ch. 139, L. 1911;
re-en. Sec. 1454, R. C. M. 1921.

Collateral References

Hospitals 6.
41 C.J.S. Hospitals § 5.

38-711. (1455) Furnishing liquor or drugs to patient a felony—penalty. Any person who shall furnish any patient of said hospital for inebriates any intoxicating liquor or narcotic drug, except upon the written prescription of the superintendent, shall be guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for a period of not less than six months nor more than five years, or by a fine of not less than five hundred dollars nor more than one thousand dollars. Any person who shall knowingly furnish any intoxicating liquor or narcotic drug to one who has been discharged from said hospital as cured, except upon the written prescription of a reputable practicing physician, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty dollars and not more than one thousand dollars.

History: En. Sec. 12, Ch. 139, L. 1911;
re-en. Sec. 1455, R. C. M. 1921.

48 C.J.S. Intoxicating Liquors § 258;
72 C.J.S. Poisons § 7.

Collateral References

Intoxicating Liquors 161; Poisons 9.

CHAPTER 8

MONTANA STATE TRAINING SCHOOL

- Section 38-801. Montana state training school established.
- 38-802. Purposes and objects of school.
- 38-803. Powers and duties of state board of education.
- 38-804. Powers and duties of superintendent.
- 38-805. Eligibility for admission—exclusions.
- 38-806. Applications for admission, contents of.
- 38-807. Same—filing of—proviso.
- 38-808. Investigation by county welfare board.
- 38-809. Duty of board as to approved applications—board required to determine amount paid by person admitted or parents.
- 38-810. Hearing by judge of district court—notification by county clerk.
- 38-811. Same—procedure—approval of application—physician's statement.
- 38-812. Citation to persons liable to testify as to financial condition—order for support.
- 38-813. Approval of applications limited to room available.
- 38-814. Transfer of certain persons to state hospital—disposition of copies—court's order.
- 38-815. Cost of hearing and transportation of persons admitted to school.
- 38-816. Persons admitted to school—how removed.
- 38-817. Term of members of executive board.

38-818. Repealing clause—saving clause as to commitments and orders.

38-819. Procedure for commitment of certain inmates of state training school to Montana state hospital.

38-801. Montana state training school established. That the institution heretofore established at Boulder, in Jefferson county, state of Montana, as a training school for the education, training and detention of subnormal minors and adults and epileptics, shall be known and designated as the "Montana state training school," and shall be under the general direction, supervision and control of the state board of education, with a local executive board appointed in the manner, and having the powers and duties granted to and imposed upon such local executive board by the provisions of sections 75-302 to 75-309.

History: En. Sec. 1, Ch. 183, L. 1943.

38-802. Purposes and objects of school. The purpose and object of such school shall be the mental, moral and physical education and training of subnormal persons whose defects prevent them from receiving proper instruction and training in the public schools, or who are so mentally deficient that they are incapable of managing themselves or their affairs independently with ordinary prudence or of being taught to do so, or who require control and education for their own welfare and the welfare of others, and minors whose intelligence will not develop without such care; epileptics and subnormal adults whose defects prevent them from taking care of themselves or their property, or who, from social standards, are a menace to society.

History: En. Sec. 2, Ch. 183, L. 1943.

38-803. Powers and duties of state board of education. The state board of education shall have the power to prescribe and adopt such rules and regulations, not inconsistent with the provisions of this act, as may be deemed necessary, with regard to the admission of both minors and adults to the school; the courses of study and training to be given any or all persons in such school, and generally for the proper maintenance and operation of such school. It shall be the duty of said board to appoint some suitable and qualified person as superintendent thereof and to provide the suitable staff and other employees therefor, and to fix the salary or compensation of the superintendent, members of the staff and other employees, subject to the approval of the state board of examiners.

History: En. Sec. 3, Ch. 183, L. 1943.

38-804. Powers and duties of superintendent. The superintendent of the school, under the direction of the state board of education, shall provide for the maintenance of a school department for the instruction and training of those inmates who are capable of being benefitted by school instruction, and a custodial department for the care and custody of those who are not capable of being benefitted by such school instruction, and may provide for giving any or all of the inmates of the school such instruction and training in unskilled labor, manual training, arts, crafts and trades as may be deemed suitable for such persons by said state board of education.

History: En. Sec. 4, Ch. 183, L. 1943.

38-805. Eligibility for admission—exclusions. There shall be admitted to the training school, in accordance with the provisions of this act, and such rules and regulations as may be adopted and provided by the state board of education with regard thereto, the following persons, if they have been residents of this state for at least one (1) year immediately preceding application for admission: Subnormal persons whose defects prevent them from receiving proper instruction and training in the public schools, or who are so mentally deficient that they are incapable of managing themselves or their affairs independently with ordinary prudence or of being taught to do so, or who require control and education for their own welfare and the welfare of others, and minors whose intelligence will not develop without such care; epileptics and subnormal persons whose defects prevent them from taking care of themselves or their property, or who, from social standards, are a menace to society. Provided, however, that no person who is insane, or who requires hospitalization, or who is dangerously diseased in body, or who is suffering from any infectious or contagious disease, or of confirmed immorality, shall be admitted to such school.

History: En. Sec. 5, Ch. 183, L. 1943.

38-806. Applications for admission, contents of. Applications for admission to the training school shall be made on forms prescribed by the superintendent thereof, and each application for admission must give the full name of the person for whom made, residence and length of time a resident of this state, age, sex, race, general mental, moral and physical condition and family history, names of parents, if any, and residences, if known, or guardian, if any, and residence, the names and residences of the nearest relatives, other than parents, if any, and known, the name of the person making the application and relationship, if any, to the person for whom made, and such other additional information as the superintendent of such school may deem necessary and proper, and must be signed by the applicant and verified under oath. Application for admission of any person to such school may be made by any parent, guardian or relative or by any person legally entitled to the custody and control of such person; by a county health officer or county physician or county attorney or by any member of the staff of the state public welfare department or of a county public welfare board, or by any reputable citizen.

History: En. Sec. 6, Ch. 183, L. 1943.

38-807. Same—filing of—proviso. If such application is made by the parents, or by one thereof, if the other be dead or absent from the state, or if not made by, but there is endorsed on such application the approval and consent of such parents or parent to the person named in such application being placed in such school, and which approval and consent is signed by such parents or parent, such application shall be made to and filed with the county public welfare board of the county in which such person resides. If such application is not made by such parents or parent, and such approval and consent has not been endorsed on the application and signed as herein provided, then such application must be made to and filed in the district court of the county in which such person resides. Provided, that if the custody and control of any such person has been given, by a court

of competent jurisdiction, to one parent, the signing of such approval and consent herein provided for by such parent shall be sufficient.

History: En. Sec. 7, Ch. 183, L. 1943.

38-808. Investigation by county welfare board. Whenever an application for admission of any person to such training school has been made, and filed with county board of public welfare, or has been filed in the office of the clerk of any district court and the clerk of such court has notified the county board of public welfare of such county of the filing thereof, as hereinafter provided, some member of the staff of such county board of public welfare must, without delay, make an investigation to ascertain the financial condition of the person named in such application, the property and value thereof, if any owned by him, the income, if any therefrom, the names and residences of parents or other relatives, if any, legally liable for his support and maintenance and their financial condition and ability to pay for his transportation and for his care, maintenance, clothing, and other necessary personal expenses at such school, and shall make a written report thereof in duplicate to said county board of public welfare, and the county clerk of such county shall, whenever any such application is received by such board, notify the county physician thereof, giving the name and address of the person named in such application, and the names and residences of the parents, guardian and relatives, if any named therein, and such county physician shall, without unnecessary delay, make an examination of him for the purpose of ascertaining his mental condition, and whether or not he is a proper person to be placed in such school, and shall make and file with such county board of public welfare a written report of such examination.

History: En. Sec. 8, Ch. 183, L. 1943.

38-809. Duty of board as to approved applications—board required to determine amount paid by person admitted or parents. (1) When an application has been filed with a county board of public welfare, and the reports of the member of the staff investigating such application, and the report of the county physician of his examination of the person named therein, have been filed with such board, if such board finds and determines that he is a proper person to be placed in such training school, such board shall ascertain from the superintendent thereof if there is room for his accommodation in such school, and if there is, the board may then make an order approving such application, and authorizing the transportation to and the placing of such person in such school, and if it appears to such board that the person named in said application has means, money or property out of which the cost of his transportation, care, maintenance, clothing and other necessary personal expenses in such school, or some part thereof could be paid, or that he has parents, or other relatives legally liable for his support and maintenance who are financially able to pay for such transportation, care, maintenance, clothing and other necessary personal expenses while in such school, or a part thereof, the board shall make an order requiring the person or persons having possession of any of said moneys, means or property, or such parents or other relatives, to appear before such board, at a time and place fixed in said order, to testify

before such board regarding any such money, means or property of such person or the financial ability of such parents or other relatives to pay for such transportation, care, maintenance, clothing and other necessary expenses.

(2) After hearing such evidence and examining the report of the investigator filed with such board, the board shall fix and determine the amount, if any, to be paid for such transportation, maintenance, care, clothing and other necessary expenses while in such school out of any money, means or property of such person, or by his parents or other relatives who are legally liable for his support and maintenance; provided, however, that the amount fixed in such order shall not exceed two dollars (\$2.00) per day for such maintenance, care, clothing and other necessary expenses at such school. The county clerk shall make certified copies of the application filed with such board, and of the order of such board approving such application and authorizing the placing of such person in such school and fixing the amount to be paid, if any, by such parents, guardian, or relatives, for his maintenance and support, which shall be given the officer or other person taking him to such school, and by him delivered to the superintendent of such school and the same shall be the authority of such superintendent for receiving and keeping him in such school.

History: En. Sec. 9, Ch. 183, L. 1943;
amd. Sec. 1, Ch. 186, L. 1953.

38-810. Hearing by judge of district court—notification by county clerk. If the application is filed in the office of the clerk of the district court such clerk shall immediately notify the county board of public welfare of such filing, with the name and residence of the person for whom such application is made, the name and residence of the person making the application and the names and residences of all parents and other relatives given therein, if any; and shall also call such application to the attention of the judge of such court. The judge shall make an order fixing a time and place for hearing of such application in open court, and the clerk shall mail copies thereof to the person making the application and to all parents and other relatives named in such application, if any.

History: En. Sec. 10, Ch. 183, L. 1943.

38-811. Same—procedure—approval of application—physician's statement. Upon the hearing on such application the court may name two (2) physicians, one (1) of whom may be the county physician, who shall, with the assistance of the county attorney and any attorney appearing at such hearing for the purpose of representing any parents, or other relatives, or guardian of such person, examine such person and submit to the court in writing, the facts as found by them and their recommendations. If the court concludes therefrom that such person is a proper person to be placed in said training school, and it further appears to the court from information obtained from the superintendent of such school that there is room for his accommodation in such school, the court shall make an order approving such application and authorizing the placing of such person in such school. The statement of facts and conclusions of said physicians and any order made by the court approving such application shall be filed in the

office of the clerk of the court. The clerk of the court shall make certified copies of such application, the statement of facts and the order of the court and deliver the same to the officer or person taking such person to said training school, who shall deliver such certified copies to the superintendent of such school and the same shall be his authority for receiving and keeping such person in such school.

History: En. Sec. 11, Ch. 183, L. 1943.

38-812. Citation to persons liable to testify as to financial condition—order for support. If it appears to the court on such hearing that the person named in such application has money, means or property out of which the cost of transportation and care, maintenance, clothing and other necessary personal expenses of such person in such school, or some part thereof could be paid, or has parents or other relatives legally liable for his support and maintenance and financially able to pay the same, or a part thereof, a citation may be issued by the court to the person or persons having possession of such moneys, means or property, or any part thereof, and to said parents or other relatives, requiring them to appear and testify concerning such property, or their financial ability to pay for such transportation, care, maintenance, clothing and other expenses at such school, and on such hearing the court may make such order or orders as may be deemed proper for the payment thereof, or some part thereof, out of the moneys, means or property of such person or by such parents or other relatives, which order or orders shall be filed in the office of the clerk of the court, and such clerk shall make a certified copy thereof and deliver the same to the county board of public welfare; provided, however, that the amount fixed in such order shall not exceed two dollars (\$2.00) per day for such maintenance, care, clothing and such other expenses at such school.

History: En. Sec. 12, Ch. 183, L. 1943;
amd. Sec. 2, Ch. 186, L. 1953.

38-813. Approval of applications limited to room available. Before any county board of public welfare, or any court, or judge thereof, shall make any order approving any application and authorizing the person named therein to be placed in such school, said board, or judge, shall first ascertain by telephone or otherwise, from the superintendent of said school as to whether or not there is room to accommodate such person in said school; provided that if there is not room, applications for admission shall be granted in the order of their submission.

History: En. Sec. 13, Ch. 183, L. 1943.

38-814. Transfer of certain persons to state hospital—disposition of copies—court's order. (1) Whenever any person has been placed in such school under any order or commitment of a district court, or order of a county board of public welfare, and has been in such school for a period of not less than sixty (60) days, and the superintendent of such school believes from his observation of him and from his actions and conduct that he is disordered in his mind to such an extent that he is not a proper person to remain in such school but should be placed in the Montana state hospital, such superintendent shall notify in writing the judge of the district court

authorizing his admission to such school, if admitted under an order or commitment of the district court, or the county board of public welfare if admitted under an order of such board, of such fact, and request that an order be made permitting him to be transferred to the state hospital for a period of at least six (6) weeks for examination, tests and observation for the purpose of ascertaining and determining his mental condition. If the order requested by said superintendent be made by the district court or by the county board of public welfare, duplicate copies of such order shall be made and certified by the clerk of the court if made by the court, or by the county clerk, if made by the county board of public welfare, and both of such copies shall be transmitted to such superintendent. Upon receipt of such certified copies of order such superintendent may transfer such person to the Montana state hospital, delivering one (1) of such copies of order to the superintendent of such hospital and retaining the other copy thereof in the files of the training school.

(2) If prior to the expiration of the period fixed in such order the superintendent and physicians of such hospital shall conclude and determine from their tests, examination and observation of such person, that he is so far disordered in his mind that he should be kept and detained in such hospital, the superintendent of such hospital shall make out a certificate, in triplicate, so reciting, and shall state in addition, in as much detail as necessary, the apparent cause or class of the disorder, probable duration and condition of the disease and the probable result of any treatment which may be given to him in such hospital. Each of such copies shall be signed by the superintendent and by each physician who has taken any part in the examinations, tests and observations of such person. One (1) of such copies shall be retained in the files of the hospital and shall be the authority of the superintendent for keeping and detaining such person therein. One (1) copy shall be transmitted to the superintendent of the training school to be placed in the files of such school. One (1) copy shall be transmitted to the clerk of the district court of the county from which such person was sent to the training school, who shall file and record the same in the manner required by section 38-208, and such certificate shall take the place and be in lieu of and equivalent to, in every respect, the warrant, affidavit, physicians' certificate, and commitment provided for and required by sections 38-201, 38-202, 38-206 and 38-208.

(3) If, before the expiration of such period, the superintendent and physicians of such hospital shall conclude and determine from their tests, examinations and observations of such person that he is not disordered in his mind to such an extent as to require that he should be kept and retained in such hospital, but that he is a proper person to be kept and detained at such training school, a certificate, in triplicate, shall be made and signed by the superintendent of such hospital, so stating, one (1) copy thereof being retained in the files of such hospital, one (1) copy being transmitted to the clerk of the district court which made such order of transfer, or to the county board of public welfare of such county, as the case may be, and the remaining copy shall be delivered to the superintendent of the training school at the same time such person is returned to such school. The costs of transportation and all other expense and cost in-

curred in connection with the transfer of such person to the Montana state hospital, and his return to the Montana state training school, if returned thereto, shall be paid out of the moneys appropriated for such training school.

History: En. Sec. 14, Ch. 183, L. 1943.

38-815. Cost of hearing and transportation of persons admitted to school. The costs of hearing and transportation of persons admitted to the school shall be paid by the county from which admitted out of its poor fund. If any order has been made by a county board of public welfare, or district court, as provided in sections 38-809 and 38-812, requiring the parents, guardian, or any relative of any person to pay the whole or a part of the cost of his care, maintenance, clothing and other necessary personal needs, the superintendent of the school shall quarter-annually, at the end of each quarter, prepare and transmit to the board of county commissioners of such county an itemized account showing the name of such person, the number of days in the quarter for which payment is to be made, clothing and other necessary expenses and the amount thereof, and said board of county commissioners shall allow and pay it by warrant drawn against its poor fund payable to said training school, and the county, in turn, shall collect in its own name, from the parents, guardian or relatives, named and designated in such order. If any such order shall be made to the effect that any such person has no property or estate out of which payment can be made, and has no parents, guardian or relatives financially able to pay any part of such cost of care, maintenance, clothing and other necessary needs, the county from which he was admitted shall be liable for such clothing and other necessary personal expenses, and the superintendent of the school shall quarter-annually, at the end of each quarter, prepare and transmit to the board of county commissioners of such county an itemized statement showing the amount to be paid therefor for such quarter, and said board of county commissioners shall allow and pay it by warrant drawn against its poor fund payable to such training school. All warrants received by the superintendent of the training school under the provisions of this section shall be transmitted to the state treasurer and the proceeds thereof shall be credited to the state general fund.

The provisions of this section shall apply to the payment for clothing and other necessary personal needs of persons theretofore admitted to and in such school on the date when this act takes effect.

History: En. Sec. 15, Ch. 183, L. 1943.

38-816. Persons admitted to school—how removed. No person admitted to such school under any order of a district court, or county board of public welfare, may be removed from said school, either permanently or temporarily, except upon the written order of the superintendent, or upon an order of any district court of the state, or order of the county board of public welfare of the county from which received, or in accordance with the provisions of section 38-814, and the provisions of this section shall apply to adults as well as minors therein. The costs of any court action for the removal of any person from such school shall be borne by the

party bringing the action. Any order of the district court, pursuant to this act, may be reviewed by the supreme court, provided such appeal is taken within sixty (60) days after the making of such order. Whenever the superintendent believes that any person admitted to the training school does not properly belong in said institution or at the state hospital, he shall have authority to discharge or remove such person from the said institution.

History: En. Sec. 16, Ch. 183, L. 1943.

38-817. Term of members of executive board. The members of the executive board of the Montana state training school in office on the date when this act takes effect, shall continue to constitute such executive board and shall remain in office until the terms for which they were respectively appointed shall expire.

History: En. Sec. 17, Ch. 183, L. 1943.

38-818. Repealing clause—saving clause as to commitments and orders. Sections 1474 to 1483, inclusive, R. C. M., 1935, and all acts amendatory thereof, section 4 of chapter 43, session laws of 1937, and all other acts and parts of acts in conflict with this act, or any of the provisions hereof, are each and all thereof, hereby repealed; provided, however, that all commitments and orders made by any and all of the district courts of this state, prior to the date this act takes effect, under and in accordance with the provisions of section 1476, Revised Codes of Montana, 1935, shall remain in full force and effect and shall not be affected in any manner whatever by the repeal of such section by this act, and all the provisions of this act, insofar as the same may be applicable, shall apply to all persons in such school under such commitments or orders at the time this act takes effect.

History: En. Sec. 18, Ch. 183, L. 1943.

38-819. Procedure for commitment of certain inmates of state training school to Montana state hospital. If any inmate of the Montana state training school shall be so far disordered in mind as to endanger health, person or property, such person may be committed to the Montana state hospital by proceedings against such person in the district court of the county in which said Montana state training school is located, said proceedings to be in compliance with the laws relating to the apprehension, examination, hearing and commitment of insane persons; the cost of such examination, commitment and taking of such person to the Montana state hospital must be paid by the said Montana state training school.

History: En. Sec. 1, Ch. 11, L. 1943.

CHAPTER 9

LEASES OF FARM LAND FOR STATE HOSPITAL AND STATE PENITENTIARY AUTHORIZED

Section 38-901. Emergency condition at state hospital declared.

38-902. State board of examiners authorized to enter into leases or option to purchase lands.

38-901. Emergency condition at state hospital declared. There is a serious emergency condition confronting the people of Montana in connec-

tion with the Montana state hospital at Warm Springs and the state penitentiary at Deer Lodge, in that said institutions do not have or control any good farm lands from which said institutions may produce food crops for the use of said institutions.

History: En. Sec. 1, Ch. 209, L. 1943.

38-902. State board of examiners authorized to enter into leases or option to purchase lands. The state board of examiners is hereby authorized and directed to enter into leases for, and/or leases with the option to purchase, such lands as the board may select and upon such terms and conditions as said board may determine to be for the best interest of the state.

History: En. Sec. 2, Ch. 209, L. 1943.

CHAPTER 10

STATE DEPARTMENT OF MENTAL HYGIENE

Section 38-1001. State department of mental hygiene created.

38-1002. Director and staff.

38-1003. Responsibility and duties.

38-1001. State department of mental hygiene created. There is hereby created a separate division of the state hospital to be designated as the state department of mental hygiene.

History: En. Sec. 1, Ch. 103, L. 1947.

38-1002. Director and staff. The superintendent of the state hospital shall act as the director of said department and shall have immediate supervision over the operation thereof. In addition to the director, the staff of said department shall consist of the assistant superintendent of the state hospital, such medical assistants and other employees of the state hospital as may be designated by the director, and such other medical specialists, psychologists, and social workers as may be appointed either permanently or for temporary periods by the director with the approval of the state board of commissioners of the insane.

History: En. Sec. 2, Ch. 103, L. 1947.

38-1003. Responsibility and duties. The state department of mental hygiene shall take cognizance of all matters affecting the mental health of the citizens of the state of Montana, and shall assume responsibility for the preventive mental hygiene activities and other activities of the state's mental health program. It shall make scientific and medical investigations relative to the incidence, cause, prevention, and cure of mental and nervous illnesses and shall collect and disseminate such information relating to mental hygiene as it considers proper for diffusion among the people. It shall prepare and submit plans for the development of mental health services in the state, and shall submit such plans to the surgeon general of the United States. It shall examine persons received into the state hospital and other persons who shall make application for examination, for the purpose of diagnosing and prescribing treatment of mental and nervous illnesses. It may establish and conduct temporary clinics in cities and towns in the state of Montana for the diagnosis of and prescription of treatment for

mental and nervous illnesses of citizens of the state and for consultation with persons recuperating from mental or nervous illnesses and with the families of such persons, and for such purpose may rent office and clinical space in such cities and towns. The state department of mental hygiene is hereby authorized and empowered to receive from the United States, or agencies thereof, and from other agencies within and without the state, such grants or sums of money as may hereafter be allocated from the United States or agencies thereof, or from other agencies, to the state department of mental hygiene of Montana for the development of mental hygiene services within the state; and to use such monies so received and other funds made available to such department, in the conduct of its operations and for the purchase of supplies, equipment and transportation units necessary to carry out the provisions of this act.

History: En. Sec. 3, Ch. 103, L. 1947.

CHAPTER 11

HOME FOR SENILE MEN AND WOMEN

- Section 38-1101. Definitions.
 38-1102. Voluntary admission.
 38-1103. Commitment to home.
 38-1104. Warrant of commitment—transportation.
 38-1105. Costs paid by county.
 38-1106. Delivery of patient to home—cost of maintenance.
 38-1107. Patient violently insane—commitment to state hospital.
 38-1108. Transfer of patients from state hospital to home.
 38-1109. Parole of patient—notice of parole, discharge, transfer, death or escape.
 38-1110. False commitment—penalty.
 38-1111. Petition for restoration to capacity.
 38-1112. Lien for care of patients.

38-1101. Definitions. The following words and phrases when used in this act, unless the context clearly indicates otherwise, shall have the meanings ascribed to them in this section.

(a) "Senile person" means any person who by reason of unsoundness of mind due to advanced years, is in such condition of mind and body as to be a fit subject for care and treatment in a home for senile persons; except that no person who is afflicted with insanity, epilepsy or feeble-mindedness shall be regarded as a senile person, unless he is senile as above defined.

(b) "Superintendent" means the superintendent of the home for senile men and women.

(c) "Home" means the home for senile men and women.

(d) "Patient" means any person for whose commitment as a senile person, proceedings have been instituted or completed.

History: En. Sec. 6, Ch. 206, L. 1949.

temporary provisions for the selection of a site and the construction of the home.

Compiler's Note

Section 1 of Ch. 206, Laws 1949 provided an appropriation of \$900,000 for the building of the home for senile men and women. Sections 2 to 5 contained

Collateral References

Asylums—5.

7 C.J.S. Asylums § 7.

38-1102. Voluntary admission. Any senile person desiring to receive treatment at the home may be admitted upon his own application to the superintendent, if accommodations are available at the home, in such manner and upon such conditions as the state board of examiners of the state of Montana may determine. A person thus received at the home shall have the right to leave at any time on giving ten (10) days notice to the superintendent and shall not be detained under such voluntary admission for more than ten (10) days from and inclusive of the date of notice in writing of his intention or desire to leave unless admission procedure under other sections of this chapter be complied with; nor shall any person be received as a voluntary patient whose mental condition is such that he cannot comprehend the act of voluntary commitment. Upon admission to the home, the patient shall be informed in simple, nontechnical language of his rights of discharge as prescribed herein. The superintendent shall, within ten (10) days after the admission of a patient by voluntary admission, forward to the state board of examiners, a record of the patient, in accordance with rules and regulations prescribed by the superintendent.

History: En. Sec. 7, Ch. 206, L. 1949.

Collateral References

Asylums § 5.

7 C.J.S. Asylums § 7.

38-1103. Commitment to home. A senile person may be committed to the superintendent and detained at the home upon an order made by the district court of the county in which such person resides or in which he may otherwise be present. Any reputable citizen may file in the district court of the patient's residence or presence, a petition for commitment, setting forth the name and address of the patient and of his nearest relative and the reasons for the application. The petition shall be accompanied by a certificate dated within ten (10) days of the filing thereof on a form prescribed by the superintendent, executed by a qualified physician duly licensed to practice medicine in the state of Montana. The certificate shall contain a statement of the facts and circumstances upon which the judgment of the examiner is based, and shall show the condition of the patient examined is such as to require care and treatment in the home, and shall disclose so far as possible the particular mental illness of the patient and shall certify that the examining physician has made known to the patient the nature of the examination and the patient's response thereto. The certifying physician shall not be a relative of the person applying for the admission or of the person alleged to be a senile person.

All costs incident to the filing of the petition incurred prior to the hearing thereon, including the physician's fees for the examination and certificate, shall be borne by the person commencing the proceedings insofar as possible, otherwise by the county of the patient's residence.

Upon the filing of the petition, the court shall order a hearing thereon, directing that service of written notice thereof and of the reason for such hearing be given to the patient at least ten (10) days before such hearing. Service of written notice of the hearing shall also be made within a like period on the nearest relative of the patient, if there be any such person known to be within the state of Montana; if not, the person with whom the patient may reside or at whose home he may be, or in his absence, upon a

friend of the patient; and if there be no such person or persons, such additional service shall be dispensed with upon filing of proof that no such person is known to petitioner, except when a qualified physician, duly licensed to practice medicine in the state of Montana shall certify in writing that in his opinion harm might be inflicted upon the patient or others on account of the delay caused by giving the said ten (10) days notice, then the court hearing the petition may shorten the notice to not less than twenty-four (24) hours.

The court shall appoint two qualified physicians duly licensed to practice medicine in the state of Montana, one of whom will be the certifying physician who shall be present at the hearing and adequately examine the patient. Their determination as to the necessity for care and treatment of the patient in the home shall be in writing and submitted to the court forthwith.

The patient shall be represented by counsel and if unable to obtain counsel for himself, the court shall appoint counsel for him. Any counsel who may be appointed by the court shall receive such compensation for his services as the judge of the district court shall fix, such compensation to be paid by the county in the same manner as in cases where a counsel is appointed for an accused in criminal matters.

The court shall, upon the written determination of the two examining physicians and such other proof as may be produced at the hearing, make its findings upon such forms as may be prescribed by the superintendent, which shall be filed in the court and a copy thereof shall be transmitted to the superintendent. If the court shall determine that the patient is a senile person in need of care and treatment at the home, he shall be committed thereto, otherwise the application shall be dismissed. The court shall determine the nature and the extent of the property of the patient and of the person upon whom liability is imposed by law for his care and support and make and file in the court, its findings upon such forms as may be prescribed by the superintendent and shall transmit a copy of such findings to the superintendent.

History: En. Sec. 8, Ch. 206, L. 1949.

38-1104. Warrant of commitment—transportation. If the patient is found to be a senile person, the court shall issue to the sheriff or other persons a warrant in duplicate committing the patient to the custody of the superintendent. Transportation of the patient shall be effected as safely and humanely as possible and in the manner prescribed by the court of commitment, but no female patient shall be taken to the home by any person not her husband, father, brother, or son without the attendance of some other woman of reputable character and mature age.

History: En. Sec. 9, Ch. 206, L. 1949.

38-1105. Costs paid by county. The costs, fees and mileage incurred and ordered by the court incident to any commitment under this act shall be paid by the county from which the patient is committed.

History: En. Sec. 10, Ch. 206, L. 1949.

38-1106. Delivery of patient to home—cost of maintenance. Upon delivery of any person to the home, the superintendent thereof shall retain

the duplicate warrant and endorse his receipt upon the original which shall be filed in the court of commitment. Upon such delivery, the patient shall be under the care, custody, and control of the superintendent until discharged by the superintendent or by a court of competent jurisdiction.

The provisions of the law applicable to the costs of the care and maintenance of persons otherwise committed and confined in the state hospital at Warm Springs shall be applicable likewise to the costs of the care and maintenance of senile persons.

History: En. Sec. 11, Ch. 206, L. 1949.

38-1107. Patient violently insane—commitment to state hospital. If after being admitted to the home, any person shall become violently insane, he shall be taken by the superintendent before the district court of the county in which the home is located and the same proceedings shall be had as in other cases for commitment to the state hospital at Warm Springs, Montana.

History: En. Sec. 12, Ch. 206, L. 1949.

Collateral References

Insane Persons—49.

44 C.J.S. Insane Persons § 64.

38-1108. Transfer of patients from state hospital to home. The superintendent of the hospital at Warm Springs, Montana, is authorized to have examinations of the patients at that institution made by competent doctors for the purpose of ascertaining whether some patients now in confinement there should be transferred to the home, and if as a result of such examinations any persons are found to be senile, the state board of examiners of the state of Montana is authorized to order their transfer from the state hospital at Warm Springs, Montana, to the home.

History: En. Sec. 13, Ch. 206, L. 1949.

Collateral References

Insane Persons—51.

44 C.J.S. Insane Persons § 72.

38-1109. Parole of patient—notice of parole, discharge, transfer, death or escape. Any senile person committed under this act will be paroled from the home to such persons upon such terms and under such conditions as may be prescribed by the superintendent.

When a patient is paroled, discharged, transferred to another hospital, dies, escapes or is returned, the superintendent having charge of the patient shall file notice thereof in the court of commitment.

History: En. Sec. 14, Ch. 206, L. 1949.

38-1110. False commitment—penalty. Whoever, for a corrupt consideration or advantage or through malice, shall make or join in or advise the making of any false petition or report or shall knowingly or wilfully make any false representation for the purpose of causing or having a person admitted to the home as a senile person shall be guilty of a felony and punished by imprisonment in the state penitentiary for not more than one (1) year or by a fine of not more than one thousand dollars (\$1,000.00).

History: En. Sec. 15, Ch. 206, L. 1949.

38-1111. Petition for restoration to capacity. The patient who has been committed, or any person who considers himself aggrieved by any commitment, may petition the court of commitment. Upon the filing of such

petition the court shall fix a time and place for hearing thereon. Ten (10) days' written notice of the hearing shall be given to the patient or to the superintendent and to such other persons and in such manner as the court may direct.

If the petition be filed by any person other than the superintendent, there shall be paid to the superintendent in advance of the hearing, all expenses in connection with the hearing in such amount as may be fixed by the superintendent for the transportation, board and lodging of the patient, and authorized attendants.

The court shall appoint two qualified physicians duly licensed to practice medicine in the state of Montana, neither of whom shall be the physician whose certificate accompanied the petition for commitment or who was appointed by the court at the time of the hearing on the petition for commitment, and who are not related to the patient, who shall be present at the hearing for restoration to capacity and shall thoroughly examine the patient. The patient shall be represented by counsel as provided in section 38-1107. The physicians' fees shall be paid in the same manner as in cases where patients now confined in the state hospital at Warm Springs, pay on petition for restoration to capacity. If the court shall determine upon proof submitted at the hearing, that the patient is not a senile person, the court shall order him restored to capacity and shall direct the superintendent to release the patient from the home. If restoration be denied, the patient shall be remanded to the superintendent.

History: En. Sec. 16, Ch. 206, L. 1949.

38-1112. Lien for care of patients. If any patient dies, who has been in the home and has not paid for the reasonable value of his care and treatment there, and leaves an estate in the state of Montana, the said state of Montana shall have a first lien on all such estate for the reasonable value of the care and treatment furnished the patient and it shall be the duty of the attorney general to file a creditor's claim for such an amount on behalf of the state of Montana.

History: En. Sec. 17, Ch. 206, L. 1949.

TITLE 39

INSTRUMENTS, ACKNOWLEDGMENT AND PROOF

Chapter 1. Acknowledgment and proof of instruments, 39-101 to 39-134.

CHAPTER 1

ACKNOWLEDGMENT AND PROOF OF INSTRUMENTS

- Section 39-101. By whom acknowledgments may be taken in this state.
39-102. Same—where and by whom acknowledgments may be taken.
39-103. By whom taken without the state.
39-103.1. Effect of acknowledgment outside state in accordance with other state's law.
39-104. By whom taken without the United States.
39-105. Deputy can take acknowledgment.
39-106. Acknowledgments and other notarial acts may be done by designated officers in armed services.
39-107. Officer taking acknowledgment must know person—corporations.
39-108. Acknowledgment by married women.
39-109. Conveyance by married woman—acknowledgment.
39-110. Officer must indorse certificate.
39-111. General form of certificate.
39-112. Certificate of acknowledgment by corporation.
39-113. Form of certificate of acknowledgment by married woman.
39-114. Form of certificate of acknowledgment by attorney in fact.
39-115. Officers must affix their signatures.
39-116. Certificate of authority of justices in certain cases.
39-117. Proof of execution—how made.
39-118. Witness must be personally known to officer.
39-119. What must be proved by subscribing witness.
39-120. Handwriting may be proved, when.
39-121. What facts must be proved by evidence of handwriting.
39-122. Certificate of proof.
39-123. Officers authorized to do certain things.
39-124. Instrument improperly certified—how corrected.
39-125. Judgment proving instrument.
39-126. Effect of judgment in such action.
39-127. Conveyances heretofore made to be governed by then existing laws.
39-128. Effect as evidence of instruments made and acknowledged before code takes effect—recording.
39-129. Validation of records erroneously executed or acknowledged—copies as evidence.
39-130. Deeds heretofore executed valid though not acknowledged.
39-131. Deeds made prior to 1900—presumption grantor had no wife living.
39-132. Validation of instruments omitting address of grantee, mortgagee or assignee—copies as evidence.
39-133. Validation of recorded instruments affecting real property regardless of defects in execution.
39-134. Validation of deeds not formally executed.

39-101. (6905) By whom acknowledgments may be taken in this state.
The proof of acknowledgment of an instrument may be made at any place within this state before a justice or clerk of the supreme court, or a judge of the district court.

History: For earlier acts relating to conveyance and form of acknowledgments, see Secs. 1-52, pp. 479-488, Bannack Stat.; Secs. 1-52, pp. 396-404, Cod. Stat. 1871; Secs. 178-229, 5th Div. Rev. Stat. 1879; Secs. 235-287, 5th Div. Comp. Stat. 1887.

This section En. Sec. 1600, Civ. C. 1895; re-en. Sec. 4654, Rev. C. 1907; re-en. Sec. 6905, R. C. M. 1921. Cal. Civ. C. Sec. 1180. Based on Field Civ. C. Sec. 516.

Cross-References

Judges may take and certify acknowledgments, sec. 93-1004.

Mortgages of personal property, acknowledgment, sec. 52-302.

Mortgages of real property, acknowledgment of, sec. 52-205.

Private writings, manner of proof and acknowledgment, sec. 93-1101-19.

Recording, acknowledgment required, sec. 73-105.

References

Angell v. Lewistown State Bank et al., 72 M 345, 351, 232 P 90.

Collateral References

Acknowledgment—9, 16.

1 C.J.S. Acknowledgments §§ 45, 60.

1 Am. Jur. 333, Acknowledgments, § 49.

39-102. (6906) Same—where and by whom acknowledgments may be taken. The proof of acknowledgment of an instrument may be made in this state within the city, county, or district for which the officer was elected or appointed, before either:

1. A clerk of a court of record; or,
2. A county clerk; or,
3. A notary public; or,
4. A justice of the peace; or,
5. A United States commissioner.

History: En. Sec. 1601, Civ. C. 1895; re-en. Sec. 4655, Rev. C. 1907; amd. Sec. 1, Ch. 10, L. 1913; re-en. Sec. 6906, R. C. M. 1921. Cal. Civ. C. Sec. 1181. Based on Field Civ. C. Sec. 517.

Cross-References

Justices of the peace, power to take, sec. 93-1004.

Notaries public may take, sec. 56-104.

References

Angell v. Lewistown State Bank et al., 72 M 345, 351, 232 P 90.

Collateral References

1 Am. Jur. 333, Acknowledgments, § 49.

39-103. (6907) By whom taken without the state. The proof of acknowledgment of an instrument may be made without this state, but within the United States, and within the jurisdiction of the officer, before either:

1. A justice, judge, or clerk of any court of record of the United States; or,
2. A justice, judge, or clerk of any court of record of any state or territory; or,
3. A commissioner appointed by the governor of this state for that purpose; or,
4. A notary public; or,
5. Any other officer of the state or territory where the acknowledgment is made authorized by its laws to take such proof or acknowledgment.

History: En. Sec. 1602, Civ. C. 1895; re-en. Sec. 4656, Rev. C. 1907; re-en. Sec. 6907, R. C. M. 1921. Cal. Civ. C. Sec. 1182. Based on Field Civ. C. Sec. 518.

Cross-References

Commissioners of deeds, acknowledgments, by, sec. 56-202.

References

Gotzian & Co. v. Norris et al., 89 M 307, 315, 297 P 489.

Collateral References

Acknowledgment—17.

1 C.J.S. Acknowledgments § 49.

1 Am. Jur. 341, Acknowledgments, § 65.

39-103.1. Effect of acknowledgment outside state in accordance with other state's law. Notwithstanding any provision contained in Title 39 of the Revised Codes of Montana of 1947, the acknowledgment of any instru-

ment without this state in compliance with the manner and form prescribed by the laws of the place of its execution, if in a state, a territory or insular possession of the United States, or in the District of Columbia, verified by the official seal of the officer before whom it is acknowledged, shall have the same effect as an acknowledgment in the manner and form prescribed by the laws of this state for instruments executed within the state.

History: En. Sec. 1, Ch. 81, L. 1953.

39-104. (6908) By whom taken without the United States. The proof or acknowledgment of an instrument may be made without the United States, before either:

1. A minister, commissioner, or charge d'affaires of the United States, resident and accredited in the country where the proof or acknowledgment is made; or,

2. A consul, vice-consul, or consular agent of the United States, resident in the country where the proof or acknowledgment is made; or,

3. A judge of a court of record of the country where the proof or acknowledgment is made; or,

4. Commissioners appointed for such purposes by the governor of the state, pursuant to special statutes; or,

5. A notary public.

History: En. Sec. 1603, Civ. C. 1895; re-en. Sec. 4657, Rev. C. 1907; re-en. Sec. 6908, R. C. M. 1921. Cal. Civ. C. Sec. 1183.

fied by U. S. consul. Sufficient compliance with section 91-3802. In re Astibia's Estate, 100 M 224, 233, 46 P 2d 712.

Authority in Heirship Matter

Held, power of attorney, filed in case at bar, for proof of authority of counsel in heirship matter, was duly acknowledged, and notary's authority duly certi-

Collateral References

Acknowledgment—18.

1 C.J.S. Acknowledgments § 50.

1 Am. Jur. 342, Acknowledgments, § 68.

39-105. (6909) Deputy can take acknowledgment. When any of the officers mentioned in the four preceding sections are authorized by law to appoint a deputy, the acknowledgment or proof may be taken by such deputy, in the name of his principal.

History: En. Sec. 1604, Civ. C. 1895; re-en. Sec. 4658, Rev. C. 1907; re-en. Sec. 6909, R. C. M. 1921. Cal. Civ. C. Sec. 1184.

39-106. Acknowledgments and other notarial acts may be done by designated officers in armed services. (1) In addition to the acknowledgment of instruments and the performance of other notarial acts in the manner and form and as otherwise authorized by law, instruments may be acknowledged, documents attested, oaths and affirmations administered, depositions and affidavits executed, and other notarial acts performed, before or by any commissioned officer in active service of the armed forces of the United States with the rank of second lieutenant or higher in the army or marine corps, or with the rank of ensign or higher in the navy or coast guard, or with equivalent rank in any other component part of the armed forces of the United States, by any person who either (a) is a member of the armed forces of the United States, or (b) is serving as a merchant seaman outside the limits of the United States included within the forty-eight (48) states and the District of Columbia; or (c) is outside the

limits of the United States of America by permission, assignment or direction of any department or official of the United States government, in connection with any activity pertaining to the prosecution of any war in which the United States is then engaged.

(2) Such acknowledgment of instruments, attestation of documents, administration of oaths and affirmations, execution of depositions and affidavits, and performance of other notarial acts, heretofore or hereafter made or taken, are hereby declared legal, valid and binding, and instruments and documents so acknowledged, authenticated, or sworn to shall be admissible in evidence and eligible to record in this state under the same circumstances, and with the same force and effect as if such acknowledgment, attestation, oath, affirmation, deposition, affidavit, or other notarial act, had been made or taken within this state before or by a duly qualified officer or official as otherwise provided by law.

(3) In the taking of acknowledgments and the performing of other notarial acts requiring certification, a certificate endorsed upon or attached to the instrument or documents, which shows the date of the notarial act and which states, in substance, that the person appearing before the officer acknowledged the instrument as his act or made or signed the instrument or document under oath, shall be sufficient for all intents and purposes. The instrument or document shall not be rendered invalid by the failure to state the place of execution or acknowledgment.

(4) The signature, rank, and branch of service or subdivision thereof, of any such commissioned officer shall appear upon such instrument or document or certificate and no further proof of the authority of such officer so to act shall be required and such action by such commissioned officer shall be prima facie evidence that the person making such oath or acknowledgment is within the purview of this act.

History: En. Sec. 1, Ch. 117, L. 1945.

39-107. (6910) Officer taking acknowledgment must know person—corporations. The acknowledgment of an instrument must not be taken unless the officer taking it knows or has satisfactory evidence, on the oath or affirmation of a credible witness, that the person making such acknowledgment is the individual who is described in and who executed the instrument; or, if executed by a corporation, that the person making such acknowledgment is the president, or vice-president, or secretary, or assistant secretary of such corporation, or other person duly authorized by resolution of such corporation, who executed it on its behalf.

History: En. Sec. 1605, Civ. C. 1895; re-en. Sec. 4659, Rev. C. 1907; amd. Sec. 1, Ch. 2, L. 1913; re-en. Sec. 6910, R. C. M. 1921; amd. Sec. 1, Ch. 171, L. 1937. Cal. Civ. C. Sec. 1185.

Operation and Effect

While a vice-president is not specifically designated by statute in this state as one who has authority to acknowledge an instrument on behalf of his corporation, it must be held that in view of the provisions of this section and sections 39-112 and 39-129, in each of which an acknowl-

edgment by such officer is recognized, the legislature intended to give effect to instruments so acknowledged. *Gotzian & Co. v. Norris et al.*, 89 M 307, 316, 297 P 489.

References

Genzberger v. Adams, 62 M 430, 435, 205 P 658; *Steinbrenner v. Elder*, 80 M 395, 399, 260 P 725.

Collateral References

Acknowledgment—22.

1 C.J.S. Acknowledgments §§ 69, 77.

39-108. (6911) Acknowledgment by married women. The acknowledgment of a married woman to an instrument purporting to be executed by her must be taken the same as that of any other person.

History: En. Sec. 1606, Civ. C. 1895; re-en. Sec. 4660, Rev. C. 1907; re-en. Sec. 6911, R. C. M. 1921. Cal. Civ. C. Sec. 1186.

Collateral References
Acknowledgment⇒25.
1 C.J.S. Acknowledgments § 76.

39-109. (6912) Conveyance by married woman—acknowledgment. A conveyance by a married woman has the same effect as if she were unmarried, and may be acknowledged in the same manner.

History: En. Sec. 1607, Civ. C. 1895; re-en. Sec. 4661, Rev. C. 1907; re-en. Sec. 6912, R. C. M. 1921. Cal. Civ. C. Sec. 1187. Based on Field Civ. C. Sec. 522.

Collateral References
Acknowledgment⇒25; Husband and Wife⇒69.
1 C.J.S. Acknowledgments § 76; 41 C. J.S. Husband and Wife § 196.

39-110. (6913) Officer must indorse certificate. An officer taking the acknowledgment of an instrument must indorse thereon, or attach thereto, a certificate substantially in the forms hereinafter prescribed.

History: En. Sec. 1608, Civ. C. 1895; re-en. Sec. 4662, Rev. C. 1907; re-en. Sec. 6913, R. C. M. 1921. Cal. Civ. C. Sec. 1188.

Collateral References
Acknowledgment⇒29.
1 C.J.S. Acknowledgments § 83.

39-111. (6914) General form of certificate. The certificate of acknowledgment, unless it is otherwise in this chapter provided, must be substantially in the following form:

State of }
County of } ss.

On this day of, in the year, before me (here insert the name and quality of the officer), personally appeared, known to me (or proved to me on the oath of), to be the person whose name is subscribed to the within instrument, and acknowledged to me that he (she or they) executed the same.

History: En. Sec. 1609, Civ. C. 1895; re-en. Sec. 4663, Rev. C. 1907; re-en. Sec. 6914, R. C. M. 1921. Cal. Civ. C. Sec. 1189.

Collateral References
Acknowledgment⇒36(1).
1 C.J.S. Acknowledgments § 91.

References

Springhorn v. Springer et al., 75 M 294,
301, 243 P 803.

39-112. (6915) Certificate of acknowledgment by corporation. The certificate of acknowledgment of an instrument executed by a corporation must be substantially in the following form:

State of }
County of } ss.

On this day of, in the year, before me (here insert the name and quality of the officer), personally appeared, known to me (or proved to me on the oath of), to be the president (or vice-president) or the secretary (or the assistant secretary) of the corporation that executed the within instrument (where, however, the instrument is executed in behalf of the corporation by some one other than the president, or vice-president, or secretary, or assistant secretary), insert: known to me (or proved to me on the oath of), to be the person who executed the within instrument on behalf of the

corporation therein named, and acknowledged to me that such corporation executed the same.

History: En. Sec. 1612, Civ. C. 1895; re-en. Sec. 4664, Rev. C. 1907; amd. Sec. 1, Ch. 3, L. 1913; re-en. Sec. 6915, R. C. M. 1921; amd. Sec. 1, Ch. 169, L. 1937. Cal. Civ. C. Sec. 1190.

Operation and Effect

While a vice-president is not specifically designated by statute in this state as one who has authority to acknowledge an instrument on behalf of his corporation, it must be held that in view of the provi-

sions of sections 39-107, this section and 39-129, in each of which an acknowledgment by such officer is recognized, the legislature intended to give effect to instruments so acknowledged. Gotzian & Co., v. Norris et al., 89 M 307, 316, 297 P 489.

References

Genzberger v. Adams, 62 M 430, 435, 205 P 658; Stauffacher v. Great Falls P. S. Co. et al., 99 M 324, 43 P 2d 647.

39-113. (6916) Form of certificate of acknowledgment by married woman. The certificate of acknowledgment by a married woman must be substantially in the form prescribed in section 39-111.

History: En. Sec. 1611, Civ. C. 1895; re-en. Sec. 4665, Rev. C. 1907; re-en. Sec. 6916, R. C. M. 1921. Cal. Civ. C. Sec. 1191.

Collateral References

Acknowledgment⇒37.
1 C.J.S. Acknowledgments § 100.

39-114. (6917) Form of certificate of acknowledgment by attorney in fact. The certificate of acknowledgment by an attorney in fact must be substantially in the following form:

State of }
County of } ss.

On this day of, in the year, before me (here insert the name and quality of the officer), personally appeared, known to me (or proved to me on the oath of), to be the person whose name is subscribed to the within instrument as the attorney in fact of, and acknowledged to me that he subscribed the name of thereto as principal, and his own name as attorney in fact.

History: En. Sec. 1612, Civ. C. 1895; re-en. Sec. 4666, Rev. C. 1907; re-en. Sec. 6917, R. C. M. 1921. Cal. Civ. C. Sec. 1192.

39-115. (6918) Officers must affix their signatures. Officers taking and certifying acknowledgments or proof of instruments for record must authenticate their certificates by affixing their signatures, followed by the names of their offices; also, their seals of office, if by the laws of the state or country where the acknowledgment or proof is taken, or by authority of which they are acting, they are required to have official seals.

History: En. Sec. 1613, Civ. C. 1895; re-en. Sec. 4667, Rev. C. 1907; re-en. Sec. 6918, R. C. M. 1921. Cal. Civ. C. Sec. 1193.

Collateral References

Acknowledgment⇒33.
1 C.J.S. Acknowledgments §§ 88, 89.

39-116. (6919) Certificate of authority of justices in certain cases. The certificate of proof or acknowledgment, if made before a justice of the peace, when used in any county other than that in which he resides, must be accompanied by a certificate, under the hand and seal of the clerk of the county in which the justice resides, setting forth that such justice, at the time of making such proof or acknowledgment, was authorized to take the same, and that the clerk is acquainted with his handwriting, and believes that the signature to the original certificate is genuine.

History: En. Sec. 1614, Civ. C. 1895;
re-en. Sec. 4668, Rev. C. 1907; re-en. Sec.
6919, R. C. M. 1921. Cal. Civ. C. Sec. 1194.

Collateral References

Acknowledgment↔32.
1 C.J.S. Acknowledgments § 87.

39-117. (6920) Proof of execution—how made. Proof of the execution of an instrument, when not acknowledged, may be made either:

1. By the party executing it, or either of them; or,
2. By a subscribing witness; or,
3. By other witnesses, in cases mentioned in section 39-120.

History: En. Sec. 1615, Civ. C. 1895;
re-en. Sec. 4669, Rev. C. 1907; re-en. Sec.
6920, R. C. M. 1921. Cal. Civ. C. Sec. 1195.

Collateral References

Acknowledgment↔12; Evidence↔601
(2).
1 C.J.S. Acknowledgments § 40; 32
C.J.S. Evidence § 1050.

39-118. (6921) Witness must be personally known to officer. If by a subscribing witness, such witness must be personally known to the officer taking the proof to be the person whose name is subscribed to the instrument as a witness, or must be proved to be such by the oath of a credible witness.

History: En. Sec. 1616, Civ. C. 1895;
re-en. Sec. 4670, Rev. C. 1907; re-en. Sec.
6921, R. C. M. 1921. Cal. Civ. C. Sec. 1196.

39-119. (6922) What must be proved by subscribing witness. The subscribing witness must prove that the person whose name is subscribed to the instrument as a party is the person described in it, and that such person executed it, and that the witness subscribed his name thereto as a witness.

History: En. Sec. 1617, Civ. C. 1895;
re-en. Sec. 4671, Rev. C. 1907; re-en. Sec.
6922, R. C. M. 1921. Cal. Civ. C. Sec. 1197.

Collateral References

Acknowledgment↔27; Evidence↔601
(2).
1 C.J.S. Acknowledgments § 74; 32
C.J.S. Evidence § 1050.

39-120. (6923) Handwriting may be proved, when. The execution of an instrument may be established by proof of the handwriting of the party and of a subscribing witness, if there is one, in the following cases:

1. When the parties and all the subscribing witnesses are dead; or,
2. When the parties and all the subscribing witnesses are non-residents of the state; or,
3. When the place of their residence is unknown to the party desiring the proof, and cannot be ascertained by the exercise of due diligence; or,
4. When the subscribing witness conceals himself, or cannot be found by the officer by the exercise of due diligence in attempting to serve the subpoena or attachment; or,
5. In case of the continued failure or refusal of the witness to testify for the space of one hour, after his appearance.

History: En. Sec. 1618, Civ. C. 1895;
re-en. Sec. 4672, Rev. C. 1907; re-en. Sec.
6923, R. C. M. 1921. Cal. Civ. C. Sec. 1198.

Collateral References

Evidence↔562, 601(2).
32 C.J.S. Evidence §§ 516, 531, 614, 616,
1050.

39-121. (6924) What facts must be proved by evidence of handwriting. The evidence taken under the preceding section must satisfactorily prove to the officer the following facts:

1. The existence of one or more of the conditions mentioned therein; and,

2. That the witness testifying knew the person whose name purports to be subscribed to the instrument as a party, and is well acquainted with his signature, and that it is genuine; and,

3. That the witness testifying personally knew the person who subscribed the instrument as a witness, and is well acquainted with his signature, and that it is genuine; and,

4. The place of residence of the witness.

History: En. Sec. 1619, Civ. C. 1895;
re-en. Sec. 4673, Rev. C. 1907; re-en. Sec.
6924, R. C. M. 1921. Cal. Civ. C. Sec. 1199.

39-122. (6925) Certificate of proof. An officer taking proof of the execution of any instrument must, in his certificate indorsed thereon or attached thereto, set forth all the matters required by law to be done or known by him, or proved before him on the proceeding, together with the names of all the witnesses examined before him, their places of residence respectively, and the substance of their testimony.

History: En. Sec. 1620, Civ. C. 1895;
re-en. Sec. 4674, Rev. C. 1907; re-en. Sec.
6925, R. C. M. 1921. Cal. Civ. C. Sec. 1200.
Based on Field Civ. C. Sec. 526.

Collateral References

Acknowledgment⇒29-38.
1 C.J.S. Acknowledgments §§ 83-114.

39-123. (6926) Officers authorized to do certain things. Officers authorized to take the proof of instruments are authorized in such proceedings:

1. To administer oaths or affirmations, as prescribed in the Code of Civil Procedure;
2. To employ and swear interpreters;
3. To issue subpoenas, as prescribed in the Code of Civil Procedure;
4. To punish for contempt, as prescribed in the Code of Civil Procedure.

The civil damages and forfeiture to the party aggrieved are prescribed in the Code of Civil Procedure.

History: En. Sec. 1621, Civ. C. 1895;
re-en. Sec. 4675, Rev. C. 1907; re-en. Sec.
6926, R. C. M. 1921. Cal. Civ. C. Sec. 1201.

tion relating to probate and guardianship which is Title 91.

Collateral References

Acknowledgment⇒24.
1 C.J.S. Acknowledgments § 68.

NOTE.—The Code of Civil Procedure is Title 93 of these codes except for the por-

39-124. (6927) Instrument improperly certified—how corrected. When the acknowledgment or proof of the execution of an instrument is properly made, but defectively certified, any party interested may have an action in the district court to obtain a judgment correcting the certificate.

History: En. Sec. 1622, Civ. C. 1895;
re-en. Sec. 4676, Rev. C. 1907; re-en. Sec.
6927, R. C. M. 1921. Cal. Civ. C. Sec. 1202.

Collateral References

Acknowledgment⇒46.
1 C.J.S. Acknowledgments § 119.

39-125. (6928) Judgment proving instrument. Any person interested under an instrument entitled to be proved for record may institute an

action in the district court against the proper parties to obtain a judgment proving such instrument.

History: En. Sec. 1623, Civ. C. 1895; re-en. Sec. 4677, Rev. C. 1907; re-en. Sec. 6928, R. C. M. 1921. Cal. Civ. C. Sec. 1203.

39-126. (6929) Effect of judgment in such action. A certified copy of the judgment in a proceeding instituted under either of the two preceding sections, showing the proof of the instrument, and attached thereto, entitles such instrument to record, with the like effect as if acknowledged.

History: En. Sec. 1624, Civ. C. 1895; re-en. Sec. 4678, Rev. C. 1907; re-en. Sec. 6929, R. C. M. 1921. Cal. Civ. C. Sec. 1204.

39-127. (6930) Conveyances heretofore made to be governed by then existing laws. The legality of the execution, acknowledgment, proof, form, or record of any conveyance or other instrument made before this code goes into effect, executed, acknowledged, proved, or recorded, is not affected by anything contained in this chapter, but depends for its validity and legality upon the laws in force when the act was performed.

History: En. Sec. 41, p. 403, Cod. Stat. 1871; re-en. Sec. 218, 5th Div. Rev. Stat. 1879; re-en. Sec. 276, 5th Div. Comp. Stat. 1887; amd. Sec. 1625, Civ. C. 1895; re-en. Sec. 4679, Rev. C. 1907; re-en. Sec. 6930, R. C. M. 1921. Cal. Civ. C. Sec. 1205.

References

Cited or applied as section 4679, Civil Code, in *Westheimer v. Goodkind*, 24 M 90, 100, 60 P 813.

Collateral References

Acknowledgment \Leftrightarrow 3, 47.
1 C.J.S. Acknowledgments §§ 5, 120.

39-128. (6931) Effect as evidence of instruments made and acknowledged before code takes effect—recording. All conveyances of real property made before this code goes into effect, and acknowledged or proved according to the laws in force at the time of such making and acknowledgment or proof, have the same force as evidence, and may be recorded in the same manner and with the like effect, as conveyances executed and acknowledged in pursuance of this chapter.

History: En. Sec. 1626, Civ. C. 1895; re-en. Sec. 4680, Rev. C. 1907; re-en. Sec. 6931, R. C. M. 1921. Cal. Civ. C. Sec. 1206.

39-129. (6932) Validation of records erroneously executed or acknowledged—copies as evidence. Any instrument affecting real property, which was, previous to the date this act takes effect, copied into the proper book, kept in the office of the county clerk and recorder, shall be deemed to impart, after that date, notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, or informality in the execution of the instrument or in the certificate of acknowledgment thereof, or the absence of any such certificate; and all such instruments heretofore acknowledged by the vice president and assistant secretary of any corporation, or by either of them, or other person duly authorized by resolution by such corporation executing the same on behalf of the corporation, and recorded, shall be valid and shall have the same force and effect as though acknowledged by the president or secretary; but nothing herein shall be deemed to affect the rights of purchasers or encumbrancers previous to the date this act takes effect. Duly certified copies of the record

of any such instrument may be read in evidence, with like effect as copies of an instrument duly acknowledged and recorded.

History: En. Sec. 1627, Civ. C. 1895; re-en. Sec. 4681, Rev. C. 1907; amd. Sec. 1, Ch. 4, L. 1913; re-en. Sec. 6932, R. C. M. 1921; amd. Sec. 1, Ch. 17, L. 1931; amd. Sec. 1, Ch. 4, L. 1943. Cal. Civ. C. Sec. 1207.

NOTE.—An identical validating act was passed as Ch. 36, Laws 1947 (sec. 39-133).

Operation and Effect

Under this section, an instrument affecting real property recorded prior to the enactment of the section is to be deemed to impart notice to subsequent purchasers and encumbrancers though improperly acknowledged, and is admissible in evidence. *First State Bank v. Mussigbrod et al.*, 83 M 68, 95, 271 P 695.

While a vice-president is not specifically designated by statute in this state as one who has authority to acknowledge an instrument on behalf of his corporation, it must be held that in view of the provisions of sections 39-107 and 39-112, and this section, in each of which an acknowledgment by such officer is recognized, the legislature intended to give effect to instruments so acknowledged. *Gotzian & Co. v. Norris et al.*, 89 M 307, 317, 297 P 489.

Collateral References

Acknowledgment—47; Evidence—343.
1 C.J.S. Acknowledgments § 120; 32 C.J.S. Evidence § 659.

39-130. (6933) Deeds heretofore executed valid though not acknowledged. All deeds to real property heretofore executed in this state, or any state or territory of the United States, which shall have been signed by the grantors in due form, shall be sufficient in law to convey the legal title to the premises therein described from the grantors to the grantees, without any other execution or acknowledgment or witnesses thereto whatever; and such deeds so executed shall be received in evidence in all courts in this state, and be conclusive evidence of the title to the lands therein described against the grantors, their heirs and assigns.

History: En. Sec. 1, p. 145, L. 1899; 6933, R. C. M. 1921; amd. Sec. 2, Ch. 4, re-en. Sec. 4682, Rev. C. 1907; re-en. Sec. L. 1943.

39-131. Deeds made prior to 1900—presumption grantor had no wife living. When a deed to real property has been made, executed and acknowledged prior to the year 1900 by a grantor without recital in the body of the deed or acknowledgment as to whether or not the grantor is married or single, and the wife of such grantor, if any, not joining in the conveyance, or otherwise releasing or conveying her dower, the presumption shall be that the person conveying such land had no wife living at the date of such conveyance and that such land was conveyed free of all right of dower, inchoate or vested.

History: En. Sec. 1, Ch. 183, L. 1945.

Operation and Effect

Where instrument, executed in 1876, purporting to sell interest in land did not

show marital status of grantor, it was proper for district court to find that he was a single man. *Clinton v. Miller*, 124 M 463, 226 P 2d 487, 497.

39-132. (6933.1) Validation of instruments omitting address of grantee, mortgagee or assignee—copies as evidence. Any deed, mortgage, or assignment of mortgage which was, previous to the date this act takes effect, copied into the proper book, kept in the office of the county clerk and recorder, shall be deemed to impart, after the date this act takes effect, notice of its contents to subsequent purchasers and encumbrancers notwithstanding the omission therefrom of the post office address of the grantee, mortgagee, or assignee of the mortgagee, as the case may be;

and all such instruments heretofore recorded which do not contain the post office address of the grantee, mortgagee, or assignee of the mortgagee, as the case may be, shall be valid and shall have the same force and effect as though the post office address of such grantee, mortgagee, or assignee of the mortgagee were contained therein; but nothing herein shall be deemed to affect the rights of purchasers or encumbrancers previous to the date this act takes effect. Duly certified copies of the record of any such instrument may be read in evidence, with like effect as certified copies of instruments duly recorded containing the post office address of the grantee, mortgagee, or assignee of the mortgagee, as the case may be.

History: En. Sec. 1, Ch. 37, L. 1931. 26 C.J.S. Deeds § 38; 59 C.J.S. Mortgages §§ 114, 346.

Collateral References

Deeds⌚52; Mortgages⌚55, 224.

39-133. Validation of recorded instruments affecting real property regardless of defects in execution. Any instrument affecting real property, which was, previous to the date this act takes effect, copied into the proper book, kept in the office of the county clerk and recorder, shall be deemed to impart, after that date, notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, or informality in the execution of the instrument or in the certificate of acknowledgment thereof, or the absence of any such certificate; and all such instruments heretofore acknowledged by the vice president and assistant secretary of any corporation, or by either of them, or other person duly authorized by resolution by such corporation executing the same on behalf of the corporation, and recorded, shall be valid and shall have the same force and effect as though acknowledged by the president or secretary; but nothing herein shall be deemed to affect the rights of purchasers or encumbrancers previous to that date. Duly certified copies of the record of any such instrument may be read in evidence, with like effect as copies of an instrument duly acknowledged and recorded.

History: En. Sec. 1, Ch. 36, L. 1947.

NOTE.—Previous validating acts of this nature are section 39-129 and earlier versions of that section.

39-134. Validation of deeds not formally executed. All deeds to real property heretofore executed in this state, or any state or territory of the United States, which shall have been signed by the grantors in due form, shall be sufficient in law to convey the legal title to the premises therein described from the grantors to the grantees, without any other execution or acknowledgment or witnesses thereto whatever; and such deeds so executed shall be received in evidence in all courts in this state, and be conclusive evidence of the title to the lands therein described against the grantors, their heirs and assigns.

History: En. Sec. 1, Ch. 37, L. 1947.

TITLE 40

INSURANCE AND INSURANCE COMPANIES

- Chapter 1. Insurance in general—definitions—what may be insured, 40-101 to 40-105.
2. Parties—insurable interest, 40-201 to 40-218.
 3. Concealment and representation, 40-301 to 40-323.
 4. The policy, 40-401 to 40-415.
 5. Warranties—the premium, 40-501 to 40-517.
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 10. Life, health and accident insurance, 40-1001 to 40-1005.
 11. Insurance and surety companies' regulation by commissioner of insurance, 40-1101 to 40-1118.
 12. State insurance commission, 40-1201 to 40-1203.
 13. Insurance companies—license and general regulations, 40-1301 to 40-1333.
 14. Insurance companies other than life, 40-1401 to 40-1441.
 15. Mutual hail, fire and other casualty insurance of farm property and stock and rural buildings, 40-1501 to 40-1517.
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 17. Surety companies, 40-1701 to 40-1727.
 18. Assessment accident insurance companies, 40-1801 to 40-1820.
 19. Life insurance companies, 40-1901 to 40-1946.
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 21. Fraternal benefit societies, 40-2101 to 40-2138.
 22. Benevolent associations—regulation by insurance commissioner, 40-2201 to 40-2212.
 23. Title insurance companies, 40-2301 to 40-2310.
 24. Insurance rate regulation—rating bureaus, 40-2401 to 40-2416.
 25. Surplus line insurance, 40-2501 to 40-2513.

CHAPTER 1

INSURANCE IN GENERAL—DEFINITIONS—WHAT MAY BE INSURED

- Section 40-101. Insurance defined.
- 40-102. What events may be insured against.
- 40-103. Insurance of lottery or lottery prize unauthorized.
- 40-104. Usual kinds of insurance.
- 40-105. By what law governed.

40-101. (8060) Insurance defined. Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event.

History: En. Sec. 3370, Civ. C. 1895; re-en. Sec. 5545, Rev. C. 1907; re-en. Sec. 8060, R. C. M. 1921. Cal. Civ. C. Sec. 2527. Field Civ. C. Sec. 1357.

References

Stevens v. Steck et al., 101 M 569, 576, 55 P 2d 7.

Collateral References

Insurance—2.

44 C.J.S. Insurance § 1.

29 Am. Jur. 49, Insurance, §§ 4 et seq.

What constitutes insurance. 63 ALR 711.

Applicability to limitation prescribed by policy of insurance, or by special statutory provision in relation to insurance, of provisions of statute of limitations extending time or fixing time when action deemed commenced, 149 ALR 483.

40-102. (8061) What events may be insured against. Any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest, or create a liability against him, may be insured against, subject to the provisions of this chapter.

History: En. Sec. 3380, Civ. C. 1895;
re-en. Sec. 5546, Rev. C. 1907; re-en. Sec.
8061, R. C. M. 1921. Cal. Civ. C. Sec. 2531.
Field Civ. C. Sec. 1358.

44 C.J.S. Insurance § 239.

Insurance as covering automobile while being used for illegal purpose. 4 ALR 2d 134.

Collateral References

Insurance 126.

40-103. (8062) Insurance of lottery or lottery prize unauthorized. The preceding section does not authorize an insurance for or against the drawing of any lottery, or for or against any chance or ticket in a lottery drawing a prize.

History: En. Sec. 3381, Civ. C. 1895;
re-en. Sec. 5547, Rev. C. 1907; re-en. Sec.
8062, R. C. M. 1921. Cal. Civ. C. Sec. 2532.

40-104. (8063) Usual kinds of insurance. The usual kinds of insurance are:

1. Marine insurance;
2. Fire insurance;
3. Life insurance;
4. Health insurance; and,
5. Accident insurance.

History: En. Sec. 3382, Civ. C. 1895;
re-en. Sec. 5548, Rev. C. 1907; re-en. Sec.
8063, R. C. M. 1921. Cal. Civ. C. Sec. 2533.
Based on Field Civ. C. Sec. 1359.

Collateral References

29 Am. Jur., Insurance, §§ 5-15.

Construction of hail insurance. 4 ALR 1298.

What constitutes insurance. 63 ALR 711.

Representations and warranties in credit insurance. 97 ALR 1468.

Insurance companies, which are mem-

bers of Federal reserve banks or similar Federal agencies or national banks, as within state social security or unemployment compensation act. 145 ALR 1074.

Construction and application of provision of accident policy or accident feature of life policy extending benefits to one disabled from engaging in any occupation or employment for wage or profit. 149 ALR 7.

Misstatement in description of automobile as affecting automobile policy. 149 ALR 531.

Rent loss insurance. 17 ALR 2d 1226.

40-105. (8064) By what law governed. All kinds of insurance are subject to the provisions of sections 40-101 to 40-706.

History: En. Sec. 3383, Civ. C. 1895; 8064, R. C. M. 1921. Cal. Civ. C. Sec. 2534.
re-en. Sec. 5549, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1360.

CHAPTER 2

PARTIES—INSURABLE INTEREST

- Section 40-201. Designation of parties.
40-202. Who may insure.
40-203. Who may be insured.
40-204. Assignment to mortgagee of thing insured.
40-205. New contract between insurer and assignee.
40-206. Insurable interest defined.
40-207. In what may consist.
40-208. Interest of carrier or depository.

- 40-209. Mere expectancies.
- 40-210. Measure of interest in property.
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- 40-215. Exception in the case of several subjects in one policy.
- 40-216. In case of the death of the insured.
- 40-217. In the case of transfer between cotenants.
- 40-218. Policy—when void.

40-201. (8065) Designation of parties. The person who undertakes to indemnify another by a contract of insurance is called the insurer, and the person indemnified is called the insured.

History: En. Sec. 3390, Civ. C. 1895; re-en. Sec. 5550, Rev. C. 1907; re-en. Sec. 8065, R. C. M. 1921. Cal. Civ. C. Sec. 2538. Field Civ. C. Sec. 1361.

Collateral References

Insurance⊕156.
44 C.J.S. Insurance § 238.
29 Am. Jur. 213, Insurance, §§ 201-205.

40-202. (8066) Who may insure. Any one capable of making a contract may be an insurer, subject to the restrictions imposed by special statutes upon foreign corporations, non-residents, and others.

History: En. Sec. 3391, Civ. C. 1895; re-en. Sec. 5551, Rev. C. 1907; re-en. Sec. 8066, R. C. M. 1921. Cal. Civ. C. Sec. 2539. Field Civ. C. Sec. 1362.

References

State ex rel. Lloyds v. Porter, 88 M 347, 355, 294 P 363.

Collateral References

Insurance⊕1.
44 C.J.S. Insurance § 55.

40-203. (8067) Who may be insured. Any one except a public enemy may be insured.

History: En. Sec. 3392, Civ. C. 1895; re-en. Sec. 5552, Rev. C. 1907; re-en. Sec. 8067, R. C. M. 1921. Cal. Civ. C. Sec. 2540. Field Civ. C. Sec. 1363.

Collateral References

Insurance⊕138(1).
44 C.J.S. Insurance § 239.

40-204. (8068) Assignment to mortgagee of thing insured. Where a mortgagor of property effects insurance in his own name, providing that the loss shall be payable to the mortgagee, or assigns a policy of insurance to the mortgagee, the insurance is deemed to be upon the interest of the mortgagor, who does not cease to be a party to the original contract, and any act of his which would otherwise avoid the insurance will have the same effect, although the property is in the hands of the mortgagee.

History: En. Sec. 3393, Civ. C. 1895; re-en. Sec. 5553, Rev. C. 1907; re-en. Sec. 8068, R. C. M. 1921. Cal. Civ. C. Sec. 2541. Field Civ. C. Sec. 1364.

Collateral References

Insurance⊕221.
45 C.J.S. Insurance § 437.

Effect of insurance provision declaring loss, in case of mortgagee's interest, subject to all the terms and conditions of the policy. 19 ALR 1449.

Liability to mortgagee of insurer which pays loss to mortgagor, in absence of loss-payable clause. 21 ALR 1464.

Breach of a policy by a mortgagor as

affecting the mortgagee under a loss-payable clause which does not provide for that event. 38 ALR 367.

Adjustment of a loss by an agreement between a mortgagor and an insurer as affecting the mortgagee under a loss-payable clause. 38 ALR 383.

Purchase of property by mortgagee or holder of mortgaged securities as breach of condition against sale or change of title in insurance policy with mortgage clause. 45 ALR 597.

Liability of mortgagee under mortgage clause for insurance premium. 47 ALR 1126.

Rights as between mortgagor and insurance company where policy avoided

as to mortgagor, but not as to mortgagee. 52 ALR 278.

Procuring of insurance by holder of mortgage or deed of trust as violation of provision in mortgagor's policy against additional insurance. 66 ALR 1173.

Extent of recovery by insured who has only a partial or limited interest in the insured property. 68 ALR 1344.

Comment note: Right of third person to enforce contract between others for his benefit. 81 ALR 1271 and 148 ALR 359.

Repair of premises by owner as affecting right of mortgagee to recover under a mortgage bond or upon a policy taken out by him on his interest. 91 ALR 1354.

Union or standard mortgage clause as relieving mortgagee of mortgagor's breach of conditions at inception of policy or before mortgage clause attached. 97 ALR 1165.

Mortgagee's knowledge or acceptance of mortgagee clause before loss, as condition of his right to benefit of it. 132 ALR 355.

Right of insurer, in absence of subrogation clause, to be subrogated to claim of mortgagee (or conditional vendor) to whom it paid loss, under loss-payable or mortgagee clause, after policy had been canceled as against insured or had become unenforceable by him. 146 ALR 442.

40-205. (8069) New contract between insurer and assignee. If an insurer assents to the transfer of an insurance from a mortgagor to a mortgagee, and, at the time of his assent, imposes further obligations on the assignee, making a new contract with him, the acts of the mortgagor cannot affect his rights.

History: En. Sec. 3394, Civ. C. 1895; re-en. Sec. 5554, Rev. C. 1907; re-en. Sec.

8069, R. C. M. 1921. Cal. Civ. C. Sec. 2542. Field Civ. C. Sec. 1365.

40-206. (8070) Insurable interest defined. Any interest in property, or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest.

History: En. Sec. 3400, Civ. C. 1895; re-en. Sec. 5555, Rev. C. 1907; re-en. Sec. 8070, R. C. M. 1921. Cal. Civ. C. Sec. 2546. Field Civ. C. Sec. 1366.

"Insurable Interest"

Oil companies which sold certain property but reserved possession and use until full payment was made or until operation of property ceased to be profitable had an "insurable interest" in property which could be covered by fire policy, particularly where companies were required to replace property, citing this section. *Rice Oil Co. et al. v. Atlas Assur. Co. Ltd.*, 102 F 2d 561, 575.

Undisclosed principal for whom agent had bought land and a building, the agent taking title in his own name with obligation to convey to the principal, had equitable title to the property and therefore an "insurable interest" under this section. *Stevens v. Steck*, 101 M 569, 577, 55 P 2d 7.

Operation and Effect

Complaint in an action to recover on a policy of hail insurance, alleging that plaintiff "had" a certain number of acres of wheat growing was sufficient to show

that he was the owner of the crop, and therefore had an insurable interest therein. *Pasherstnik v. Continental Ins. Co.*, 67 M 19, 22, 214 P 603.

While after a sale of real property under execution or order of sale, the judgment debtor has no title to the property sold and thereafter his right to redeem is but a personal privilege, such right of redemption is an insurable interest which continues to exist after foreclosure sale and before the time of redemption has expired, and which he may assign, and if assigned the right to recover for a fire loss sustained during the period covered by the policy passes to the assignee. *Baker v. Pennsylvania Fire Ins. Co.*, 81 M 271, 279, 263 P 93.

Collateral References

Insurance—115.

44 C.J.S. Insurance § 175.

29 Am. Jur. 289, Insurance, §§ 318 et seq.

Insurance as covering automobile while being used for illegal purpose. 4 ALR 2d 134.

Insurable interest of husband or wife in other's property. 27 ALR 2d 1059.

40-207. (8071) In what may consist. An insurable interest in property may consist in:

1. An existing interest;
2. An inchoate interest founded on an existing interest; or,
3. An expectancy, coupled with an existing interest in that out of which the expectancy arises.

History: En. Sec. 3401, Civ. C. 1895; re-en. Sec. 5556, Rev. C. 1907; re-en. Sec. 8071, R. C. M. 1921. Cal. Civ. C. Sec. 2547. Field Civ. C. Sec. 1367.

Collateral References

Insurable interest predicated upon invalid or unenforceable contract. 9 ALR 2d 181.

40-208. (8072) Interest of carrier or depository. A carrier or depository of any kind has an insurable interest in a thing held by him as such, to the extent of its value.

History: En. Sec. 3402, Civ. C. 1895; re-en. Sec. 5557, Rev. C. 1907; re-en. Sec. 8072, R. C. M. 1921. Cal. Civ. C. Sec. 2548. Field Civ. C. Sec. 1368.

Collateral References

Insurance of bank against larceny and false pretenses. 15 ALR 2d 1006.

40-209. (8073) Mere expectancies. A mere contingent or expectant interest in anything, not founded on an actual right to the thing, nor upon any valid contract for it, is not insurable.

History: En. Sec. 3403, Civ. C. 1895; re-en. Sec. 5558, Rev. C. 1907; re-en. Sec. 8073, R. C. M. 1921. Cal. Civ. C. Sec. 2549. Field Civ. C. Sec. 1369.

Collateral References

Insurance—115(1).
44 C.J.S. Insurance § 175.

40-210. (8074) Measure of interest in property. The measure of an insurable interest in property is the extent to which the insured might be damnified by loss or injury thereof.

History: En. Sec. 3404, Civ. C. 1895; re-en. Sec. 5559, Rev. C. 1907; re-en. Sec. 8074, R. C. M. 1921. Cal. Civ. C. Sec. 2550. Field Civ. C. Sec. 1370.

Collateral References

Insurance—115(1).
44 C.J.S. Insurance § 175.

40-211. (8075) Insurance without interest illegal. The sole object of insurance is the indemnity of the insured, and if he has no insurable interest the contract is void.

History: En. Sec. 3405, Civ. C. 1895; re-en. Sec. 5560, Rev. C. 1907; re-en. Sec. 8075, R. C. M. 1921. Cal. Civ. C. Sec. 2551. Field Civ. C. Sec. 1371.

Operation and Effect

Under this section, if one insuring property against fire has no insurable interest therein the contract is void, and under the following section an interest insured must exist when the insurance takes effect and when the loss occurs. *Libby Lbr. Co. v. Pacific States Fire Ins. Co.*, 79 M 166, 174, 255 P 340.

While after a sale of real property under execution or order of sale, the judgment debtor has no title to the property sold and thereafter his right to redeem is but a personal privilege, such right of redemption is an insurable interest which continues to exist after foreclosure sale and before the time of redemption has expired, and which he may assign, and if

assigned the right to recover for a fire loss sustained during the period covered by the policy passes to the assignee. *Baker v. Pennsylvania Fire Ins. Co.*, 81 M 271, 278, 263 P 93.

Where Named Insured Had No Insurable Interest, Policy Void

Where agent for undisclosed principal took title to land and building purchased for principal in his own name and procured fire insurance policies naming himself as the owner and insured, the principal's equitable ownership was an insurable interest, the agent had no insurable interest, and under this section the contract of insurance was not enforceable. *Stevens v. Steck*, 101 M 569, 577, 55 P 2d 7.

Collateral References

Insurance—118-120.
44 C.J.S. Insurance § 175.

40-212. (8076) When interest must exist. An interest insured must exist when the insurance takes effect, and when the loss occurs, but need not exist in the meantime.

History: En. Sec. 3406, Civ. C. 1895; re-en. Sec. 5561, Rev. C. 1907; re-en. Sec. 8076, R. C. M. 1921. Cal. Civ. C. Sec. 2552. Field Civ. C. Sec. 1372.

Operation and Effect

Under the preceding section, if one insuring property against fire loss has no insurable interest therein the contract is

void, and under this section, an interest insured must exist when the insurance takes effect and when the loss occurs. Libby Lbr. Co. v. Pacific States Fire Ins. Co., 79 M 166, 174, 255 P 340.

Collateral References

Insurance ⇨ 114.
44 C.J.S. Insurance § 175.

40-213. (8077) Effect of transfer. Except in the cases specified in the next four sections, and in the cases of life, accident, and health insurance, a change of interest in any part of a thing insured, unaccompanied by a corresponding change of interest in the insurance, suspends the insurance to an equivalent extent, until the interest in the thing and the interest in the insurance are vested in the same person.

History: En. Sec. 3407, Civ. C. 1895; re-en. Sec. 5562, Rev. C. 1907; re-en. Sec. 8077, R. C. M. 1921. Cal. Civ. C. Sec. 2553. Based on Field Civ. C. Sec. 1373.

Collateral References

Insurance ⇨ 328.
45 C.J.S. Insurance § 561.

40-214. (8078) Transfer after loss. A change of interest in a thing insured, after the occurrence of any injury which results in a loss, does not affect the right of the insured to indemnity for the loss.

History: En. Sec. 3408, Civ. C. 1895; re-en. Sec. 5563, Rev. C. 1907; re-en. Sec. 8078, R. C. M. 1921. Cal. Civ. C. Sec. 2554. Field Civ. C. Sec. 1374.

Collateral References

Insurance ⇨ 328(1).
45 C.J.S. Insurance § 562.

40-215. (8079) Exception in the case of several subjects in one policy. A change of interest in one or more of several distinct things, separately insured by one policy, does not avoid the insurance as to the others.

History: En. Sec. 3409, Civ. C. 1895; re-en. Sec. 5564, Rev. C. 1907; re-en. Sec. 8079, R. C. M. 1921. Cal. Civ. C. Sec. 2555. Field Civ. C. Sec. 1375.

Collateral References

Insurance ⇨ 328(15).
45 C.J.S. Insurance § 546.

40-216. (8080) In case of the death of the insured. A change of interest, by will or succession, on the death of the insured, does not avoid an insurance; and his interest in the insurance passes to the person taking his interest in the thing insured.

History: En. Sec. 3410, Civ. C. 1895; re-en. Sec. 5565, Rev. C. 1907; re-en. Sec. 8080, R. C. M. 1921. Cal. Civ. C. Sec. 2556. Field Civ. C. Sec. 1376.

Collateral References

Insurance ⇨ 328(11).
45 C.J.S. Insurance § 565.

40-217. (8081) In the case of transfer between cotenants. A transfer of interest by one of several partners, joint owners, or owners in common, who are jointly insured, to the others, does not avoid an insurance, even though it has been agreed that the insurance shall cease upon an alienation of the thing insured.

History: En. Sec. 3411, Civ. C. 1895; re-en. Sec. 5566, Rev. C. 1907; re-en. Sec. 8081, R. C. M. 1921. Cal. Civ. C. Sec. 2557. Field Civ. C. Sec. 1377.

Collateral References

Insurance ⇨ 328(3).
45 C.J.S. Insurance § 564.

40-218. (8082) Policy—when void. Every stipulation in a policy of insurance for the payment of loss, whether the person insured has or has not any interest in the property insured, or that the policy shall be received as proof of such interest, and every policy executed by way of gaming or wagering, is void.

History: En. Sec. 3412, Civ. C. 1895;
re-en. Sec. 5567, Rev. C. 1907, re-en. Sec.
8082, R. C. M. 1921. Cal. Civ. C. Sec. 2558.

Collateral References
Insurance—120.
44 C.J.S. Insurance § 33.

CHAPTER 3

CONCEALMENT AND REPRESENTATION

- Section 40-301. Concealment, what constitutes.
40-302. Effect of concealment.
40-303. What must be disclosed.
40-304. Matters which need not be communicated without inquiry.
40-305. Test of materiality.
40-306. Matters which each is bound to know.
40-307. Waiver of communication.
40-308. Interest of insured.
40-309. Fraudulent warranty.
40-310. Matters of opinion.
40-311. Representation—may be oral or written.
40-312. When may be made.
40-313. How interpreted.
40-314. Representation as to future.
40-315. How may affect policy.
40-316. When may be withdrawn.
40-317. Time intended by representation.
40-318. Representing information.
40-319. Falsity.
40-320. Effect of falsity.
40-321. Materiality.
40-322. Solicitor deemed agent of the company.
40-323. Application of provisions of this chapter.

40-301. (8083) Concealment, what constitutes. A neglect to communicate that which a party knows, and ought to communicate, is called a concealment.

History: En. Sec. 3420, Civ. C. 1895;
re-en. Sec. 5568, Rev. C. 1907; re-en. Sec.
8083, R. C. M. 1921. Cal. Civ. C. Sec. 2561.
Field Civ. C. Sec. 1378.

Collateral References
Insurance—258.
45 C.J.S. Insurance § 473.
29 Am. Jur. 436, Insurance, §§ 540 et
seq.

40-302. (8084) Effect of concealment. A concealment, whether intentional or unintentional, entitles the injured party to rescind a contract of insurance.

History: En. Sec. 3421, Civ. C. 1895;
re-en. Sec. 5569, Rev. C. 1907; re-en. Sec.
8084, R. C. M. 1921. Cal. Civ. C. Sec. 2562.
Field Civ. C. Sec. 1379.

Collateral References
Insurance—261.
45 C.J.S. Insurance § 473.

40-303. (8085) What must be disclosed. Each party to a contract of insurance must communicate to the other, in good faith, all the facts within his knowledge which are or which he believes to be material to the contract, and which the other has not the means of ascertaining, and as to which he makes no warranty.

History: En. Sec. 3422, Civ. C. 1895; re-en. Sec. 5570, Rev. C. 1907; re-en. Sec. 8085, R. C. M. 1921. Cal. Civ. C. Sec. 2563. Field Civ. C. Sec. 1380.

Intentional Concealment of Material Facts

If the insured intentionally conceals facts which are material, or makes false representations with reference to them, intending to mislead the insurer, he is guilty of actual fraud, which, at the option of the latter, avoids the policy. Such a fraud, however, is always a question of fact for the jury, under section 13-310, and unless the condition of the evidence is such that only one inference may be drawn from it, the court may not direct a verdict. *McDonald v. Northern Benefit Association*, 113 M 595, 606, 131 P 2d 479.

Operation and Effect

If the insured intentionally conceals facts which are material or makes false representations with reference to them, intending to mislead the insurer, he is guilty of actual fraud, which, at the option of the latter, avoids the policy. *Pelican v. Mutual Life Ins. Co.*, 44 M 277, 288, 119 P 778.

40-304. (8086) Matters which need not be communicated without inquiry. Neither party to a contract of insurance is bound to communicate information of the matters following, except in answer to the inquiries of the other:

1. Those which the other knows;
2. Those which, in the exercise of ordinary care, the other ought to know, and of which the former has no reason to suppose him ignorant;
3. Those of which the other waives communication;
4. Those which prove or tend to prove the existence of a risk excluded by a warranty, and which are not otherwise material; and,
5. Those which relate to a risk excepted from the policy, and which are not otherwise material.

History: En. Sec. 3423, Civ. C. 1895; re-en. Sec. 5571, Rev. C. 1907; re-en. Sec. 8086, R. C. M. 1921. Cal. Civ. C. Sec. 2564. Field Civ. C. Sec. 1381.

Agent's Knowledge of Defect Imputed to Principal

Where the agent of an insurance company at the time he wrote a policy insuring the owner of a city building against public liability for injuries suffered there-

in his application for a life insurance policy which provided, among other things, that the statements of the insured, in the absence of fraud, should be deemed representations and not warranties, the applicant represented that the only illness or disease he had had since childhood was a slight cold, and that he had consulted, or been treated by, only one physician for five years last past. The evidence showed that four months before making these statements on his medical examination he had been treated by two physicians and was present at a consultation respecting his case held between the two and a third, that the treatment was not for a cold but for a serious ulcer of the throat of syphilitic or tubercular nature. Insured died of tubercular laryngitis some four months after issuance of the policy. Held, that the representations, accepted and acted upon as true by defendant to its prejudice, were as to material facts affecting the risk, intended to mislead and therefore fraudulent, justifying the insurer in avoiding the policy. *Williams v. Mutual Life Ins. Co. of N. Y.*, 61 M 66, 72, 201 P 320.

Collateral References

Insurance 258.
45 C.J.S. Insurance § 473.

in provided the building was in the care of but a single tenant knew that the premises were occupied by several tenants, his knowledge was imputable to the insurer, his principal, and in the absence of misrepresentations and concealment on the part of the insured, the breach of the single tenancy clause did not void the policy. *Curtis v. Zurich General Accident & Liability Insurance Co. Ltd.*, 103 M 275, 279, 89 P 2d 1038.

40-305. (8087) Test of materiality. Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries.

History: En. Sec. 3424, Civ. C. 1895; re-en. Sec. 5572, Rev. C. 1907; re-en. Sec. 8087, R. C. M. 1921. Cal. Civ. C. Sec. 2565. Field Civ. C. Sec. 1382.

Collateral References

Insurance 260.
45 C.J.S. Insurance § 473.

40-306. (8088) Matters which each is bound to know. Each party to a contract of insurance is bound to know all the general causes which are open to his inquiry, equally with that of the other, and which may affect either the political or material perils contemplated, and all general usages of trade.

History: En. Sec. 3425, Civ. C. 1895; re-en. Sec. 5573, Rev. C. 1907; re-en. Sec. 8088, R. C. M. 1921. Cal. Civ. C. Sec. 2566. Field Civ. C. Sec. 1383.

40-307. (8089) Waiver of communication. The right to information of material facts may be waived, either by the terms of insurance or by neglect to make inquiries as to such facts, where they are distinctly implied in other facts of which information is communicated.

History: En. Sec. 3426, Civ. C. 1895; re-en. Sec. 5574, Rev. C. 1907; re-en. Sec. 8089, R. C. M. 1921. Cal. Civ. C. Sec. 2567. Field Civ. C. Sec. 1384.

Agent's Knowledge of Defect Imputed to Principal

Where the agent of an insurance company at the time he wrote a policy insuring the owner of a city building against public liability for injuries suffered therein provided the building was in the care of but a single tenant knew

that the premises were occupied by several tenants, his knowledge was imputable to the insurer, his principal, and in the absence of misrepresentations and concealment on the part of the insured, the breach of the single tenancy clause did not void the policy. *Curtis v. Zurich General Accident & Liability Insurance Co. Ltd.*, 108 M 275, 280, 89 P 2d 1038.

Collateral References

Insurance 372.
45 C.J.S. Insurance § 674.

40-308. (8090) Interest of insured. Information of the nature or amount of the interest of one insured need not be communicated unless in answer to an inquiry, except as prescribed by section 40-402.

History: En. Sec. 3427, Civ. C. 1895; re-en. Sec. 5575, Rev. C. 1907; re-en. Sec. 8090, R. C. M. 1921. Cal. Civ. C. Sec. 2568. Field Civ. C. Sec. 1385.

Disclosure Interest of Assured

Under this section information as to the interest of the assured on the property insured, if he is not the absolute owner thereof, must be supplied to the

insurance company by the applicant as required by section 40-402. *Stevens v. Steek et al.*, 101 M 569, 576, 55 P 2d 7.

Id. Since under this section a fire insurance policy must specify the interest of the assured, it is material to the validity of the policy and concealment or misrepresentation of such fact renders the policy void.

40-309. (8091) Fraudulent warranty. An intentional and fraudulent omission, on the part of one insured, to communicate information of matters proving or tending to prove the falsity of a warranty, entitles the insurer to rescind.

History: En. Sec. 3428, Civ. C. 1895; re-en. Sec. 5576, Rev. C. 1907; re-en. Sec. 8091, R. C. M. 1921. Cal. Civ. C. Sec. 2569. Field Civ. C. Sec. 1386.

Collateral References

29 Am. Jur. 421, Insurance, §§ 522 et seq.

References

Weyh et al. v. California Ins. Co., 89 M 298, 305, 296 P 1030.

Error in periodic reports required by insurance policy respecting property covered or other insurance in effect, as breach of warranty. 10 ALR 2d 214.

40-310. (8092) Matters of opinion. Neither party to a contract of insurance is bound to communicate, even upon inquiry, information of his own judgment upon the matters in question.

History: En. Sec. 3429, Civ. C. 1895;
re-en. Sec. 5577, Rev. C. 1907; re-en. Sec.
8092, R. C. M. 1921. Cal. Civ. C. Sec. 2570.
Field Civ. C. Sec. 1387.

Collateral References
29 Am. Jur. 425, Insurance, § 527.

40-311. (8093) Representation—may be oral or written. A representation may be oral or written.

History: En. Sec. 3430, Civ. C. 1895;
re-en. Sec. 5578, Rev. C. 1907; re-en. Sec.
8093, R. C. M. 1921. Cal. Civ. C. Sec. 2571.
Field Civ. C. Sec. 1388.

Collateral References
Insurance—253.
45 C.J.S. Insurance § 473.

40-312. (8094) When may be made. A representation may be made at the same time with issuing the policy, or before it.

History: En. Sec. 3431, Civ. C. 1895; 8094, R. C. M. 1921. Cal. Civ. C. Sec. 2572.
re-en. Sec. 5579, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1389.

40-313. (8095) How interpreted. The language of a representation is to be interpreted by the same rules as the language of contracts in general.

History: En. Sec. 3432, Civ. C. 1895; 8095, R. C. M. 1921. Cal. Civ. C. Sec. 2573.
re-en. Sec. 5580, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1390.

40-314. (8096) Representation as to future. A representation as to the future is to be deemed a promise, unless it appears that it was merely a statement of belief or expectation.

History: En. Sec. 3433, Civ. C. 1895; 8096, R. C. M. 1921. Cal. Civ. C. Sec. 2574.
re-en. Sec. 5581, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1391.

40-315. (8097) How may affect policy. A representation cannot be allowed to qualify an express provision in a contract of insurance; but it may qualify an implied warranty.

History: En. Sec. 3434, Civ. C. 1895; 8097, R. C. M. 1921. Cal. Civ. C. Sec. 2575.
re-en. Sec. 5582, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1392.

40-316. (8098) When may be withdrawn. A representation may be altered or withdrawn before the insurance is affected, but not afterwards.

History: En. Sec. 3435, Civ. C. 1895; 8098, R. C. M. 1921. Cal. Civ. C. Sec. 2576.
re-en. Sec. 5583, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1393.

40-317. (8099) Time intended by representation. The completion of the contract of insurance is the time to which a representation must be presumed to refer.

History: En. Sec. 3436, Civ. C. 1895; 8099, R. C. M. 1921. Cal. Civ. C. Sec. 2577.
re-en. Sec. 5584, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1394.

40-318. (8100) Representing information. When a person insured has no personal knowledge of a fact, he may nevertheless repeat information which he has upon the subject, and which he believes to be true, with the explanation that he does so on the information of others, or he may submit the information, in its whole extent, to the insurer; and in neither case is he responsible for its truth, unless it proceeds from an agent of the insured, whose duty it is to give the intelligence.

History: En. Sec. 3437, Civ. C. 1895; 8100, R. C. M. 1921. Cal. Civ. C. Sec. 2578.
re-en. Sec. 5585, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1395.

40-319. (8101) Falsity. A representation is to be deemed false when the facts fail to correspond with its assertions or stipulations.

History: En. Sec. 3438, Civ. C. 1895; 8101, R. C. M. 1921. Cal. Civ. C. Sec. 2579.
re-en. Sec. 5586, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1396.

40-320. (8102) Effect of falsity. If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time when the representation becomes false.

History: En. Sec. 3439, Civ. C. 1895;
re-en. Sec. 5587, Rev. C. 1907; re-en. Sec.
8102, R. C. M. 1921. Cal. Civ. C. Sec. 2580.
Field Civ. C. Sec. 1396.

Collateral References

Effect of error in making periodic reports required by insurance policy respecting property covered or other insurance in effect. 10 ALR 2d 214.

40-321. (8103) Materiality. The materiality of a representation is determined by the same rule as the materiality of a concealment.

History: En. Sec. 3440, Civ. C. 1895; 8103, R. C. M. 1921. Cal. Civ. C. Sec. 2581.
re-en. Sec. 5588, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1398.

40-322. (8104) Solicitor deemed agent of the company. Any person who shall solicit an application for insurance upon the life of another shall, in any controversy between the assured or his beneficiary and the company issuing any policy upon such application, be regarded as the agent of the company, and not the agent of the assured.

History: En. Sec. 1, Ch. 30, L. 1907;
re-en. Sec. 5589, Rev. C. 1907; re-en. Sec.
8104, R. C. M. 1921.

Collateral References

Insurance⇒129.
44 C.J.S. Insurance § 228.

40-323. (8105) Application of provisions of this chapter. The provisions of this chapter apply as well to a modification of a contract of insurance as to its original formation.

History: En. Sec. 3441, Civ. C. 1895;
re-en. Sec. 5590, Rev. C. 1907; re-en. Sec.
8105, R. C. M. 1921. Cal. Civ. C. Sec. 2582.
Field Civ. C. Sec. 1399.

Collateral References

Insurance⇒144, 250(1).
44 C.J.S. Insurance § 281; 45 C.J.S. Insurance § 473.

CHAPTER 4

THE POLICY

- Section 40-401. Policy, what constitutes.
40-402. What must be specified in a policy.
40-403. Policy must contain the whole contract.
40-404. Whose interest is covered.
40-405. Insurance by agent or trustee.
40-406. Insurance by part owner.
40-407. General terms.
40-408. Successive owners.
40-409. Transfer of the thing insured.
40-410. Open and valued policies.
40-411. Open policy defined.
40-412. Valued policy defined.
40-413. Running policy defined.
40-414. Effect of receipt.
40-415. Agreement not to transfer claim—when void.

40-401. (8106) Policy, what constitutes. The written instrument, in which a contract of insurance is set forth, is called a policy of insurance.

History: En. Sec. 3450, Civ. C. 1895; 8106, R. C. M. 1921. Cal. Civ. C. Sec. 2586.
re-en. Sec. 5591, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1400.

Delinquent Premiums — Policies Construed as Any Other Contract

Contracts of insurance, like other contracts must be construed according to the terms which the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary and popular sense; the condition in a policy of life insurance that the policy shall cease if the stipulated premium shall not be paid on or before the day fixed is of the very essence and substance of the contract, against which even a court of equity cannot grant relief. (Not citing this section.) *Conlon v. Northern Life Insurance Co.*, 108 M 473, 498, 92 P 2d 284.

Insurance Policies To be Liberally Construed

A policy of insurance must be liberally construed in favor of the insured, and strictly construed against the insurer. (Not citing this section.) *Wills v. Midland National Life Insurance Co.*, 108 M 536, 543, 91 P 2d 695.

Matter Not Included, Nor Referred to in Policy

Under this and section 40-403, the application for life insurance is not a part of the policy unless incorporated therein by reference or otherwise. *Schroeder v.*

Metropolitan Life Insurance Co., 103 M 547, 557, 63 P 2d 1016.

References

Baker v. Pennsylvania Fire Ins. Co., 81 M 271, 277, 263 P 93; *State v. Holmes*, 100 M 256, 281, 47 P 2d 624.

Collateral References

Insurance—124.

44 C.J.S. Insurance § 223.

29 Am. Jur. 141, Insurance, §§ 126 et seq.

Oral contracts of insurance. 15 ALR 995.

Validity, applicability, construction, and effect of statute relating to size or other characteristics of type or color of printing for insurance policies. 72 ALR 875.

Departure from standard policy as affecting enforceability of policy provision against insurer. 113 ALR 773.

Validity, construction, and effect of approval or disapproval by insurance commissioner of form of policy. 119 ALR 877.

Applicability to limitation prescribed by policy of insurance, or by special statutory provision in relation to insurance, of provisions of statute of limitations extending time or fixing time when action deemed commenced. 149 ALR 483.

"Family" insurance. 152 ALR 1169.

40-402. (8107) What must be specified in a policy. A policy of insurance must specify:

1. The parties between whom the contract is made;
2. The rate of premium;
3. The property or life insured;
4. The interest of the insured in the property insured, if he is not the absolute owner thereof;
5. The risks insured against; and,
6. The period during which the insurance is to continue.

History: En. Sec. 3451, Civ. C. 1895; re-en. Sec. 5592, Rev. C. 1907; re-en. Sec. 8107, R. C. M. 1921. Cal. Civ. C. Sec. 2587. Field Civ. C. Sec. 1401.

Cross-Reference

Motor vehicle liability policy, sec. 53-438.

Operation and Effect

A fire insurance policy specifying the parties between whom the contract is made, the rate of premium, the property insured, the risk insured against and the period of time during which the insurance is to continue, contains all the elements of

a policy of insurance required by the provisions of this and the preceding section. *Baker v. Pennsylvania Fire Ins. Co.*, 81 M 271, 277, 263 P 93.

Under this section a contract of fire insurance must be construed as any other contract; the policy must specify the matters enumerated in this section and this information must be supplied to the insurance company by the applicant for the policy. *Stevens v. Steck et al.*, 101 M 569, 576, 55 P 2d 7.

Collateral References

Insurance—133.

44 C.J.S. Insurance § 227.

40-403. (8108) Policy must contain the whole contract. Every policy of insurance issued or delivered within this state on or after the first day

of January, 1908, by any life insurance corporation doing business within the state, shall contain the entire contract between the parties.

History: En. Sec. 1, Ch. 39, L. 1907; Sec. 5593, Rev. C. 1907; re-en. Sec. 8108, R. C. M. 1921.

When Application Not Part of Contract

In an action to recover on a life insur-

ance policy, the application for the policy may not be considered as a part of the contract unless incorporated therein by reference or otherwise. *Schroeder v. Metropolitan Life Insurance Co.*, 103 M 547, 557, 63 P 2d 1016.

40-404. (8109) Whose interest is covered. When the name of the person intended to be insured is specified in a policy, it can be applied only to his own proper interest.

History: En. Sec. 3452, Civ. C. 1895; re-en. Sec. 5594, Rev. C. 1907; re-en. Sec. 8109, R. C. M. 1921. Cal. Civ. C. Sec. 2588. Field Civ. C. Sec. 1402.

Operation and Effect

Where agent for undisclosed principal purchased land and building in his own name and procured fire insurance policies naming himself as sole owner and insured and interest of the principal was not dis-

closed, under this and section 40-405, the policy applied only to the agent, whose was the only name specified in the policy, and it applied only to "his own proper interest," which was nil. *Stevens v. Steck*, 101 M 569, 578, 55 P 2d 7.

Collateral References

Insurance⌘157.

44 C.J.S. Insurance § 309.

40-405. (8110) Insurance by agent or trustee. When an insurance is made by an agent or trustee, the fact that his principal or beneficiary is the person really insured may be indicated by describing him as agent or trustee, or by other general words in the policy.

History: En. Sec. 3453, Civ. C. 1895; re-en. Sec. 5595, Rev. C. 1907; re-en. Sec. 8110, R. C. M. 1921. Cal. Civ. C. Sec. 2589. Field Civ. C. Sec. 1403.

Principal Has No Interest in Insurance in Agent's Name Unless Named as Agent

Where agent for undisclosed principal purchased land and building in his own name and procured fire insurance policies

naming himself as sole owner and insured, and interest of the principal was not shown as indicated by this section, the principal could not enforce the policies. *Stevens v. Steck*, 101 M 569, 578, 55 P 2d 7.

Collateral References

Insurance⌘133(1), 156(1).

44 C.J.S. Insurance §§ 227, 308.

40-406. (8111) Insurance by part owner. To render an insurance, effected by one partner or part owner, applicable to the interest of his copartners, or of other part owners, it is necessary that the terms of the policy should be such as are applicable to the joint or common interest.

History: En. Sec. 3454, Civ. C. 1895; re-en. Sec. 5596, Rev. C. 1907; re-en. Sec. 8111, R. C. M. 1921. Cal. Civ. C. Sec. 2590. Field Civ. C. Sec. 1404.

Collateral References

Insurance⌘156.

44 C.J.S. Insurance § 308.

40-407. (8112) General terms. When the description of the insured in a policy is so general that it may comprehend any person or any class of persons, he only can claim the benefit of the policy who can show that it was intended to include him.

History: En. Sec. 3455, Civ. C. 1895; re-en. Sec. 5597, Rev. C. 1907; re-en. Sec. 8112, R. C. M. 1921. Cal. Civ. C. Sec. 2591. Field Civ. C. Sec. 1405.

40-408. (8113) Successive owners. A policy may be so framed that it will inure to the benefit of whomsoever, during the continuance of the risk, may become the owner of the interest insured.

History: En. Sec. 3456, Civ. C. 1895; re-en. Sec. 5598, Rev. C. 1907; re-en. Sec. 8113, R. C. M. 1921. Cal. Civ. C. Sec. 2592. Field Civ. C. Sec. 1406.

40-409. (8114) Transfer of the thing insured. The mere transfer of a thing insured does not transfer the policy, but suspends it until the same person becomes the owner of both the policy and the thing insured.

History: En. Sec. 3457, Civ. C. 1895; re-en. Sec. 5599, Rev. C. 1907; re-en. Sec. 8114, R. C. M. 1921. Cal. Civ. C. Sec. 2593. Field Civ. C. Sec. 1407.

Collateral References

Insurance⌘328.
45 C.J.S. Insurance § 561.

40-410. (8115) Open and valued policies. A policy is either open or valued.

History: En. Sec. 3458, Civ. C. 1895; re-en. Sec. 5600, Rev. C. 1907; re-en. Sec. 8115, R. C. M. 1921. Cal. Civ. C. Sec. 2594. Field Civ. C. Sec. 1408.

Collateral References

Insurance⌘499, 500.
45 C.J.S. Insurance §§ 915, 916.

40-411. (8116) Open policy defined. An open policy is one in which the value of the thing insured is not agreed upon, but is left to be ascertained in case of loss.

History: En. Sec. 3459, Civ. C. 1895; re-en. Sec. 5601, Rev. C. 1907; re-en. Sec. 8116, R. C. M. 1921. Cal. Civ. C. Sec. 2595. Field Civ. C. Sec. 1409.

Collateral References

Insurance⌘499.
45 C.J.S. Insurance § 915.

40-412. (8117) Valued policy defined. A valued policy is one which expresses on its face an agreement that the thing insured shall be valued at a specified sum.

History: En. Sec. 3460, Civ. C. 1895; re-en. Sec. 5602, Rev. C. 1907; re-en. Sec. 8117, R. C. M. 1921. Cal. Civ. C. Sec. 2596. Field Civ. C. Sec. 1410.

Collateral References

Insurance⌘500.
45 C.J.S. Insurance § 916.

40-413. (8118) Running policy defined. A running policy is one which contemplates successive insurances, and which provides that the object of the policy may be from time to time defined, especially as to the subjects of insurance, by additional statements or indorsements.

History: En. Sec. 3461, Civ. C. 1895; re-en. Sec. 5603, Rev. C. 1907; re-en. Sec. 8118, R. C. M. 1921. Cal. Civ. C. Sec. 2597. Field Civ. C. Sec. 1411.

Collateral References

Insurance⌘157.
44 C.J.S. Insurance § 49.

40-414. (8119) Effect of receipt. An acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment, so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid.

History: En. Sec. 3462, Civ. C. 1895; re-en. Sec. 5604, Rev. C. 1907; re-en. Sec. 8119, R. C. M. 1921. Cal. Civ. C. Sec. 2598. Field Civ. C. Sec. 1412.

Collateral References

Insurance⌘186.
44 C.J.S. Insurance § 344.

40-415. (8120) Agreement not to transfer claim—when void. An agreement made before a loss, not to transfer the claim of a person insured against the insurer, after the loss has happened, is void.

History: En. Sec. 3463, Civ. C. 1895; re-en. Sec. 5605, Rev. C. 1907; re-en. Sec. 8120, R. C. M. 1921. Cal. Civ. C. Sec. 2599. Field Civ. C. Sec. 1413.

Collateral References

Insurance⌘594.
46 C.J.S. Insurance §§ 1193, 1199.

CHAPTER 5

WARRANTIES—THE PREMIUM

- Section 40-501. Warranty—express or implied.
 40-502. Form—no particular words necessary.
 40-503. Warranty—in what contained.
 40-504. Past, present and future warranties.
 40-505. Warranty as to past or present.
 40-506. Warranty as to the future.
 40-507. Performance excused.
 40-508. When acts avoid the policy.
 40-509. Policy may provide for avoidance.
 40-510. Breach without fraud.
 40-511. When premium is earned.
 40-512. Return of premium.
 40-513. When not allowed.
 40-514. Return for fraud, misrepresentation, ignorance or nonliability of insurer.
 40-515. Overinsurance by several insurers.
 40-516. Contribution.
 40-517. Proportionate contribution.

40-501. (8121) Warranty—express or implied. A warranty is either express or implied.

History: En. Sec. 3470, Civ. C. 1895; re-en. Sec. 5606, Rev. C. 1907; re-en. Sec. 8121, R. C. M. 1921. Cal. Civ. C. Sec. 2603. Field Civ. C. Sec. 1414.

Collateral References

Insurance 264(1).
 45 C.J.S. Insurance § 473.
 29 Am. Jur. 426, Insurance, §§ 529 et seq.

40-502. (8122) Form—no particular words necessary. No particular form of words is necessary to create a warranty.

History: En. Sec. 3471, Civ. C. 1895; re-en. Sec. 5607, Rev. C. 1907; re-en. Sec. 8122, R. C. M. 1921. Cal. Civ. C. Sec. 2604. Field Civ. C. Sec. 1415.

40-503. (8123) Warranty—in what contained. Every express warranty, made at or before the execution of the policy, must be contained in the policy itself, or in another instrument signed by the insured and referred to in the policy, as making a part of it.

History: En. Sec. 3472, Civ. C. 1895; re-en. Sec. 5608, Rev. C. 1907; re-en. Sec. 8123, R. C. M. 1921. Cal. Civ. C. Sec. 2605. Based on Field Civ. C. Sec. 1416.

Beneficiary's Adoption of Physician's Certificate as Bearing Upon "Sound Health" Warranty

Where attending physician recited in death certificate that he treated insured some six weeks before date of policy and cause of death was heart disease and acute bronchitis, and beneficiary adopted the certificate in making proof of death, the certificate makes out a prima facie case of the truth of the statements, and is sufficient evidence to establish breach of warranty. (Not citing this section.) *Schroeder v. Metropolitan Life Insurance Co.*, 103 M 547, 561, 63 P 2d 1016.

Operation and Effect

The provision of this section that every

express warranty made at, or before, the execution of a policy must be contained in the policy itself, or in another instrument signed by the insured and referred to in the policy as making a part of it, is applicable to fidelity or indemnity bonds. *Montana A. F. Corp. v. Federal Surety Co.*, 85 M 149, 167, 278 P 116.

"Sound Health" Warranty

The term "sound health" as used in life insurance policy under which insurer may declare the policy void if insured is not so at date of the issuance of the policy, means freedom from any physical affliction of a serious nature undermining his constitution; does not apply to temporary afflictions; when stipulated in policy is a warranty in nature of condition precedent requiring strict compliance to justify recovery. *Schroeder v. Metropolitan Life Insurance Co.*, 103 M 547, 557, 63 P 2d 1016.

"Warranty"

A "warranty" in a life insurance policy must be part and parcel of the contract—made so by express agreement of the parties upon the face thereof; and where a warranty is found to have been violated it is unnecessary to determine the legal effect of an alleged fraudulent representa-

tion appearing in the application for the policy. *Schroeder v. Metropolitan Life Insurance Co.*, 103 M 547, 557, 63 P 2d 1016.

References

Cited or applied as section 5608, Revised Codes, in *Mandoli v. National Council etc.*, 58 M 671, 679, 194 P 493.

40-504. (8124) Past, present and future warranties. A warranty may relate to the past, the present, the future, or to any or all of these.

History: En. Sec. 3473, Civ. C. 1895; 8124, R. C. M. 1921. Cal. Civ. C. Sec. 2606.
re-en. Sec. 5609, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1417.

40-505. (8125) Warranty as to past or present. A statement in a policy, of a matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty thereof.

History: En. Sec. 3474, Civ. C. 1895; re-en. Sec. 5610, Rev. C. 1907; re-en. Sec. 8125, R. C. M. 1921. Cal. Civ. C. Sec. 2607.
Field Civ. C. Sec. 1418.

Operation and Effect

By this section a statement in an insur-

ance policy of a matter relating to the thing insured, or to the risk, as a fact, is made an express warranty, a breach of which in its inception prevents the policy from attaching to the risk. *Weyh et al. v. California Ins. Co.*, 89 M 298, 305, 296 P 1030.

40-506. (8126) Warranty as to the future. A statement in a policy, which imports that it is intended to do or not to do a thing which materially affects the risk, is a warranty that such an act or omission shall take place.

History: En. Sec. 3475, Civ. C. 1895; 8126, R. C. M. 1921. Cal. Civ. C. Sec. 2608.
re-en. Sec. 5611, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1419.

40-507. (8127) Performance excused. When, before the time arrives for the performance of a warranty relating to the future, a loss insured against happens, or performance becomes unlawful at the place of the contract, or impossible, the omission to fulfil the warranty does not avoid the policy.

History: En. Sec. 3476, Civ. C. 1895; re-en. Sec. 5612, Rev. C. 1907; re-en. Sec. 8127, R. C. M. 1921. Cal. Civ. C. Sec. 2609.
Field Civ. C. Sec. 1420.

Collateral References

Insurance—268.
45 C.J.S. Insurance § 473.

40-508. (8128) When acts avoid the policy. The violation of a material warranty, or other material provision of a policy, on the part of either party thereto, entitles the other to rescind.

History: En. Sec. 3477, Civ. C. 1895; re-en. Sec. 5613, Rev. C. 1907; re-en. Sec. 8128, R. C. M. 1921. Cal. Civ. C. Sec. 2610.
Field Civ. C. Sec. 1421.

References

Weyh et al. v. California Ins. Co., 89 M 298, 305, 296 P 1030.

40-509. (8129) Policy may provide for avoidance. A policy may declare that a violation of specified provisions shall avoid it, otherwise the breach of an immaterial provision does not avoid the policy.

History: En. Sec. 3478, Civ. C. 1895; re-en. Sec. 5614, Rev. C. 1907; re-en. Sec. 8129, R. C. M. 1921. Cal. Civ. C. Sec. 2611.
Field Civ. C. Sec. 1422.

Operation and Effect

Held that this section providing that a policy of insurance may declare that a violation of specified provisions shall avoid it, otherwise the breach of an immaterial

provision does not avoid the policy, refers to provisions other than warranties. *Weyh et al. v. California Ins. Co.*, 89 M 298, 305, 296 P 1030.

40-510. (8130) Breach without fraud. A breach of warranty, without fraud, merely exonerates the insurer from the time that it occurs, or where it is broken in its inception prevents the policy from attaching to the risk.

History: En. Sec. 3479, Civ. C. 1895; re-en. Sec. 5615, Rev. C. 1907; re-en. Sec. 8130, R. C. M. 1921. Cal. Civ. C. Sec. 2612. Field Civ. C. Sec. 1423.

Operation and Effect

By section 40-505, a statement in an in-

surance policy of a matter relating to the thing insured, or the risk, as a fact, is made an express warranty, a breach of which in its inception prevents the policy from attaching to the risk. *Weyh et al. v. California Ins. Co.*, 89 M 298, 305, 296 P 1030.

40-511. (8131) When premium is earned. An insurer is entitled to payment of the premium as soon as the thing insured is exposed to the peril insured against.

History: En. Sec. 3490, Civ. C. 1895; re-en. Sec. 5616, Rev. C. 1907; re-en. Sec. 8131, R. C. M. 1921. Cal. Civ. C. Sec. 2616. Field Civ. C. Sec. 1424.

Collateral References

Insurance—181.
44 C.J.S. Insurance § 355.
29 Am. Jur. 326, Insurance, §§ 377 et seq.

40-512. (8132) Return of premium. A person insured is entitled to a return of premium, as follows:

1. To the whole premium, if no part of his interest in the thing insured be exposed to any of the perils insured against.

2. Where the insurance is made for a definite period of time, and the insured surrenders his policy, to such proportion of the premium as corresponds with the unexpired time, after deducting from the whole premium any claim for loss or damage under the policy which has previously accrued.

History: En. Sec. 3491, Civ. C. 1895; re-en. Sec. 5617, Rev. C. 1907; re-en. Sec. 8132, R. C. M. 1921. Cal. Civ. C. Sec. 2617. Based on Field Civ. C. Sec. 1425.

Collateral References

Insurance—198
44 C.J.S. Insurance § 405.
29 Am. Jur. 376, Insurance, §§ 452 et seq.

References

Osborne v. Supreme Lodge etc. Ins. Dept., 69 M 361, 368, 222 P 456.

Right of infant to recover back insurance premiums. 94 ALR 965.

40-513. (8133) When not allowed. If a peril insured against has existed, and the insurer has been liable for any period, however short, the insured is not entitled to return of premiums, so far as that particular risk is concerned.

History: En. Sec. 3492, Civ. C. 1895; re-en. Sec. 5618, Rev. C. 1907; re-en. Sec. 8133, R. C. M. 1921. Cal. Civ. C. Sec. 2618.

40-514. (8134) Return for fraud, misrepresentation, ignorance or non-liability of insurer. A person insured is entitled to a return of the premium when the contract is voidable, on account of the fraud or misrepresentation of the insurer, or on account of facts, of the existence of which the insured was ignorant without his fault; or when, by any default of the insured other than actual fraud, the insurer never incurred any liability under the policy.

History: En. Sec. 3493, Civ. C. 1895; re-en. Sec. 5619, Rev. C. 1907; re-en. Sec.

8134, R. C. M. 1921. Cal. Civ. C. Sec. 2619. Field Civ. C. Sec. 1426.

"Actual Fraud"—Payments Not Required To Be Returned

Where there was actual fraud on the part of the decedent in securing membership in a mutual benefit association by reason of false statements made by him in his application therefor, which prevented the membership from ever becoming effective, the association was not, under this section required to repay to the beneficiary a certificate fee of \$5 and several monthly assessments of \$1 each paid by decedent prior to his death, as it would have been under this section in case of defaults other than those caused by fraud.

McDonald v. Northern Benefit Association, 113 M 595, 609, 131 P 2d 479.

Operation and Effect

In an action to recover back life insurance premiums alleged to have been paid without consideration and under the mistaken idea that the policy was still in force, whereas it had been forfeited for noncompliance with its conditions, the test whether plaintiff can prevail is: could his beneficiary have collected the amount thereof had the insured died in the meantime? Osborne v. Supreme Lodge etc. Ins. Dept., 69 M 361, 368, 222 P 456.

40-515. (8135) Overinsurance by several insurers. In case of an overinsurance by several insurers, the insurer is entitled to a ratable return of the premium, proportioned to the amount by which the aggregate sum insured in all the policies exceeds the insurable value of the thing at risk.

History: En. Sec. 3494, Civ. C. 1895; 8135, R. C. M. 1921. Cal. Civ. C. Sec. 2620. re-en. Sec. 5620, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1428.

40-516. (8136) Contribution. When an overinsurance is effected by simultaneous policies, the insurers contribute to the premium to be returned in proportion to the amount insured by their respective policies.

History: En. Sec. 3495, Civ. C. 1895; 8136, R. C. M. 1921. Cal. Civ. C. Sec. 2621. re-en. Sec. 5621, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1429.

40-517. (8137) Proportionate contribution. When an overinsurance is effected by successive policies, those only contribute to a return of the premium who are exonerated by prior insurances from the liability assumed by them, and in proportion as the sum for which the premium was paid exceeds the amount for which, on account of prior insurance, they could be made liable.

History: En. Sec. 3496, Civ. C. 1895; 8137, R. C. M. 1921. Cal. Civ. C. Sec. 2622. re-en. Sec. 5622, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1430.

CHAPTER 6**LOSS AND NOTICE OF LOSS**

- Section 40-601. Perils, remote and proximate.
 40-602. Loss incurred in rescue from peril.
 40-603. Excepted perils.
 40-604. Loss caused by wilful act or fraud of insured.
 40-605. Notice of loss.
 40-606. Preliminary proofs.
 40-607. Waiver of defects in notice, etc.
 40-608. Waiver of delay.
 40-609. Certificate—when dispensed with.

40-601. (8138) Perils, remote and proximate. An insurer is liable for a loss of which a peril insured against was the proximate cause; although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause.

History: En. Sec. 3500, Civ. C. 1895; 8138, R. C. M. 1921. Cal. Civ. C. Sec. 2626. re-en. Sec. 5623, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1431.

Collateral References

Insurance 413, 427, 447, 466.
 45 C.J.S. Insurance §§ 756, 809, 851,
 874, 893.

29 Am. Jur. 688, Insurance, §§ 901 et
 seq.

40-602. (8139) Loss incurred in rescue from peril. An insurer is liable where the thing insured is rescued from a peril insured against, that would otherwise have caused a loss, if in the course of such rescue the thing is exposed to a peril not insured against, which permanently deprives the insured of its possession, in whole or in part; or where a loss is caused by efforts to rescue the thing insured from a peril insured against.

History: En. Sec. 3501, Civ. C. 1895;
 re-en. Sec. 5624, Rev. C. 1907; re-en. Sec.
 8139, R. C. M. 1921. Cal. Civ. C. Sec. 2627.
 Field Civ. C. Sec. 1432.

Collateral References

Insurance 402-429.
 45 C.J.S. Insurance §§ 791 et seq., 807
 et seq., 852 et seq., 877 et seq., 885 et
 seq.

40-603. (8140) Excepted perils. Where a peril is specially excepted in a contract of insurance, a loss, which would not have occurred but for such peril, is thereby excepted; although the immediate cause of the loss was a peril which was not excepted.

History: En. Sec. 3502, Civ. C. 1895;
 re-en. Sec. 5625, Rev. C. 1907; re-en. Sec.
 8140, R. C. M. 1921. Cal. Civ. C. Sec. 2628.
 Field Civ. C. Sec. 1433.

Insurer Not Entitled to Equitable Set-Off

Where a fire insurance company had not in its policy excepted liability for loss incurred through the burning of the insured property by the insured himself while insane as it could have done under

this section, it may not, in reliance on section 40-604, declaring that the insurer is not liable for a loss caused by the wilful act of the insured, assert that it was entitled to an equitable set-off. *Hier v. Farmers Mutual Fire Insurance Co.*, 104 M 471, 487, 67 P 2d 831.

Collateral References

Insurance 413, 427, 447, 466.
 45 C.J.S. Insurance §§ 756, 809, 851,
 874, 893.

40-604. (8141) Loss caused by wilful act or fraud of insured. An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of his agents or others.

History: En. Sec. 3503, Civ. C. 1895;
 re-en. Sec. 5626, Rev. C. 1907; re-en. Sec.
 8141, R. C. M. 1921. Cal. Civ. C. Sec. 2633.
 Field Civ. C. Sec. 1434.

Operation and Effect

Under this section, where a bank, insured against robbery and burglary, deliberately permitted the time-locks on its safe and vault to remain unset on the night of a contemplated robbery in aid of an unsuccessful plan of the sheriff to capture the robbers and recapture the loot, in violation of its covenant to have the locks set, the loss was caused by the bank's wilful act and the insurer exonerated. *Harrison State Bk. v. U. S. Fidelity & G. Co.*, 94 M 100, 109, 22 P 2d 1061.

Property Burned by Insane Insured

Under this section where a sane insured wilfully burns insured buildings, neither he nor his estate can recover under the contract of insurance; where the burning is done by the insured while mentally incompetent, the insurer is liable in the absence of a provision in the policy absolving the company from liability under such circumstances. *Hier v. Farmers Mutual Fire Insurance Co.*, 104 M 471, 483, 67 P 2d 831.

Collateral References

Insurance 416, 417, 428, 429, 447.
 45 C.J.S. Insurance §§ 822, 851, 870,
 873.

40-605. (8142) Notice of loss. In case of loss upon an insurance against fire, an insurer is exonerated, if notice thereof be not given to him by some person insured, or entitled to the benefit of the insurance, without unnecessary delay.

History: En. Sec. 3510, Civ. C. 1895; re-en. Sec. 5627, Rev. C. 1907; re-en. Sec. 8142, R. C. M. 1921. Cal. Civ. C. Sec. 2633. Field Civ. C. Sec. 1435.

Operation and Effect

Held, that in the absence of a more specific provision for notice of loss sustained by fire, the provision of this section to the effect that notice thereof given the insurer by some person insured, or entitled to the benefit of the insurance, without unnecessary delay, is controlling, and that where the insurer was notified of loss on the night of the fire by the mortgagee, and the day following one of its agents was advised of the fact by the

insured and later one of its adjusters made an investigation, the requirement of the statute above was sufficiently complied with. *Baker v. Pennsylvania Fire Ins. Co.*, 81 M 271, 280, 263 P 93.

Collateral References

Insurance—535.

45 C.J.S. Insurance § 1006.

29 Am. Jur. 823, Insurance, §§ 1099 et seq.

Act or default of additional insured in respect of giving notice of suit or delivery of suit papers to insurer, as affecting rights of named insured against insurer. 6 ALR 2d 661.

40-606. (8143) Preliminary proofs. When preliminary proof of loss is required by a policy, the insured is not bound to give such proof as would be necessary in a court of justice; but it is sufficient for him to give the best evidence which he has in his power at the time.

History: En. Sec. 3511, Civ. C. 1895; re-en. Sec. 5628, Rev. C. 1907; re-en. Sec. 8143, R. C. M. 1921. Cal. Civ. C. Sec. 2634. Field Civ. C. Sec. 1436.

Cross-Reference

False proof of loss, penalty, sec. 94-2202.

Distinction Between "Notice of Disability" and "Proof of Loss"

The terms "notice" and "proof of loss" within the meaning of a life insurance policy requiring both from one claiming disability benefits, are frequently used interchangeably, but they are distinct, proof being more formal and definite. This is made clear in the case of *Da Rin v. Casualty Company of America*, 41 M 175, 108 P 649, 137 Am. St. Rep. 709, 27 L. R. A. (N. S.) 1164, but prompt proof of loss may answer for notice. *Conlon v. Northern Life Insurance Co.*, 108 M 473, 488, 92 P 2d 284.

"Due Proof of Loss"—No Particular Form

"Due proof of loss" as a condition precedent to the right of recovery of any loss arising under a life insurance policy, providing for disability benefits, unless waived, does not require any particular form or proof which the insurer might arbitrarily demand, but such a statement of facts which, if established, would prima facie require payment of the claim. *Conlon v. Northern Life Insurance Co.*, 108 M 473, 489, 92 P 2d 284.

Insufficient Proof of Disability

A letter received by an insurance company on the date of insured's death advising of insured's illness, one received on the following day asking for blanks on which to submit proof of loss of time

due to sickness, and one advising the company of insured's death, held insufficient as formal proof of disability required under sick benefit provisions of life insurance policy to establish right to sick indemnities to apply on quarterly premium to extend policy beyond the thirty-one days' grace period. *Conlon v. Northern Life Insurance Co.*, 108 M 473, 492, 92 P 2d 284.

Operation and Effect

This section applies to life and accident insurance as well as to fire insurance policies. *Da Rin v. Casualty Company of America*, 41 M 175, 185, 108 P 649.

Purpose and effect of this section declared in *Da Rin v. Casualty Company of America*, 41 M 175, 186, 108 P 649.

Held, that the provision in a health policy requiring written notice within ten days after commencement of disability from sickness, must be read in connection with this section, providing that where preliminary proof of loss is required by a policy, the insured need not give such proof as is necessary in a court of justice, it being sufficient if he give the best evidence which it is in his power to give at the time; held, further, that conditions may be such as to relieve insured from giving any notice whatever except that contained in his final proof of disability. *Wick v. Western Life & Casualty Co.*, 60 M 553, 556, 199 P 272.

Where preliminary proof is required under an insurance policy, the insured is not bound to give such proof as is necessary in a court of justice, the best evidence within his power to give at the time being sufficient to put the insurer upon inquiry to determine whether he is liable. *Caldwell v. Washington F. Nat. Ins. Co.*, 94 M 431, 443, 23 P 2d 257.

Id. Where the insured has attempted to make proof of loss, even though it be insufficient or defective, the burden is cast upon the insurance company to make objection thereto, or it will be deemed to have waived the defect or insufficiency.

Collateral References

Insurance Ⓒ542.

45 C.J.S. Insurance § 1097.

Overvaluation in proof of loss of property insured as fraud avoiding fire insurance policy. 20 ALR 1164.

Denial of liability as waiver of proofs of loss required by insurance policy. 22 ALR 407.

Duty of insured under provision of policy requiring separation of damaged and undamaged property and inventory of same in proofs of loss. 53 ALR 1113.

Sufficiency of request, demand, or requirement for sworn statements, notice,

40-607. (8144) Waiver of defects in notice, etc. All defects in a notice of loss, or in preliminary proofs thereof, which the insured might remedy, and which the insurer omits to specify to him, without unnecessary delay, as grounds of objection, are waived.

History: En. Sec. 3512, Civ. C. 1895; re-en. Sec. 5629, Rev. C. 1907; re-en. Sec. 8144, R. C. M. 1921. Cal. Civ. C. Sec. 2635. Field Civ. C. Sec. 1437.

Claim of Waiver Must Be Sufficiently Pleaded and Proved—Accrued Indemnity to Pay Back Premiums

Where, in an action on a life insurance policy containing provisions for sickness and indemnity for loss of time, claimed forfeited because of nonpayment of premium, plaintiff, under this section, claimed that the company waived proof of loss of time by a rider attached to the policy because of its failure promptly to furnish forms on which to make proof, but such failure not being pleaded or proved, there was no foundation upon which the claim of waiver could be based; the same applied to the claim that enough sickness indemnity accrued to pay overdue premiums to keep the policy alive, hence cause remanded for new trial. Conlon v. Northern Life Insurance Co., 108 M 473, 494, 92 P 2d 284.

Waiver by Act of Adjuster

Held, that where insured had failed to furnish a sworn statement of proof of loss as he was required to do under the provisions of the policy, but the company's adjuster notwithstanding such failure had made offers of settlement, defendant waived the requirement even though the policy provided that such act on the part of its adjuster should not constitute a waiver. Pasherstnik v. Continental Ins. Co., 67 M 19, 27, 214 P 603.

certificate, or proofs of loss under fire policy. 78 ALR 1335.

Assignment of claim for loss under fire insurance policy as affecting the furnishing of proofs of loss. 101 ALR 1300.

Mortgagee's duty to make proofs of loss. 130 ALR 602.

Misrepresentations by agent to applicant, insured, or beneficiary, as to proofs of loss, as basis of action by them other than on policy itself, or as defense to action against them. 136 ALR 31.

Waiver of, for estoppel to assert, provision of policy respecting location of personal property covered thereby. 4 ALR 2d 868.

Insurer's demand for additional or corrected proof of loss as suspending running of contractual limitation provision. 15 ALR 2d 955.

Under this section and the following section, defects in proofs of loss sustained by fire may be waived, and were waived by an adjuster of defendant insurance company by advising plaintiff that the proofs exhibited to him, after certain amendments made, were "all right." Morrison v. Concordia Fire Ins. Co. et al., 72 M 97, 101, 231 P 905.

Waiver by Failure of Insurer to Object Within Reasonable Time

Where a fire insurance policy requires preliminary proofs of loss, and they are presented in due time but are defective, such defects are waived by the failure of the insurer to make objection to them within a reasonable time (this section); especially so, where such delay operates to delay the time of payment of the loss, or is for such a period as to render it impossible to remedy the defects within the sixty-day time limit fixed by the policy. Federal Land Bk. v. Rocky Mt. F. Ins. Co., 85 M 405, 416, 279 P 239.

The provision of this section that defects in a notice of loss or in the preliminary proof which the insurer fails to specify as grounds of objection without delay, are waived, is as much a part of the policy of insurance as though written therein, and is controlling when it conflicts with provisions in the policy. Caldwell v. Washington F. Nat. Ins. Co., 94 M 431, 444, 23 P 2d 257.

Collateral References

Insurance Ⓒ560(1).

45 C.J.S. Insurance § 1097.

Waiver of, or estoppel to assert, provision of policy respecting location of personal property covered thereby. 4 ALR 2d 868.

Theory of waiver as applicable where provisions of policy or acts of insurer are

inconsistent with statutory requirements. 9 ALR 2d 1436.

Insurer's demand for additional or corrected proof of loss as waiver or estoppel as to right of asserted contractual limitation provision. 15 ALR 2d 955.

40-608. (8145) Waiver of delay. Delay in the presentation to an insurer of notice or proof of loss is waived, if caused by any act of his, or if he omits to make objection promptly and specifically upon that ground.

History: En. Sec. 3513, Civ. C. 1895; re-en. Sec. 5630, Rev. C. 1907; re-en. Sec. 8145, R. C. M. 1921. Cal. Civ. C. Sec. 2636. Field Civ. C. Sec. 1438.

Pleading of Waiver Necessary

Under this section, where suit on a fire insurance policy is commenced within time, delay in the presentation of notice or proof of loss is waived if caused by the act of the insurer, or if he omits to make prompt and specific objection on that ground; but to entitle the insured to take advantage of this provision he must plead the waiver. *Krause v. Insurance Co. of North America*, 73 M 169, 176, 235 P 406.

One who depends upon waiver of proof of loss under an insurance policy, must, as required by this section, plead and prove the facts essential to constitute waiver. *Conlon v. Northern Life Insurance Co.*, 108 M 473, 493, 92 P 2d 284.

Waiver by Act of Agent

Notwithstanding a clause in a hail insurance policy that defendant company's agents had not the power to orally waive any of its provisions, they may, under this section, be held to have waived a provision therein for proof of loss by failing to promptly advise the insured, in their negotiations for settlement, that delay in payment of the loss was caused by absence of proof of loss or that the company would rely upon his omission to make the necessary proof. *Ames v. Minneapolis F. & M. Ins. Co.*, 69 M 177, 181, 220 P 747.

Under the next preceding section and this section, defects in proofs of loss sustained by fire may be waived, and were waived by an adjuster of defendant insurance company by advising plaintiff that the proofs exhibited to him, after certain amendments made, were "all right." *Morrison v. Concordia Fire Ins. Co. et al.*, 72 M 97, 101, 231 P 905.

Failure to furnish proof of a loss by fire as required by the policy bars recovery thereon unless the insurer voluntarily or involuntarily waived the condition, and was waived where the president of a mutual insurance company, after receiving notice of loss, appointed a committee which went to the scene of the fire and did all it would have done under a formal proof of loss duly filed and did not in-

form the insured that anything further would be required, the claim being rejected for other reasons. *La Bonte v. Mutual Fire etc. Ins. Co.*, 75 M 1, 12, 241 P 631.

Waiver by Failure to Make Timely Objection

When notice of a casualty and proof of resulting death are incorporated in the same communication to the insurer, and the proof of the cause of death, with the attendant facts, meets all the requirements of the policy, except that the statement is not as full as it might be, the failure of the insurer to demand more explicit proof is a waiver of his right to thereafter object to its sufficiency. *Da Rin v. Casualty Company of America*, 41 M 175, 187, 108 P 649.

The condition of a fidelity insurance bond that notice of loss must be given by the insured within a given period is a condition precedent to recovery on the bond, which, however, may be waived and is waived, under this section, if the insurer fails to make objection on account of such failure promptly and specifically on that ground. *Montana A. F. Corp. v. Federal Surety Co.*, 85 M 149, 164, 278 P 116.

Under this section, held that where a fire insurance company for nine months after a fire made no specific objection on the ground that the insured had failed to file proof of loss, it will be held to have waived that requirement of the policy, statements in letters sent to the insured that what was said therein was said "without waiving any of the provisions of the policy," not meeting the requirement of specific objection. *Altermatt v. Rocky Mountain Fire Ins. Co.*, 85 M 419, 427, 279 P 243.

What Not Waiver of Proof of Loss

The fact that an insurer, even with notice of loss fails to demand that the insured comply with the stipulation as to proofs of loss does not constitute a waiver thereof, unless coupled with other facts calculated to lead the insured to belief that such proofs need not be made. *Conlon v. Northern Life Insurance Co.*, 108 M 473, 492, 92 P 2d 284.

References

Pasherstnik v. Continental Ins. Co., 67
M 19, 27, 214 P 603; Federal Land Bk. v.

Rocky Mt. F. Ins. Co., 85 M 405, 415,
279 P 239.

40-609. (8146) Certificate—when dispensed with. If a policy requires, by way of preliminary proof of loss, the certificate or testimony of a person other than the insured, it is sufficient for the insured to use reasonable diligence to procure it, and in case of the refusal of such person to give it, then to furnish reasonable evidence to the insurer that such refusal was not induced by any just grounds of disbelief in the facts necessary to be certified.

History: En. Sec. 3514, Civ. C. 1895;
re-en. Sec. 5631, Rev. C. 1907; re-en. Sec.
8146, R. C. M. 1921. Cal. Civ. C. Sec. 2637.
Field Civ. C. Sec. 1439.

Collateral References

Insurance 546, 547.
45 C.J.S. Insurance § 1097.

CHAPTER 7

DOUBLE INSURANCE—REINSURANCE

- Section 40-701. Double insurance.
40-702. Contribution in case of double insurance.
40-703. Reinsurance defined.
40-704. Disclosures required.
40-705. Reinsurance presumed to be against liability.
40-706. Original insured has no interest.

40-701. (8147) Double insurance. A double insurance exists where the same person is insured by several insurers separately in respect to the same subject and interest.

History: En. Sec. 3520, Civ. C. 1895;
re-en. Sec. 5632, Rev. C. 1907; re-en. Sec.
8147, R. C. M. 1921. Cal. Civ. C. Sec. 2641.
Field Civ. C. Sec. 1440.

Collateral References

Insurance 604.
46 C.J.S. Insurance § 1207.

40-702. (8148) Contribution in case of double insurance. In case of double insurance, the several insurers are liable to pay losses thereon as follows:

1. In fire insurance, each insurer must contribute ratably towards the loss, without regard to the dates of the several policies.

2. In marine insurance, the liability of the several insurers for a total loss, whether actual or constructive, where the policies are not simultaneous, is in the order of the dates of the several policies, no liability attaching to a second or other subsequent policy, except as to the excess of the loss over the amount of all previous policies on the same interest. If two or more policies bear date upon the same day, they are deemed to be simultaneous, and the liability of insurers on simultaneous policies is to contribute ratably with each other. The insolvency of any of the insurers does not affect the proportionate liability of the other insurers. The liability of all insurers on the same marine interest for a partial or average loss is to contribute ratably.

History: En. Sec. 3521, Civ. C. 1895;
re-en. Sec. 5633, Rev. C. 1907; re-en. Sec.
8148, R. C. M. 1921. Cal. Civ. C. Sec. 2642.

Collateral References

29 Am. Jur. 992, Insurance, §§ 1325 et
seq.

40-703. (8149) Reinsurance defined. A contract of reinsurance is one by which an insurer procures a third person to insure him against loss or liability by reason of such original insurance.

History: En. Sec. 3530, Civ. C. 1895; re-en. Sec. 5634, Rev. C. 1907; re-en. Sec. 8149, R. C. M. 1921. Cal. Civ. C. Sec. 2646. Field Civ. C. Sec. 1442.

References

Fitzpatrick v. State Board of Examiners, 105 M 234, 242, 70 P 2d 285.

Collateral References

Insurance⌘676.
46 C.J.S. Insurance § 1220.
29 Am. Jur. 1017, Insurance, §§ 1359 et seq.

Right of reinsurer to question the insurable interest or eligibility of beneficiary. 18 ALR 1163.

Effect of reinsurance of life policy as modifying the amount of liability upon death of insured. 25 ALR 1535.

Who may enforce liability of reinsurer. 35 ALR 1348.

Reinsurance by foreign insurance corporation as doing business within state. 137 ALR 1141.

40-704. (8150) Disclosures required. Where an insurer obtains reinsurance, he must communicate all the representations of the original insured, and also all the knowledge and information he possesses, whether previously or subsequently acquired, which are material to the risk.

History: En. Sec. 3531, Civ. C. 1895; re-en. Sec. 5635, Rev. C. 1907; re-en. Sec. 8150, R. C. M. 1921. Cal. Civ. C. Sec. 2647. Field Civ. C. Sec. 1443.

Collateral References

Insurance⌘678.
46 C.J.S. Insurance § 1224.

40-705. (8151) Reinsurance presumed to be against liability. A reinsurance is presumed to be a contract of indemnity against liability, and not merely against damage.

History: En. Sec. 3532, Civ. C. 1895; re-en. Sec. 5636, Rev. C. 1907; re-en. Sec. 8151, R. C. M. 1921. Cal. Civ. C. Sec. 2648. Field Civ. C. Sec. 1444.

Collateral References

Insurance⌘683, 684.
46 C.J.S. Insurance § 1230.

40-706. (8152) Original insured has no interest. The original insured has no interest in a contract of reinsurance.

History: En. Sec. 3533, Civ. C. 1895; re-en. Sec. 5637, Rev. C. 1907; re-en. Sec. 8152, R. C. M. 1921. Cal. Civ. C. Sec. 2649. Field Civ. C. Sec. 1445.

CHAPTER 8

MARINE INSURANCE

Section 40-801. Definition of marine insurance.

40-801. (8153) Definition of marine insurance. Marine insurance is an insurance against risks connected with navigation, to which a ship, cargo, freightage, profits, or other insurable interest in movable property, may be exposed during a certain voyage or a fixed period of time.

History: En. Sec. 3540, Civ. C. 1895; re-en. Sec. 5638, Rev. C. 1907; re-en. Sec. 8153, R. C. M. 1921. Cal. Civ. C. Sec. 2655. Field Civ. C. Sec. 1446.

Collateral References

Insurance⌘402.
45 C.J.S. Insurance § 852.
29 Am. Jur. 228, Insurance, §§ 227 et seq.

CHAPTER 9

FIRE INSURANCE RISKS—ALTERATION

- Section 40-901. Alteration increasing risk.
 40-902. Alteration not increasing risk.
 40-903. Acts of the insured.
 40-904. Measure of the indemnity.
 40-905. Amount of insurance written deemed to be value of property destroyed—payer of premium presumed owner—fraud in obtaining policy as defense.

40-901. (8154) Alteration increasing risk. An alteration in the use or condition of a thing insured from that to which it is limited by the policy, made without the consent of the insurer, by means within the control of the insured, and increasing the risk, entitles an insurer to rescind a contract of fire insurance.

History: En. Sec. 3550, Civ. C. 1895; re-en. Sec. 5639, Rev. C. 1907; re-en. Sec. 8154, R. C. M. 1921. Cal. Civ. C. Sec. 2753. Field Civ. C. Sec. 1515.

Cross-Reference

Burning to defraud insurer, sec. 94-506.

Collateral References

Insurance—316-329, 333.
 45 C.J.S. Insurance §§ 547-566.

Manufacture or sale of intoxicating liquor as increase of hazard or change in

use avoiding fire insurance policy. 2 ALR 2d 1160, 1166.

Keeping or placing of gasoline, kerosene, or similar inflammable substances on premises as increase of hazard avoiding fire insurance policy. 26 ALR 2d 809.

Casual or temporary repairs, and the like, as constituting increase of hazard so as to avoid fire or other property damage insurance. 28 ALR 2d 757.

40-902. (8155) Alteration not increasing risk. An alteration in the use or condition of a thing insured from that to which it is limited by the policy, which does not increase the risk, does not affect a contract of fire insurance.

History: En. Sec. 3551, Civ. C. 1895; re-en. Sec. 5640, Rev. C. 1907; re-en. Sec. 8155, R. C. M. 1921. Cal. Civ. C. Sec. 2754. Field Civ. C. Sec. 1516.

Collateral References

Insurance—316-329.
 45 C.J.S. Insurance §§ 547-558, 560-566.

40-903. (8156) Acts of the insured. A contract of fire insurance is not affected by any act of the insured subsequent to the execution of the policy, which does not violate its provisions, even though it increases the risk and is the cause of a loss.

History: En. Sec. 3552, Civ. C. 1895; re-en. Sec. 5641, Rev. C. 1907; re-en. Sec. 8156, R. C. M. 1921. Cal. Civ. C. Sec. 2755. Field Civ. C. Sec. 1517.

Collateral References

Manufacture or sale of intoxicating liquor in violation of law as increase of hazard or change in use avoiding fire insurance policy. 2 ALR 2d 1166.

40-904. (8157) Measure of the indemnity. If there is no valuation in the policy, the measure of indemnity in an insurance against fire is the expense, at the time that the loss is payable, of replacing the thing lost or injured, in the condition in which it was at the time of the injury; but a valuation, fraudulent in fact, entitles the insurer to rescind the contract.

History: En. Sec. 3553, Civ. C. 1895; re-en. Sec. 5642, Rev. C. 1907; re-en. Sec. 8157, R. C. M. 1921. Cal. Civ. C. Sec. 2756. Based on Field Civ. C. Sec. 1518.

Courts May Consider Appraisers' Method

Courts should never interfere with an award in a fire insurance case except to prevent a manifest injustice, nor set it aside unless made without authority, or

the result of fraud, mistake, or of misfeasance or malfeasance of the appraisers, and where questioned, courts may consider the method by which the appraisers reached their decision even though the award may be fair on its face. *McIntosh v. Hartford Fire Insurance Co.*, 106 M 434, 439, 78 P 2d 82.

Operation and Effect

Indemnity is the basis or foundation of fire insurance law; unless there is a valuation given in the policy, the measure of indemnity is the expense, at the time the loss is payable, of replacing the thing insured or destroyed, in the condition in which it was at the time of the fire, not in excess of the amount specified in the policy. *Lee v. Providence Washington Ins. Co.*, 82 M 264, 276, 266 P 640.

Part of Policy, as Though Written into It

This provision as to measure of indemnity is as much a part of the policy as though written into it. *McIntosh v. Hartford Fire Insurance Co.*, 106 M 434, 440, 78 P 2d 82.

Where Deduction for Deterioration Held Unwarranted

Held, in an action to set aside award of appraisers approved by district court,

that in view of policy containing no valuation but insurer agreed to indemnify insured by either restoring the part destroyed to the condition it was in before the fire, or pay him a sum equal to cost of restoration, that insurer was entitled to judgment for the amount found by the appraisers as the cost of repairing the building, and that deduction of 48 per cent from such amount for deterioration was unwarranted, under the facts presented. *McIntosh v. Hartford Fire Insurance Co.*, 106 M 434, 440, 78 P 2d 82.

Collateral References

Insurance—493-503.

45 C.J.S. Insurance §§ 913-921.

29 Am. Jur. 886, Insurance, § 1176.

Amount in case of partial loss of property insured under a proportional provision of statute or policy which provides in terms for full payment of amount of insurance in case of a total loss. 32 ALR 651.

Settlement with insurance company for less than face valued policy as bar to recovery of difference where total loss is shown. 109 ALR 1485.

Recovery under fire insurance policy for damage to party wall as affected by pro rata clause. 13 ALR 2d 621.

40-905. (8162.1) Amount of insurance written deemed to be value of property destroyed—payer of premium presumed owner—fraud in obtaining policy as defense. Whenever any policy of insurance shall be written to insure any improvements upon real property in this state against loss by fire, tornado or lightning, and the property insured shall be wholly destroyed, without criminal fault on the part of the insured or his assigns, the amount of insurance written in such policy shall be taken conclusively to be the true value of the property insured, and the true amount of loss and measure of damages, and the payment of money as a premium for insurance shall be prima facie evidence that the party paying such insurance premium is the owner of the property insured; provided, that any insurance company may set up fraud in obtaining the policy as a defense to a suit thereon.

History: En. Sec. 1, Ch. 23, L. 1935.

Collateral References

Insurance—493, 499, 500, 508½, 615, 653.

45 C.J.S. Insurance §§ 915, 916, 978, 980;

46 C.J.S. Insurance §§ 1248, 1323.

Amount in case of partial loss of property insured under a proportional provi-

sion of statute or policy which provides in terms for full payment of amount of insurance in case of a total loss. 32 ALR 651.

Settlement with insurance company for less than face of valued policy as bar to recovery of difference where total loss is shown. 109 ALR 1485.

CHAPTER 10

LIFE, HEALTH AND ACCIDENT INSURANCE

- Section 40-1001. Insurance upon life—when payable.
 40-1002. Insurable interest.
 40-1003. Assignee, etc., of life policy need have no interest.
 40-1004. Notice of transfer.
 40-1005. Measure of indemnity.

40-1001. (8158) Insurance upon life—when payable. An insurance upon life may be made payable on the death of the person, or on his surviving a specified period, or periodically so long as he shall live, or otherwise contingently on the continuance or determination of life.

History: En. Sec. 3560, Civ. C. 1895; re-en. Sec. 5643, Rev. C. 1907; re-en. Sec. 8158, R. C. M. 1921. Cal. Civ. C. Sec. 2762. Field Civ. C. Sec. 1519.

Collateral References

Insurance \Rightarrow 124.
 44 C.J.S. Insurance § 223.

Liberal Construction of Policy

In an action involving the meaning of a contract of insurance, the instrument must be liberally construed in favor of the insured. *DeVore v. Mutual Life Ins. Co.*, 103 M 599, 610, 64 P 2d 1071.

Permanent Disability

Under a life insurance policy covering disability losses and declaring that total disability should be presumed to be permanent, inter alia, if it had existed for ninety days, the insured was entitled to receive disability payments so long as his disability continued even though he was gainfully employed when he instituted the action, as against the contention of insurer that benefits were payable only in case of absolutely permanent disability. *DeVore v. Mutual Life Ins. Co.*, 103 M 599, 610, 64 P 2d 1071.

References

In re Fligman's Estate, 113 M 505, 510, 129 P 2d 627.

Rights and remedies arising out of delay in passing upon application for insurance. 15 ALR 1026.

What constitutes insurance. 63 ALR 711.

Validity, applicability, construction and effect of statutes relating to size or other characteristics of type or color of printing for insurance policy. 72 ALR 875.

Right of insurance company in view of its public interest, to reject applications for insurance. 107 ALR 1421.

Insurance companies, which are members of Federal reserve banks or similar Federal agencies or national banks, as within state social security or unemployment compensation act. 145 ALR 1074.

Temporary life, accident, or health insurance pending approval of application or issuance of policy. 2 ALR 2d 943.

Clause in life, accident, or health policy excluding or limiting liability in case of insured's use of intoxicants or narcotics. 13 ALR 2d 987.

40-1002. (8159) Insurable interest. Every person has an insurable interest in the life, health, and freedom from accidents:

1. Of himself;
2. Of any person on whom he depends wholly or in part for education or support;
3. Of any person under a legal obligation to him for the payment of money, or respecting property or services, of which death, illness, or injury caused by accident might delay or prevent the performance; and,
4. Of any person upon whose life any estate or interest vested in him depends.

History: En. Sec. 3561, Civ. C. 1895; re-en. Sec. 5644, Rev. C. 1907; re-en. Sec. 8159, R. C. M. 1921. Cal. Civ. C. Sec. 2763. Field Civ. C. Sec. 1520.

Collateral References

Insurance \Rightarrow 116.
 44 C.J.S. Insurance §§ 176, 199, 222.
 29 Am. Jur. 309, Insurance, §§ 353 et seq.

40-1003. (8160) Assignee, etc., of life policy need have no interest. A policy of insurance upon life, health, or freedom from accident may pass

by transfer, will, or succession to any person, whether he has an insurable interest or not, and such person may recover upon it whatever the insured might have recovered.

History: En. Sec. 3562, Civ. C. 1895;
re-en. Sec. 5645, Rev. C. 1907; re-en. Sec.
8160, R. C. M. 1921. Cal. Civ. C. Sec. 2764.
Based on Field Civ. C. Sec. 1521.

Collateral References

Insurance 122.
44 C.J.S. Insurance §§ 176, 201, 222.

References

Capital F. Corp. v. Metropolitan L. I.
Co., 75 M 460, 464, 243 P 1061.

40-1004. (8161) Notice of transfer. Notice to an insurer of a transfer or bequest thereof is not necessary to preserve the validity of a policy of insurance upon life, health, or freedom from accident, unless thereby expressly required.

History: En. Sec. 3563, Civ. C. 1895;
re-en. Sec. 5646, Rev. C. 1907; re-en. Sec.
8161, R. C. M. 1921. Cal. Civ. C. Sec. 2765.
Based on Field Civ. C. Sec. 1522.

Collateral References

Insurance 217.
45 C.J.S. Insurance § 427.

40-1005. (8162) Measure of indemnity. Unless the interest of a person insured is susceptible of exact pecuniary measurement, the measure of indemnity under a policy of insurance upon life, health, or freedom from accident is the sum fixed in the policy.

History: En. Sec. 3564, Civ. C. 1895;
re-en. Sec. 5647, Rev. C. 1907; re-en. Sec.
8162, R. C. M. 1921. Cal. Civ. C. Sec. 2766.
Based on Field Civ. C. Sec. 1523.

Collateral References

Insurance 515, 524.
45 C.J.S. Insurance §§ 897, 938.
29 Am. Jur. 866, Insurance, §§ 1150-1175.

CHAPTER 11

INSURANCE AND SURETY COMPANIES' REGULATION BY COMMISSIONER OF INSURANCE

- Section 40-1101. Commissioner of insurance—deputy.
40-1102. Salary of deputy commissioner of insurance.
40-1103. Employment of actuary.
40-1104. Appointment of chief clerk.
40-1105. Examination of insurance and surety companies by commissioner of insurance.
40-1106. Publication of examination—revocation of license.
40-1107. Commissioner and deputy commissioner—meaning of terms.
40-1108. Keeping of securities by commissioner of insurance.
40-1109. Abstracting life insurance policies—license and fee.
40-1110. Application for license—contents.
40-1111. Granting and revocation of licenses.
40-1112. Penalty for violation of act—revocation of license.
40-1113. Policies of insurance to be approved by commissioner.
40-1114. Earned premium on state insurance to be collected from counties and school districts on short rate basis.
40-1115. Disposition of moneys received.
40-1116. Refunds.
40-1117. Computation of premiums and refunds.
40-1118. Unpaid premiums on state owned property—reimbursement.

40-1101. (162) Commissioner of insurance—deputy. The state auditor, in addition to his present title, shall be hereafter designated as commissioner of insurance. He shall appoint a deputy to be designated as deputy commissioner of insurance, who shall be in charge of the department of in-

insurance in the said auditor's office under the direction and control of said state auditor and commissioner of insurance. The insurance commissioner shall have and exercise the power to enforce all the laws of the state relating to insurance, and it shall be his duty to enforce all the provisions of such laws for the public good. Provided that nothing herein contained shall be construed to authorize an increase of employees in said office.

History: En. Sec. 1, Ch. 12, L. 1909; re-en. Sec. 162, R. C. M. 1921; amd. Sec. 1, Ch. 99, L. 1923; amd. Sec. 1, Ch. 153, L. 1927; amd. Sec. 3, Ch. 182, L. 1949.

Compiler's Note

Sections 1 and 2, Ch. 182, Laws 1949 are compiled as sections 25-501 and 82-

2001. For present law fixing the salary, see sec. 25-501.

Collateral References

States⇒60, 73.

81 C.J.S. States §§ 63, 89.

29 Am. Jur. 61, Insurance, §§ 24 et seq.

40-1102. (163) Salary of deputy commissioner of insurance. The deputy commissioner of insurance shall receive a salary of three thousand dollars per annum, payable monthly.

History: En. Sec. 1, Ch. 93, L. 1919; re-en. Sec. 163, R. C. M. 1921; amd. Sec. 4, Ch. 151, L. 1927.

Collateral References

States⇒60.

81 C.J.S. States § 90.

40-1103. (164) Employment of actuary. The state auditor and commissioner of insurance ex-officio may employ an actuary, when required, who shall be experienced and skilled in insurance matters and fully competent to perform any actuarial duties of the insurance department, and to assist in or take charge of the examination of insurance companies under the general direction of the commissioner or his deputy.

History: En. Sec. 3, Ch. 12, L. 1909; re-en. Sec. 164, R. C. M. 1921.

Collateral References

States⇒53.

81 C.J.S. States § 70.

40-1104. (165) Appointment of chief clerk. The state auditor and commissioner of insurance ex-officio is hereby authorized and empowered to appoint a chief clerk, at a salary of twenty-one hundred dollars per year, payable monthly; providing that nothing herein contained shall be construed to authorize an increase of the number of employees in said office at this time.

History: En. Sec. 1, Ch. 130, L. 1913; re-en. Sec. 165, R. C. M. 1921.

Collateral References

States⇒53, 61.

81 C.J.S. States §§ 70, 91.

NOTE.—Salary is given as fixed by chapter 154, Laws of 1919.

40-1105. (166) Examination of insurance and surety companies by commissioner of insurance. (1) The commissioner of insurance shall examine and inquire into violations of insurance laws of this state, and for this purpose, or to see if the laws are obeyed, or to examine the financial condition, affairs, and management of any insurance company, including surety companies, organized under the laws of this state, or any other state or territory, or foreign country, he may visit, or cause to be visited, by any competent person or persons he may appoint, the head office in this state, or in the United States, of any domestic or foreign insurance company applying for admission to or already admitted to do business in this state, and may for these purposes examine or investigate any company organized

under the laws of Montana, and any agency of any company doing business in this state. The cost of such examinations shall be paid by the company examined, and shall include the reasonable expenses of the commissioner, his deputies, and assistants employed therein, whose services are paid for by the insurance department, and the compensation and reasonable expenses of his assistants employed therein whose services are not paid for by the department. Duplicate receipts showing the entire cost of the examination authorized by the commissioner of insurance shall be taken and certified to by the company examined, and shall be filed in and become a part of the public records of the insurance department.

(2) When insurance companies not admitted to do business in this state, or companies adjudged insolvent, or companies for any cause withdrawing from the state, neglect, fail, or refuse to pay the charges for examination as approved by the commissioner of insurance, such charges shall be paid out of the expense account of the commissioner of insurance in the same manner as other expenses of said office, or from any other such fund created to cover the expenses of the insurance department upon such approval and the amount so paid shall be a first lien upon all the assets and property of such company, and may be recovered by suit by the attorney general on behalf of the state of Montana, and restored to the said expense account, or other proper fund. The commissioner may also examine companies on the request of five or more of the policy-holders, representing at least one hundred thousand dollars insurance in force, who shall make affidavit of their belief, with specifications of their reasons therefor in writing, that such company is in an unsound or insolvent condition; provided, that only the United States branches of companies incorporated in foreign countries shall be examined by said commissioner. For the purposes of the examinations, inquiries, or investigations as aforesaid, the commissioner of insurance or his deputy, or the person authorized to make them, shall have free access to all books and papers of an insurance company that relate to its business, and the books and papers kept by any officer, agent, or employee relating to, or upon which any record of its business is kept, and may summon witnesses and administer oaths or affirmations, in the examination of the directors, trustees, officers, agents, or employees of any such company, and any other person in relation to its affairs, transactions, and conditions. He may require and compel the production of records, books, papers, contracts, or other documents by attachments, if necessary.

(3) Any person knowingly or wilfully testifying falsely in reference to any matter material to said investigation, examination, or inquiry, shall be deemed guilty of perjury, and punished accordingly, and any person who shall wilfully refuse or fail to attend, answer, or produce books or papers, or who shall refuse to give said commissioner of insurance, or the person authorized by him, full and truthful information and answer in writing to any inquiry or question made in writing by said commissioner, or the person authorized by him, in regard to the business of insurance, or suretyship, carried on by such person, or other matters under investigation, or refuse or wilfully fail to appear and testify under oath before the commissioner of insurance, or the person authorized by him, shall be

deemed guilty of a misdemeanor. Any director, trustee, officer, agent, or employee of an insurance company, or any other person, who shall knowingly or wilfully make any false certificate, entry, or memorandum upon any of the books or papers of any insurance company, or upon any statement filed or offered to be filed in the insurance department of this state, or used in the course of any examination, inquiry, or investigation, with the intent to deceive the commissioner of insurance, or any person employed or appointed by him to make such examination, inquiry, or investigation, shall be deemed guilty of a misdemeanor.

History: En. Sec. 1, Ch. 13, L. 1909;
re-en. Sec. 166, R. C. M. 1921.

References

State ex rel. Pearl Assurance Co. v.
Holmes, 113 M 144, 146, 124 P 2d 700.

Collateral References

Insurance 10.

44 C.J.S. Insurance §§ 57, 74.

29 Am. Jur. 61, Insurance, §§ 24 et seq.

40-1106. (167) Publication of examination—revocation of license.

When the commissioner of insurance deems it to the interest of the public, he may publish the result of any examination or investigation in a newspaper of general circulation published at the state capital. If the commissioner finds upon examination, hearing, or other evidence, that any insurance company, including surety companies, organized in this state, or in any other state, territory, or foreign country, is in an unsound condition, or has failed to comply with the law or with the provisions of its charter, or that its condition is, or its methods are, such as to render its operations hazardous to the public or to its policy-holders, or that its actual assets, exclusive of its capital, are less than its liabilities, or if its officers or agents refuse to submit to examination, or to perform any legal obligation relative thereto, or refuse on behalf of the company to pay the examination charges, he shall suspend or revoke all certificates of authority granted to said insurance company, and to its officers or agents, and shall cause notice thereof to be published in one or more daily newspapers of general circulation published at the state capital, and no new business shall thereafter be done by it or its agents in this state while such default or disability continues, nor until its authority to do business is restored. Before suspending or revoking the certificate of authority of any such company, the commissioner shall, unless it is insolvent or its capital impaired, grant it fifteen days in which to show cause why such action should not be taken. Any insurance company, including surety companies, organized under the laws of this state, or any other state, territory, or foreign country, whose certificate of authority has been suspended or revoked by the commissioner, may, within fifteen days thereafter, appeal from said order to the district court, which court, upon the filing of the proper petition, shall cause the record and orders of the commissioner to be brought before it, and upon a hearing of the case by the court de novo, the court shall either confirm or revoke the order of the commissioner, as the law and the fact of the case may warrant.

History: En. Sec. 2, Ch. 13, L. 1909;
re-en. Sec. 167, R. C. M. 1921.

Improper Service of Orders to Show Cause

Where two orders to show cause were

directed to an alleged parent corporation said to have control over or ownership of two insurance companies licensed separately to do business within the state, because of the alleged wrongdoing of the alleged parent company, on the theory

that the three were one and the two had no separate corporate existence, held, that the commissioner acquired no jurisdiction over the two companies, and writ of prohibition should issue, because the orders were not properly addressed, the rule when only corporate entity may be disregarded not applying to the companies in question. *State ex rel. Monarch Fire Insurance Co. v. Holmes*, 113 M 303, 307, 124 P 2d 994.

Powers and Jurisdiction of State Insurance Commissioner

The state auditor and ex-officio commissioner of insurance, has general jurisdiction, under Art. VII, Sec. 1, Constitution, and this and the preceding section, of matters relating to insurance, and has the power, under certain circumstances enumerated in the statutes, to revoke certificates of authority of insurance companies to do business in the state. *State*

ex rel. Pearl Assurance Co. v. Holmes, 113 M 144, 146, 124 P 2d 700.

Trial De Novo Operates Automatically to Stay Commissioner's Order

Contention that the appeal provided for by this section from an order of revocation is inadequate because there is no provision for a stay pending appeal, held without merit since, under the general rule, an appeal in a matter tried de novo in the appellate tribunal operates automatically to stay the commissioner's order, to deprive him of any further jurisdiction, and to prevent him from publishing the order pending the appeal. *State ex rel. Pearl Assurance Co. v. Holmes*, 113 M 144, 148, 124 P 2d 700.

Collateral References

Insurance ¶5.

44 C.J.S. Insurance § 69.

40-1107. (168) Commissioner and deputy commissioner—meaning of terms. The word "commissioner" and the words "deputy commissioner," as used in this act, shall designate the state auditor and insurance commissioner ex-officio and the deputy commissioner of insurance, respectively. Wherever in the laws of Montana which are not repealed by this act other titles are used to designate the chief officers and the second officer of the insurance department, such titles shall be understood as meaning the commissioner of insurance and the deputy commissioner of insurance, as hereinbefore specified.

History: En. Sec. 3, Ch. 13, L. 1909; re-en. Sec. 168, R. C. M. 1921.

Collateral References

Insurance ¶10.

44 C.J.S. Insurance § 57.

40-1108. (169) Keeping of securities by commissioner of insurance. The commissioner of insurance shall give vouchers for all securities deposited with him to the company depositing them. It shall be the duty of the commissioner, upon the receipt of such securities from any insurance company, to forthwith deposit the same in the presence of the president or authorized agent of the company in a strong iron box, which shall require two distinct and different keys, or one key and separate combination, to unlock the same; one key or combination to be kept by the commissioner of insurance and the other key or the combination by the company, and the box shall not be opened except in the presence of the commissioner or deputy and the president or authorized agent of the company; provided, however, that in case the company having such securities on deposit shall be adjudged insolvent or be dissolved, the court may make and enforce the necessary orders to place such securities, or any part of them, at the sole disposal of the court or commissioner of insurance. The boxes shall be placed in the vault of a safe deposit company or bank in the city of Helena, Montana, to be selected by the commissioner, and the insurance company shall pay the several fees for the safe keeping of their several boxes. So long as the company so depositing shall continue solvent the commissioner shall permit such company to

collect and receive the interest and dividends on its securities so deposited, and from time to time withdraw any such securities and deposit other securities in the stead of those to be withdrawn, such new securities to be of the same value as those withdrawn.

If the commissioner, or his deputy, shall wilfully fail, refuse or neglect to faithfully keep, deposit, account for or surrender, in the manner by law authorized or required, any such securities as aforesaid transferred to and received by him or under his custody under the provisions of this act, or shall wilfully fail, refuse or neglect to furnish proper certificates of the securities so held by him as herein provided, said commissioner or his deputy shall be responsible upon his official bond and suit may be brought upon said bond by any person injured.

History: En. Sec. 1, Ch. 182, L. 1921;
re-en. Sec. 169, R. C. M. 1921.

Remedy of creditor of corporation to reach funds or securities deposited with state official as security for its obligation.
101 ALR 496.

Collateral References

Insurance 8.

44 C.J.S. Insurance §§ 72, 96.

40-1109. (170) Abstracting life insurance policies—license and fee. It shall not be lawful for any person, firm or corporation in the state of Montana to engage, or to advertise or to hold himself or itself out as engaged in the business of auditing or abstracting policies of life insurance or annuities, or of giving or affording any advice, counsel or opinion with respect to the benefits promised under any policy of life insurance or annuity issued or proposed to be issued by any company authorized to transact the business of life insurance in this state, or the terms, value, effect, advantages or disadvantages thereof, or, directly or indirectly, to take or receive any commission or other compensation or reward in money, or otherwise, or directly or indirectly, to obtain or acquire any benefit or advantage in consideration of, return for, or as a result of, the auditing or abstracting of a policy of life insurance or annuity, or policies of life insurance or annuities, or the giving or affording of advice, counsel or opinion with respect thereto, or with respect to the plan of insurance of any such company, until a license shall have been issued to him or it by the commissioner of insurance issuing to him or it so to act. Such licenses may be issued by the commissioner for the period of one year and shall be renewed annually. The fee for each such license issued or renewed shall be ten dollars, provided, however, that the provisions of this act shall not apply to attorneys or certified public accountants furnishing advice or information to their clients in the regular and ordinary course of their business.

History: En. Sec. 1, Ch. 208, L. 1921;
re-en. Sec. 170, R. C. M. 1921.

Collateral References

Insurance 12.

44 C.J.S. Insurance § 85.

Cross-Reference

Carrying on business without license, penalty, sec. 94-1511.

40-1110. (171) Application for license—contents. No license shall be granted under this act until the person, or if it be a firm or corporation, then the person or persons representing such firm or corporation, applying therefor, shall have filed with the commissioner of insurance an

application duly signed and verified by him or them, which application shall be in the following form, to-wit:

To the commissioner of insurance of the state of Montana:

I hereby make application for a license to audit and abstract policies of life insurance and annuities and to give counsel and advice with respect to such policies of life insurance and annuities, and the plans of insurance of corporations authorized to transact the business of life insurance in the state of Montana, and make the following statement on oath:

First, I will not violate any of the insurance laws of this state during the term of the license applied for if issued;

Second, I will not receive any applicants for insurance or misrepresent any of the terms or conditions of any policy of life insurance or annuity, or the financial responsibility or business practices of any life insurance company authorized to transact business in this state;

Third, I will not upon the basis of any incomplete comparison or misrepresentation, advise or persuade, or attempt to persuade any person to drop or discontinue any insurance that he may have with any company or association during the term of such insurance for the purpose of taking insurance in any like company or association, or otherwise.

The commissioner of insurance shall have authority to address any additional inquiries to any such applicant, and the entire application shall be sworn to and signed by the applicant.

History: En. Sec. 2, Ch. 208, L. 1921;
re-en. Sec. 171, R. C. M. 1921.

Collateral References
33 Am. Jur. 321 et seq., Licenses.

40-1111. (172) Granting and revocation of licenses. The commissioner of insurance shall have the power after a hearing to refuse to grant any license requested under the provisions of this act, should he be satisfied the person, firm or corporation applying therefor is not a proper or fit person, firm or corporation to be permitted to engage in such business within this state. The commissioner of insurance shall have power to revoke for cause shown and upon hearing given to all parties concerned, any license issued by him under the provisions of this act; provided, that any action taken by the commissioner of insurance under the provisions of this section shall be subject to review by any court of competent jurisdiction. The commissioner of insurance may at any time require such additional information from such person, firm or corporation, which, in his judgment, may be deemed necessary to enforce the provisions of this act.

History: En. Sec. 3, Ch. 208, L. 1921;
re-en. Sec. 172, R. C. M. 1921.

Collateral References
33 Am. Jur. 381, Licenses, §§ 65 et seq.

40-1112. (173) Penalty for violation of act—revocation of license. Any person violating any of the provisions of this act shall, upon conviction thereof, be punished by a fine of not more than five hundred dollars, or by imprisonment in the county jail for not more than ninety days, or both such fine and imprisonment in the discretion of the court, and upon the conviction of any person, firm or corporation licensed under this act, of any violation of the provisions thereof, the commissioner of insurance shall revoke the authority of such person, firm or corporation to act un-

der such license within the state of Montana for a period of not less than one year.

History: En. Sec. 4, Ch. 208, L. 1921;
re-en. Sec. 173, R. C. M. 1921.

Collateral References
Insurance 30.
44 C.J.S. Insurance § 89.

40-1113. (173.1) Policies of insurance to be approved by commissioner.

No policy of life or endowment insurance or any policy of insurance against loss or damage from sickness or the belated injury or death of the insured by accident shall be issued or delivered in this state until a copy of the form thereof has been filed at least thirty (30) days with the commissioner of insurance, unless before the expiration of said thirty (30) days the commissioner of insurance shall approve the same in writing; if disapproved, the commissioner shall notify the company in writing, that, in his opinion, the form of said policy does not comply with the requirements of the laws of this state, specifying the reasons for his opinion; provided, that upon the petition of the company the opinion of the commissioner shall be subject to review by any court of competent jurisdiction.

History: En. Sec. 1, Ch. 83, L. 1931.

Collateral References

Insurance 10.

44 C.J.S. Insurance § 57.

Oral contracts of insurance. 15 ALR 995.

Validity, applicability, construction, and effect of statute relating to size or other

characteristics of type or color of printing for insurance policies. 72 ALR 875.

Departure from standard policy as affecting enforceability of policy provision against insurer. 113 ALR 773.

Validity, construction, and effect of approval or disapproval by insurance commissioner of form of policy. 119 ALR 877.

40-1114. Earned premium on state insurance to be collected from counties and school districts on short rate basis. The state auditor and ex-officio commissioner of insurance who was charged with the writing of policies and collecting premiums thereon under the state insurance act, chapter 179, session laws of 1935, repealed by referendum No. 37 in November, 1936, and proclaimed so repealed by the governor, December 2, 1936, is hereby authorized and directed to collect any premiums earned on such policies written during the time the said insurance law was in effect. The state auditor and ex-officio commissioner of insurance shall bill each school district or county which made application for insurance under the law, and for which application, a policy was written and placed in effect for the amount of premium earned during the life of the policy on a short rate basis. If said school district or county shall disregard such bill or notice to pay, and neglect or refuse to pay, then the state auditor and ex-officio commissioner of insurance shall certify such amount as unpaid, in the case of school districts, to the superintendent of public instruction and the state treasurer, and on the next distribution to said school district of moneys from the state common school equalization fund, or public school general fund, the amount so due the state insurance fund shall be withheld from any amounts due or to become due to said district and placed to the credit of the state insurance premium fund. In the case of counties, if the payment of the amount due is not made upon request, then the state auditor and ex-officio insurance commissioner shall certify the amount due

and unpaid, to the state board of equalization and the state treasurer, and the amount so due shall be withheld from any payments due said counties from any funds that may come into the possession of the said board of equalization or state treasurer for distribution to said county and placed to the credit of the state insurance premium fund.

History: En. Sec. 1, Ch. 165, L. 1939.

40-1115. Disposition of moneys received. All moneys received by the state auditor and ex-officio commissioner of insurance for payment of premiums and all funds withheld as provided above shall be placed in the state treasury to the credit of the state insurance premium fund account.

History: En. Sec. 2, Ch. 165, L. 1939.

40-1116. Refunds. The state auditor and ex-officio commissioner of insurance shall determine the amounts due and payable to various school districts and counties that paid premiums for insurance policies written under the above state insurance act. He shall compute such amounts on a short rate basis for the term the insurance was not in effect. He shall certify these amounts to the state board of examiners and the state board of examiners is hereby instructed and directed to refund, by state warrant, to the counties and school districts such amounts as are so certified, from the state insurance premium fund. The board of examiners shall approve for payment claims for such refunds in the order in which such claims are presented, and as funds accumulate in the state insurance premium fund from collections made by the state auditor and ex-officio commissioner of insurance.

History: En. Sec. 3, Ch. 165, L. 1939.

40-1117. Computation of premiums and refunds. The state auditor and ex-officio commissioner of insurance shall compute premiums and refunds due on a short rate basis. In case partial payments have been made by any political unit of the state, or in case several policies have been issued for one such political unit and some of the premiums have been paid on such policy and others are still unpaid, then he shall offset and certify the net amount due the state insurance premium fund or other political unit as the case may be.

History: En. Sec. 4, Ch. 165, L. 1939.

40-1118. Unpaid premiums on state owned property—reimbursement. In order that the state insurance premium fund may be reimbursed for unpaid premiums on state owned property insured under chapter 179, session laws of 1935, the board of examiners shall approve for payment the amount owing as certified to it by the state auditor and ex-officio insurance commissioner, and in addition the amount of credit received from the reinsurance company December 2, 1936, to apply on an insurance policy covering state property, said claim or claims to be paid from the current appropriations made for insurance of state property.

History: En. Sec. 5, Ch. 165, L. 1939.

CHAPTER 12

STATE INSURANCE COMMISSION

- Section 40-1201. State insurance commission—duties.
 40-1202. Powers and duties.
 40-1203. Approval of policies on state property.

40-1201. State insurance commission—duties. There is hereby created a commission to be known as “the state insurance commission,” which said commission shall be composed of the state auditor ex-officio commissioner of insurance, acting as chairman of said commission, state accountant and the chairman of the state board of equalization, all of whom shall perform the duties of the said commission without additional compensation or remuneration. The said commission shall convene at such time and place as may be designated in a notice of meeting served upon the members thereof by the chairman of said commission, which said notice shall be served not less than twenty-four hours before the date of said meeting. Two members of said commission shall constitute a quorum, and a majority vote of all members present shall authenticate any action taken by said commission.

History: En. Sec. 1, Ch. 103, L. 1939.

44 C.J.S. Insurance § 57; 81 C.J.S. States § 66.

Collateral References

Insurance◊10; States◊45.

40-1202. Powers and duties. The state insurance commission shall have the sole and exclusive power and authority, and it shall be its duty to examine and approve, by resolution recorded in its official minute book, all fire and casualty contracts or policies of insurance entered into by and between the state of Montana, by or through any of its officers, boards and commissions, and any private insurance carrier; and the said commission shall have power, and it shall be its duty to make a study of the insurance needs of the state of Montana and assemble statistics and data and make such recommendations to the various officers, boards and commissions of the state of Montana as to the elements of physical hazards existing in all state property under the jurisdiction of said officers, boards and commissions as will tend to reduce fire and casualty hazards and do all things necessary toward securing just, fair and equitable insurance coverage on all risks owned or insured by the state of Montana.

History: En. Sec. 2, Ch. 103, L. 1939.

44 C.J.S. Insurance § 57; 81 C.J.S. States § 66.

Collateral References

Insurance◊10; States◊67.

40-1203. Approval of policies on state property. All contracts or policies of insurance covering state-owned properties or state risks shall be filed with the said state insurance commission, and no such contract or policy of insurance shall be valid until the same shall have first been filed with the said state insurance commission and shall have been examined and approved as herein provided, and no moneys shall be paid out of the state treasury to any person, firm or corporation, as a consideration or premium on any policy or contract of insurance, until said policy or contract of insurance has been examined and approved by the said state insurance commission.

History: En. Sec. 3, Ch. 103, L. 1939.

CHAPTER 13

INSURANCE COMPANIES—LICENSE AND GENERAL REGULATIONS

- Section 40-1301. Definitions and classifications.
 40-1302. License fee.
 40-1303. Issuance of license.
 40-1304. Licenses of insurance companies—when expire.
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40-1301. (6111) Definitions and classifications. Corporations, associations, and societies, organized to do the following-described business, are insurance corporations within the meaning of this act:

1. To insure against loss or damage by fire, lightning, tornadoes, or hail, all kinds of buildings, merchandise, household furniture, and other property.

2. To insure the lives and health of persons, and to grant, purchase, or dispose of annuities.

3. To insure against injuries, death, or disablement of persons resulting from traveling, or, from accident by land or by water; to insure against employees' liability to employers, and of employers' liability to employees; to insure the lives of horses, cattle, or other livestock; to insure plate-glass against breakage, or steam-boilers against explosion, and against loss or damage to life or property resulting therefrom; against loss by burglary or theft, or both; and against the risks of navigation and transportation.

Foreign insurance corporations, associations, and societies shall include every insurance corporation, association, and society organized under the laws of the United States of America, or any state or territory of the United States of America other than this, or any other nation, government, or country.

Domestic insurance corporations, associations, and societies shall include every insurance corporation, association, and society organized under the laws of this state.

History: En. Sec. 1, p. 76, L. 1897; re-en. Sec. 4016, Rev. C. 1907; re-en. Sec. 6111, R. C. M. 1921.

Annuities Are Insurance

Subdivision 2 of this section indicates that annuity contracts are insurance. In re Fligman's Estate, 113 M 505, 507, 129 P 2d 627.

Operation and Effect

This section, expressly authorizing (unincorporated) associations organized under the laws of the United States, or any of its states or territories, to engage in the insurance business in Montana, are special statutes and such associations are, therefore, unaffected by the general one (sec. 93-6401), providing that a civil action may be brought in the name of the state

against an association which acts as a corporation without being legally incorporated. State ex rel. v. Porter, 88 M 347, 349 et seq., 294 P 363.

Collateral References

Insurance—2.

44 C.J.S. Insurance §§ 1, 3-14, 16-18, 23, 25, 28-30, 38, 39, 41, 42, 46-48.

29 Am. Jur. 49, Insurance, §§ 4 et seq.

What constitutes insurance. 63 ALR 711.

Applicability to limitation prescribed by policy of insurance, or by special statutory provision in relation to insurance, of provisions of statute of limitations extending time or fixing time when action deemed commenced. 149 ALR 483.

40-1302. (6112) License fee. All insurance corporations, associations, and societies, as hereinbefore specified in the preceding section, before commencing to do business in the state of Montana, shall be required to secure a license, authorizing them to transact business of insurance corporations, associations, or societies, and shall pay to the state auditor, for such license, the following fees:

For a license to collect in any one year premiums amounting to five thousand dollars or less, one hundred and twenty-five dollars.

For a license to collect in any one year premiums over the sum of five thousand dollars, the sum of twenty dollars for each and every one thousand dollars to be so collected; provided that, where any insurance corporation, association, or society has fifty per cent. of its capital stock invested in Montana securities, such insurance corporation, association, or society shall be allowed to deduct whatever tax it may have already paid from the amount due for such license fee or tax, as herein provided.

History: En. Sec. 2, p. 77, L. 1897; re-en. Sec. 4017, Rev. C. 1907; amd. Sec. 1, Ch. 63, L. 1915; re-en. Sec. 6112, R. C. M. 1921.

Cross-Reference

Taxation of insurance companies, secs. 84-5101 to 84-5103.

Annuities Are Insurance

Fact that this section makes no distinction between premiums collected for ordinary life insurance policies and those collected for annuities and consequently life insurance companies are charged a

license fee based upon total of such premiums indicates that annuities constitute life insurance. In re Fligman's Estate, 113 M 505, 507, 129 P 2d 627.

Jurisdiction to Revoke License

Where the commissioner of insurance ordered an insurance company to show cause why its license to do business in the state should not be revoked for the reason, among others, that it had not paid for the license fee required by this section, on particular premiums set forth in the order, it was sufficient to confer jurisdiction upon him to hear the matter, as

against the contention that as a basis to issue an order to show cause why a company's license should not be cancelled, the commissioner must find some of the violations enumerated in section 40-1106. State ex rel. Pearl Assurance Co. v. Holmes, 113 M 144, 147, 124 P 2d 700.

Operation and Effect

This section was not repealed by sections 84-1501 to 84-1519, imposing a further license fee of one per cent upon the net income of corporations. Equitable Life Assur. Co. v. Hart, 55 M 76, 86, 88, 173 P 1062.

The license fee required of insurance corporations by this section and that exacted by sections 84-1501 et seq. do not

constitute double taxation, the impositions, though upon the same persons, not being for the same thing. Equitable Life Assur. Co. v. Hart, 55 M 76, 86, 173 P 1062.

References

Occidental Life Insurance Co. v. Holmes, 107 M 48, 51, 80 P 2d 383.

Collateral References

Insurance \S 7, 20.

44 C.J.S. Insurance $\S\S$ 71, 80; 46 C.J.S. Insurance \S 1413.

See generally, 33 Am. Jur. 321, Licenses.

Failure to procure license or permit as affecting validity or enforceability of contract. 30 ALR 834, 866.

40-1303. (6113) Issuance of license. The state auditor, upon the payment of the fees enumerated in the preceding section, or, after the deductions have been made, as above provided for, shall issue, in duplicate, a license, as therein provided, a copy of which shall be forthwith filed in his office.

History: En. Sec. 3, p. 77, L. 1897; 2, Ch. 63, L. 1915; re-en. Sec. 6113, R. C. re-en. Sec. 4018, Rev. C. 1907; amd. Sec. M. 1921.

40-1304. (6114) Licenses of insurance companies—when expire. All licenses issued under this act shall expire on the 31st day of March of each year.

History: En. Sec. 4, Ch. 97, L. 1903; Ch. 14, L. 1909; re-en. Sec. 6114, R. C. M. re-en. Sec. 4019, Rev. C. 1907; amd. Sec. 1, 1921.

40-1305. (6115) Duty to comply with laws. Nothing in this act shall be construed into permitting any insurance corporation, association, or society to do business in the state of Montana, even when in possession of the license provided for herein, unless such corporation, association, or society shall have complied with the laws of the state of Montana now in force, or which may hereafter be enacted.

History: En. Sec. 5, p. 77, L. 1897; re-en. Sec. 4020, Rev. C. 1907; re-en. Sec. 6115, R. C. M. 1921.

40-1306. (6116) Penalty for foreign corporations doing business in violation of law. Every foreign insurance corporation, association, and society, which may hereafter desire to engage in the business of insurance in this state, shall first pay as a fee for filing the documents provided for in section 40-1422, the sum of three hundred dollars, and if any person or persons, agents, officers, or trustees of any corporation, association, and society, doing any insurance business, shall cause to be issued or procured, received or forwarded, application for insurance, or delivered policies for any company or companies or associations of persons not having complied with the provisions of this act, or shall adjust any loss, or in any manner, either directly or indirectly, aid in the transaction of insurance with any such company in this state, or in any way violate the provisions of this section, shall, upon conviction, be deemed guilty of felony.

History: En. Sec. 6, p. 77, L. 1897;
re-en. Sec. 4021, Rev. C. 1907; re-en. Sec.
6116, R. C. M. 1921.

Collateral References

Insurance 27.
44 C.J.S. Insurance § 86.

40-1307. (6117) Officers—when guilty of misdemeanor. If any officer, trustee, agent, or other person shall, directly or indirectly, collect any premium for any insurance company where such company has failed to obtain a license as provided for in this act; or where such company shall have failed to obtain a license as provided for in this act; or where such company has collected premiums in excess of the amount already provided for in the license already obtained, such persons shall be deemed guilty of a misdemeanor and upon conviction shall be punishable accordingly; provided, however, that any company which has collected premiums in excess of the sum of five thousand dollars in any year without having obtained a license authorizing it so to do, may at the time it files its annual statement pay to the state auditor the amount of the license due the state for such excess premiums.

History: En. Sec. 7, p. 78, L. 1897;
re-en. Sec. 4022, Rev. C. 1907; amd. Sec. 1,
Ch. 30, L. 1921; re-en. Sec. 6117, R. C. M.
1921.

Collateral References

Insurance 30.
44 C.J.S. Insurance § 89.

40-1308. (6118) Obtaining of licenses to transact insurance business—all agents. (1) Before transacting any fire, life or other indemnity or insurance business, each and every agent, firm or corporation acting as agent, solicitor or representative of such corporations or associations, shall procure annually from the commissioner of insurance a certificate of authority or license as an agent, solicitor or representative of each corporation or association represented by him or them, and which certificate shall terminate or expire on the thirty-first day of March of each year, unless sooner revoked or terminated as otherwise provided, for which a fee of five dollars (\$5) for each certificate shall be paid to the commissioner of insurance; provided, that the commissioner of insurance is hereby prohibited from issuing a certificate of authority to write policies of insurance, or to solicit and obtain and transact insurance business as defined in this act, to any person, agent, firm or corporation, unless such person, agent, firm or corporation is a legal resident of the state of Montana at the time such certificate of authority is issued.

(2) Every applicant who shall apply for such license shall file with the commissioner of insurance his written application on blanks furnished by the commissioner, which application shall be signed and sworn to by the applicant and shall give his name, age, residence, place of business and occupation for five (5) years next prior to the date of application and also set forth his qualifications for such license; namely, his familiarity with the insurance laws of this state and with the provisions of the contracts to be negotiated; what insurance experience he has had, if any; what insurance instruction he has had or expects to receive; whether he has been refused or has had suspended or revoked a license to solicit insurance by the insurance department or supervising officials of any state; whether any insurance company or any general agent claims such applicant is indebted under any agency, contract or otherwise, and if so, the name of the claimant, the nature of the claim and the applicant's defense thereto, if

any; whether he has had an agency contract cancelled, and if so, when, by what company or general agent and the reason therefor.

(3) The applicant shall be vouched for by an official or a licensed representative of the company for which he proposes to act, who shall certify whether the applicant is personally known to him, whether the applicant has been appointed an agent to represent such company, and that such company has duly investigated the character and record of such person, and has satisfied itself that he is trustworthy and qualified to act as its agent and intends to hold himself out in good faith as an insurance agent. Upon the termination of the employment of any agent every insurance company shall file with the commissioner of insurance a statement of the facts relative to the termination of such employment and the cause thereof. Any information, document, record, statement or thing required to be made or disclosed to the commissioner of insurance by this act, shall be privileged and shall not be used as evidence in any action or proceeding instituted against the company or any representative thereof by or in behalf of any person who has been licensed under the provisions of this act.

(4) The commissioner of insurance may suspend or revoke the license of any insurance agent if, after due investigation, notice and a hearing, he determines that such license has been secured by fraud or misrepresentation; or that the agent has violated any insurance law of this state; or has failed or refused to pay or to deliver to the company or to his principal any money or other property in the hands of said agent belonging to such company or principal when requested so to do; or has violated any lawful ruling of the insurance department; or has been convicted of a felony; or has otherwise shown himself untrustworthy or incompetent to act as an insurance agent. Before the commissioner of insurance shall revoke or suspend any such license he shall give to the agent and to the company which he represents written notice of the charges and of the hearing, not less than twenty (20) days prior to the time set for such hearing. Such notice shall be forwarded by registered mail addressed to the agent at his last known address, and to the company at its principal place of business. Full opportunity shall be given at such hearing to the agent and to the company to appear with counsel and be heard upon such charges.

(5) Within thirty (30) days after the revocation or suspension of license or the refusal of the commissioner of insurance to grant a license, the agent or applicant aggrieved may appeal from the ruling of the commissioner of insurance to any court of competent jurisdiction. Appeals may be taken from the judgment of said court as in other civil cases. In the absence of a contrary ruling by the commissioner of insurance in a given case, license renewals shall be issued from year to year upon the request of the company without further action on the part of the agent. No officer or traveling salaried employee of any insurance company not compensated on a commission basis shall be required to obtain a license under this act.

(6) Any person or persons who shall in any way violate the provisions of this act shall, upon conviction, be fined not less than fifty dollars (\$50) nor more than one hundred dollars (\$100), or imprisoned in the county jail for not less than thirty (30) days nor more than ninety (90) days, or both such fine and imprisonment, at the discretion of the court. Certificates of

authority or licenses issued under this section shall be considered the licenses of the company, corporation, association or society applying for the same and may at all times be transferred from the agent, firm or corporation for which the license was originally issued to another agent, firm or corporation, on the surrender of the said license to the commissioner of insurance, who will make the proper indorsement thereon. No part of this act shall be construed as in any way repealing section 40-1325, nor shall any part of this act be construed as in any way altering or amending any part of chapter 21 of this Title relating to fraternal benefit societies.

History: En. Sec. 8, p. 78, L. 1897; amd. Sec. 8, Ch. 97, L. 1903; re-en. Sec. 4023, Rev. C. 1907; amd. Sec. 2, Ch. 14, L. 1909; re-en. Sec. 6118, R. C. M. 1921; amd. Sec. 1, Ch. 48, L. 1933.

Collateral References

Insurance 12, 22.

44 C.J.S. Insurance § 85.

29 Am. Jur. 110, Insurance, §§ 85 et seq.

Power of state to regulate and control insurance agents or brokers. 36 ALR 1512.

Discrimination by state against foreign insurance corporations in imposition of taxes and license fees. 49 ALR 726.

Constitutionality of statutes requiring payment to state of fee on appointment of agent by foreign insurance company. 60 ALR 1172.

Regulation or control of insurance agents or brokers. 10 ALR 2d 950.

40-1309. "Insurance agent" defined. "Agent" or "insurance agent" is a person, copartnership or corporation, duly authorized and commissioned by an insurance company, to solicit applications for and effect insurance in the name of the company, and to keep a complete record of all such transactions, and to discharge such other duties as may be vested in or required of the agent by said insurance company.

History: En. Sec. 1, Ch. 76, L. 1941.

Collateral References

Regulation or control of insurance agents or brokers. 10 ALR 2d 950.

40-1310. "Solicitor" defined. "Solicitor" or "insurance solicitor" is a person duly appointed, authorized and employed by a duly commissioned and licensed insurance agent to solicit, receive, and forward applications for insurance and to collect premiums for such agent; provided, that all business transacted by said solicitor shall be in the name of the agent appointing him, and said agent shall be responsible for all acts of said solicitor while acting for such agent; and provided further, that a person devoting his whole time to clerical work in the office of an agent shall not be deemed a solicitor and shall not be required to be licensed.

History: En. Sec. 2, Ch. 76, L. 1941.

40-1311. Application for solicitor's license. As a condition precedent to securing a solicitor's license, each and every applicant for a solicitor's license shall execute and file with the commissioner of insurance an application therefor on forms to be furnished by the said commissioner of insurance in conformity with the provisions of section 40-1308, which said application shall be signed and sworn to by the applicant and certified to by the agent, who shall have filed a requisition for said license with the commissioner of insurance; provided, that each solicitor shall be required to file but one (1) application and procure but one (1) solicitor's license for all classes of companies for which insurance is being solicited; and provided further, that no solicitor shall concurrently hold a solicitor's license for more than one (1) agent, neither shall any applicant be licensed as

both agent and solicitor for the same class or classes of insurance at the same time.

History: En. Sec. 3, Ch. 76, L. 1941.

40-1312. Solicitor's license—fee and duration—transferability. The commissioner of insurance shall require in advance, for each solicitor's license, a fee of five (\$5.00) dollars, to be paid annually by the duly commissioned and licensed agent, which certificate of authority or license issued to a solicitor shall terminate or expire on the thirty-first day of March each year, unless sooner revoked or terminated, subject to the provisions of section 40-1308; provided that any solicitor's license issued and in force when this act takes effect or thereafter issued, may in the discretion of the commissioner of insurance, be renewed for a succeeding year or years by a renewal certificate without the commissioner's requiring the application prescribed in this act. Certificates of authority or licenses issued under this section may at all times be transferred from one (1) solicitor to another solicitor, at the request of the duly licensed agent and upon the surrender of said license to the commissioner of insurance, who shall make the proper indorsement thereon.

History: En. Sec. 4, Ch. 76, L. 1941.

40-1313. Construction of act. No part of this act shall be construed as in any way repealing section 40-1308, insofar as applying to agents obtaining of licenses to transact insurance business, nor shall any part of this act be construed as in any way altering or amending any part of chapter 21 of this Title, relating to fraternal benefit societies.

History: En. Sec. 5, Ch. 76, L. 1941.

40-1314. Montana insurance organizations forbidden to engage in insurance business in foreign jurisdiction without license. No insurance corporation, association, society or organization of any kind, organized or existing under the laws of the state of Montana, or any representative thereof, shall engage in or attempt to engage in the business of insurance, or advertise or circularize its business of insurance or in any manner whatsoever attempt to transact the business of insurance or accept risks of any kind or nature in any foreign jurisdiction, without first procuring a license from the proper licensing department, board or bureau of such foreign jurisdiction, wherein and whereby the Montana insurer shall be duly licensed to conduct the business of insurance in said foreign jurisdiction. Provided, however, that the provisions of this act shall not apply to a Montana insurer, where the minority proportion of a risk or risks accepted by said Montana insurer are resided, situated or located in a jurisdiction in which said Montana insurer is not licensed, provided, the major proportions of said accepted risk or risks are resided, situated or located in a jurisdiction in which the said insurer is duly licensed and provided further that the origin of the accepted risk or risks was by means other than by advertising or circularization locally in a foreign jurisdiction wherein such Montana insurer is not duly licensed.

History: En. Sec. 1, Ch. 214, L. 1943.

40-1315. Citation by commissioner to show why license should not be vacated. Whenever the insurance commissioner of the state of Montana

shall determine, after due investigation, that any Montana insurance corporation, association, society or organization, or any representative thereof, has willfully violated the provisions of this act, the said insurance commissioner shall issue a written notice to the offending Montana insurer and its representative or representatives responsible for the violation of the provisions of this act to appear, in person or by counsel, before the said insurance commissioner on a date certain, not less than ten (10) days after date of service of said notice upon the Montana insurer and its representative or representatives and show cause why the license issued to said Montana insurer and its representative or representatives or either thereof, by the Montana insurance department, should not be vacated and held for naught.

History: En. Sec. 2, Ch. 214, L. 1943.

40-1316. Findings of commissioner transmitted to attorney general—duty of latter. Whenever the insurance commissioner, of the state of Montana, shall determine, after a hearing held, pursuant to notice duly made as provided by section 40-1315, that the respondent Montana insurance corporation, association, society or organization, or its representative or representatives, has violated the provisions of this act, it shall be the duty of the insurance commissioner to transmit to the attorney general a complete report of this hearing and of the findings made by the insurance commissioner, whose duty it shall be to apply to the district court of the county wherein the seat of government be located, for an order requiring the officers, directors, or managers of such corporation to show cause why they should not be removed from office or its business closed.

History: En. Sec. 3, Ch. 214, L. 1943.

40-1317. Appeal. Any Montana insurance corporation, association, society or organization, or representative thereof, aggrieved by any order of revocation or cancellation of license duly made and entered by the Montana insurance commissioner pursuant to the provisions of this act, may, within thirty (30) days from the date of said order of revocation or cancellation, appeal to the district court of the county wherein the seat of government be located for a review of the proceedings had before the said Montana insurance commissioner. The hearing of the matter before the said district court will be as of a trial de novo and all orders and judgment of the court will be binding upon all parties.

History: En. Sec. 4, Ch. 214, L. 1943.

40-1318. Writing and countersignature of insurance policies by resident agent required. It shall be unlawful for any insurance company or association to write, issue, place or cause to be written, issued or placed in this state, any policy, bond, duplicate policy, contract of indemnity or insurance of any kind or character, hereinafter called contracts of insurance, covering risks on any persons, property, insurable business, activity or interest, located or transacted within this state, unless written through and countersigned by a resident agent of this state, duly licensed to transact such insurance, bonding or indemnity business therein. No such resident agent shall countersign contracts of insurance or endorsements in blank.

History: En. Sec. 1, Ch. 62, L. 1941.

Compiler's Note

According to the insurance commissioner of the state of Montana, chapter 95 of the Laws of 1937, omitted from the Revised Codes of Montana of 1947 as impliedly repealed by chapter 62 of the Laws of 1941 (sec. 40-1318 to 40-1324), may apply to some of the insurance excepted by section 40-1323. Accordingly, this chapter is set out here for reference:

"Section 1. It shall be unlawful for any insurance company or association, including life, fire, casualty, surety or indemnity corporations or associations doing business within the state of Montana (except so-called assessment life insurance companies, as hereinafter provided, and fraternal benefit societies and rural mutual insurance companies) to make, write, place, or cause to be made, written or placed in this state, any policy, bond, duplicate policy, contract of insurance or contract of indemnity of any kind or character, or any general floating group policy upon persons or property, or upon any insurable risk, resident, situated or located in this state, unless written through and countersigned by an agent of this state, duly licensed to transact insurance, bonding or indemnity business therein.

"A resident agent shall countersign all policies, bonds or contracts of indemnity so issued, and shall receive the full commission on all such policies, bonds or contracts of insurance on indemnity, when the premium is paid, to the end that the state may receive the tax required by law to be paid on the premiums collected for insurance on all persons, property or other insurable risks resident, situated or located within this state; provided that nothing in this act shall be construed to prevent any insurance company or association from issuing policies, bonds or contracts at its principal or department offices, covering property or persons or other insurable or indemnity risks resident, situated or located in this state; provided, however, such policies are issued upon application procured and submitted to such company or association by a resident agent, who shall keep a record of all such policies, bonds or contracts of indemnity so issued, and countersign the same, and that said resident agent or agents shall receive the full commission on all policies when premium is paid. It shall be unlawful for any such resident agent to rebate or divide such commission, with intent to evade the provisions of this act; and any violation of this provision shall be punished as provided in sections 6123 and 6124 Revised Codes of Montana 1935 [40-1329, 40-1330]. Provided, however, that the signature of a resident agent on an application for a life insurance policy shall be deemed a countersigning of the policy

if a copy of such application is attached to the policy.

"Section 2. Exceptions. No provision of this act is intended to, nor shall it apply to direct insurance covering the rolling stock of railroad corporations or property in transit while in the possession and custody of railroad corporations or other common carriers, or of property, persons or other risks which were not located, resident nor situated within the state of Montana when said insurance, bond or contract of indemnity was originally written thereon.

"Nor shall any of the provisions of this act apply to assessment life insurance companies, as defined in section 6293 Revised Codes of Montana 1935 [40-2001], nor to fraternal benefit societies having lodge systems, as defined in section 6305 et seq. Revised Codes of Montana 1935 [40-2101], nor to mutual rural insurance companies, as defined in sections 6170 to 6205 Revised Codes of Montana 1935 [40-1501 to 40-1517, 40-1601 to 40-1622], each and all of which said companies, societies and associations are hereby expressly excluded from the operation of this act.

"Section 3. Penalties. Any life insurance companies, fire insurance companies, surety or indemnity companies or associations wilfully failing to observe or comply with the provisions of this act shall be guilty of a misdemeanor and shall be subject to and liable to pay a penalty of five hundred dollars (\$500.00) for each violation thereof, and for each failure to observe and comply with the provisions of said section, after notice and hearing by the state commissioner of insurance, in the same manner as provided by law for the investigation and punishment by the state commissioner of insurance for other infractions and violations of the insurance laws of this state. Such fines and penalties shall be handled and disposed of by the state commissioner of insurance in the same manner as license fees are now handled and disposed of by said commissioner.

"After such notice and hearing the commissioner of insurance may, in his discretion, revoke the certificate of authority issued to any corporation, society or agent on his being satisfied, after notice and hearing as provided by law, that such corporation, society or agent has violated any of the provisions of this act. This penalty is in addition to the other penalties herein described.

"Any corporation, society or agent whose certificate of authority has been revoked may, within fifteen (15) days thereafter, appeal from said order to any district court of this state having jurisdiction over the persons, corporations or agents concerned.

"Section 4. Any insurance company, indemnity corporation or surety corporation or association whose authority to transact business in this state shall have been so revoked shall not again be authorized or permitted to transact business within the state of Montana until it shall have paid the amount of any fine or fines assessed by the state commissioner of insurance, and shall have filed in the office of the

state auditor a certificate signed by its president or other chief executive officer to the effect that the terms and obligations of the provisions of this act are accepted by it as part of the conditions of its right and authority to transact business in this state."

Section 5. [Repealing Clause.]

Section 6. [Effective Date.]

40-1319. Only resident agents paid by commission may countersign—exception of emergency contracts. Only resident agents within this state, whose compensation for soliciting and writing insurance is by way of commission figured as a percentage of the premium for each contract of insurance written, may countersign contracts of insurance or endorsements thereto within this state; provided, however, the provisions of this section shall not apply to mutual or stock companies soliciting insurance by salaried representatives who are paid no commission on contracts of insurance written. Except as hereinafter provided, no branch manager, state agent, special agent, general or any other like supervisory agent or any other representative of an insurance company, hereinafter referred to as company representative, whose compensation in the insurance business is derived either in whole or in part by salary, may countersign contracts of insurance or endorsements thereto; however, in any case where it is necessary to execute an emergency contract of insurance, where a resident agent is not available who has authority to execute such contract, a company representative may execute the contract in the first instance in order to produce a valid contract between the company and the obligee or the insured; provided such contract of insurance is subsequently countersigned by a resident agent who shall keep a written record of all such contracts of insurance issued.

History: En. Sec. 2, Ch. 62, L. 1941.

40-1320. Commission of resident agents on policies originating without the state. In the event contracts of insurance or endorsements thereto on risks located within this state, as defined in section 40-1318, are contracted for or otherwise originate without the state of Montana, then in that event, there shall be payable to the countersigning agent, resident of the state of Montana, a commission which shall not be less than five per cent (5%) of the premium charged for such policy or contract of insurance or endorsement thereto, when the premium is paid, to the end that the state may receive the tax required by law to be paid on the premiums collected for insurance on any persons, property, insurable business, activity or interest, located or transacted within this state; provided that where the originating agent or broker or the company assuming the risk desires additional service to be rendered during the life of the contract of insurance, then and in such cases the compensation to be paid to the countersigning resident agent shall be a matter of contract between the parties in interest.

History: En. Sec. 3, Ch. 62, L. 1941.

Former Statute Requiring Payment to Resident Agent "Full" Commission Held to Deny Due Process—Reversed

In construing Ch. 95, Laws 1937 (omit-

ted) apparently repealed by this chapter, held that the requirement of the former statute that insurance companies pay to resident agents the "full" commission on policies issued on risks in the state, prohibiting payment of a portion thereof to

nonresident agents and brokers and authorizing revocation of the certificate of authority issued to an insurance company which failed to comply therewith, denied "due process" and "equal protection of the

laws." *Springfield Fire & Marine Ins. Co. v. Holmes*, 32 F Supp 964, 988. Reversed without opinion in *Holmes v. Springfield Fire & Marine Ins. Co.*, 311 U S 606, 85 L Ed 384, 61 S Ct 19.

40-1321. Resident agents to keep record of policies issued at principal or department offices of companies—commission. Nothing in this act shall be construed to prevent any insurance company or association from issuing contracts of insurance at its principal or department offices; provided, however, such contracts of insurance are subsequently countersigned by a resident agent, who shall keep a written record of all such contracts of insurance so issued, and that said resident agent or agents shall receive the commission on all such contracts of insurance when the premium is paid.

History: En. Sec. 4, Ch. 62, L. 1941.

40-1322. Resident agents may exchange business and divide commission. It shall be lawful for any duly authorized resident agent in this state, licensed to negotiate contracts of insurance, to exchange business with other resident agents in this state authorized to transact the same character of business, and to divide the commission on the premiums collected on contracts of insurance with any resident agents in this state.

History: En. Sec. 5, Ch. 62, L. 1941.

40-1323. Exception—companies excluded. No provision of this act is intended to, nor shall it apply to direct insurance covering the rolling stock of a railroad corporation or property in transit while in the possession and custody of railroad corporations or other common carriers engaged in interstate commerce or of property in transportation.

Nor shall any of the provisions of this act apply to the business of mutual or stock insurance companies who solicit insurance by salaried representatives and upon which no commission is paid, nor to mutual rural insurance companies, as defined in sections 40-1501 to 40-1622, nor to fraternal benefit societies, as defined in sections 40-2101 and 40-2102, nor to assessment life insurance companies, as defined in section 40-2001, nor to stock and mutual life insurance companies, each and all of which said companies, societies and associations are hereby expressly excluded from the operation of this act.

History: En. Sec. 6, Ch. 62, L. 1941.

Cross-Reference

See Compiler's Note to sec. 40-1318.

40-1324. Penalty. Any person or company violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction shall be liable for a penalty of not to exceed one hundred dollars (\$100.00) for each violation thereof.

History: En. Sec. 7, Ch. 62, L. 1941.

40-1325. (6119) Law not applicable to fraternal societies. Nothing in this act shall be construed as affecting fraternal associations or secret societies, which may insure the lives of their members only.

History: En. Sec. 9, p. 78, L. 1897; re-en. Sec. 4024, Rev. C. 1907; re-en. Sec. 6119, R. C. M. 1921.

Collateral References

Insurance 687.
46 C.J.S. Insurance § 1435.

40-1326. (6120) Publication of annual statement. Every insurance company of the character provided for in this chapter, doing business in the state, organized under the laws of this or any other state or country, shall publish annually, before the first day of May, in two newspapers of general circulation, to be approved by the state auditor, one of which shall be published at the seat of government, and, in case of companies organized in the state, one in the county where the principal office is located, a certificate from the auditor that such company has in all respects complied with the law of the state relating to insurance, and an affidavit of such publication made by the publisher or foreman of such newspaper shall be filed in the office of the auditor within thirty days from the date of such publication. Said certificate shall also contain a statement made up from the annual report of said company of the actual amount of paid-up capital, the aggregate amount of assets and liabilities at the date of such report, together with the aggregate income and expenditures of such company for the preceding year, as shown by said report.

History: En. Sec. 1, Ch. 68, L. 1907;
Sec. 4025, Rev. C. 1907; re-en. Sec. 6120,
R. C. M. 1921.

Collateral References

29 Am. Jur. 64, Insurance, § 26.

40-1327. (6121) Discrimination prohibited. No insurance company organized under the laws of this state, or doing business in this state, shall make or permit any discrimination or distinction in favor of individuals between insurants or property of the same class in the amount of premiums or rates charged for policies, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes; nor shall any such company or agent thereof make any contract of insurance or agreement as to such contract other than as plainly expressed in the policy issued thereon, nor shall any such company or agent pay or allow, offer to pay or allow, as inducement to insurance, any rebate of premium payable on the policy, or any special favor or advantages in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever, not specified in the policy contract of insurance.

History: En. Sec. 1, Ch. 112, L. 1903;
re-en. Sec. 4026, Rev. C. 1907; re-en. Sec.
6121, R. C. M. 1921.

29 Am. Jur., Insurance, p. 66, § 29; p.
329, §§ 381 et seq.

Operation and Effect

A fire insurance solicitor who, pursuant to an agreement with an agent of the owner of a business block, paid over to the agent two-thirds of the commission earned by him in writing the insurance upon such block, was guilty of "rebating" under this section. *Smith v. Kleinschmidt*, 57 M 237, 187 P 894.

Flat life insurance premium rate regardless of age, or failure to apply rate applicable according to age, as discrimination. 84 ALR 525.

Right of insurer, as affected by statute against discrimination, to reformation of policy or other relief because of its own error, not due to misrepresentation by insured, in computing premiums, indemnity, or other benefit or option under policy. 125 ALR 1058, 1066.

References

Robb v. Porter et al., 65 M 460, 461, 211 P 210.

Dividends on policies as violation of statutory prohibition of rebate, remission, refund, or other discrimination in respect of premiums. 137 ALR 1029.

Collateral References

Insurance—28.

44 C.J.S. Insurance § 86.

Offering rebate or other financial benefit as ground for cancellation of agent's license. 154 ALR 1154.

40-1328. (6122) Penalty for violation of law. Every corporation or officer or agent thereof which shall violate any of the provisions of this act shall be fined in any sum not exceeding five hundred dollars, to be recovered by an action in the name of the state, and on collection to be paid into the county treasury for the benefit of the common school fund.

History: En. Sec. 2, Ch. 112, L. 1903; re-en. Sec. 4027, Rev. C. 1907; re-en. Sec. 6122, R. C. M. 1921.

References

Cited or applied as section 4027, Revised Codes, in *Smith v. Kleinschmidt*, 57 M 237, 187 P 894.

Collateral References

Insurance 28.
44 C.J.S. Insurance § 86.

Personal liability of public officials or their bonds for permitting insurance company to engage or continue in business without complying with statutory requirements. 131 ALR 275.

40-1329. (6123) Violation of law by agent a misdemeanor. Every officer or agent of any such corporation, who shall violate any of the provisions of this act, shall be deemed guilty of a misdemeanor.

History: En. Sec. 3, Ch. 112, L. 1903; re-en. Sec. 4028, Rev. C. 1907; re-en. Sec. 6123, R. C. M. 1921. Codes, in *Smith v. Kleinschmidt*, 57 M 237, 187 P 894.

References

Cited or applied as section 4028, Revised

Collateral References

Insurance 30.
44 C.J.S. Insurance § 89.

40-1330. (6124) Suspension of licenses for violations—commissioner's power to make rules and regulations. Whenever it shall appear to the satisfaction of the commissioner of insurance after a hearing before him upon notice, that any company, officer, agent, solicitor or helper has violated any provision of this act, he shall suspend the license of any such company, officer, agent, solicitor or helper to transact business in this state for a period of sixty (60) days for the first offense, and for a period of from not less than one year to not more than three years in the discretion of the commissioner of insurance, for the second or any additional offenses, and no other license shall be issued to any such company, officer, agent, solicitor, or helper during the period of suspension, as the case may be.

The insurance commissioner is hereby given power to do all things necessary and convenient for carrying into effect the laws of this state governing insurance companies and may from time to time promulgate necessary rules and regulations for the better protection of the insuring public.

History: En. Sec. 4, Ch. 112, L. 1903; re-en. Sec. 4029, Rev. C. 1907; re-en. Sec. 6124, R. C. M. 1921; amd. Sec. 1, Ch. 20, L. 1923.

Operation and Effect

In an action by an insurance agent against the state insurance commissioner to recover damages for revoking his license without first giving him notice and a chance to be heard, held, that, conceding that defendant had failed to pursue the steps prescribed by this statute in revoking the license, it appearing affirmatively that plaintiff had been guilty of rebating, he was at best only entitled to nominal

damages, and that the judgment for defendant on a directed verdict will not be disturbed on appeal to enable plaintiff to recover merely such damages. *Robb v. Porter et al.*, 65 M 460, 461, 211 P 210.

Collateral References

Insurance 5.
44 C.J.S. Insurance § 69.

Personal liability of public officials or their bonds for permitting insurance company to engage or continue in business without complying with statutory requirements. 131 ALR 275.

40-1331. (6125) Law not applicable to fraternal societies. Nothing in this act shall be construed as affecting fraternal associations or secret societies, which may insure the lives of their members only.

History: En. Sec. 5, Ch. 112, L. 1903;
re-en. Sec. 4030, Rev. C. 1907; re-en. Sec.
6125, R. C. M. 1921.

Collateral References
Insurance 687.
46 C.J.S. Insurance § 1435.

40-1332. (6126) Investigation of affairs of corporations engaged in organizing insurance companies. The commissioner of insurance shall, as often as he deems it expedient, examine into the affairs of any corporation organized under any law of this state, or having an office in this state, which corporation is engaged in, or is claiming or advertising that it is engaged in, organizing or receiving subscriptions for or disposing of stock of, or in any manner aiding or taking part in the formation or business of an insurance corporation or corporations, or which is holding a capital stock of one or more insurance corporations, for the purpose of controlling the management thereof as voting trustee or otherwise. For such purpose he may appoint as examiners one or more competent persons not officers of or connected with or interested in any insurance corporation other than as policy-holders; and upon such examination he, his deputy, or any examiner authorized by him, may examine under oath the officers and agents of such corporation, and all persons deemed to have material information regarding the company's property or business. Every such corporation, its officers and agents, shall produce its books and all papers in its or their possession relating to its business or affairs, and any other person may be required to produce any book or paper in his custody deemed to be relevant to the examination, for the inspection of the commissioner, his deputies or examiners, whenever required, and the officers and agents of such corporation shall facilitate such examination and aid the examiner in making the same so far as it is in their power to do so. Every such examiner shall make a full and true report of every examination made by him, verified by his oath, which shall comprise only facts appearing upon the books, papers, records, or documents of such corporation, or ascertained from the testimony, sworn to, of its officers or agents, or other persons examined under oath concerning its affairs, and such conclusions and recommendations as may reasonably be warranted from such facts so disclosed; and said report so verified shall be presumptive evidence in any action or proceeding in the name of the people against the corporation, its officers or agents, of the facts stated therein. The commissioner shall grant a hearing to the corporation examined before filing any such report; and may, if he deems it for the interest of the public to do so, publish any such examination as contained therein in one or more newspapers of the state.

History: En. Sec. 1, Ch. 12, L. 1911;
re-en. Sec. 6126, R. C. M. 1921.

Collateral References
Insurance 10.
44 C.J.S. Insurance § 57.

40-1333. (6127) Investment of funds in irrigation district bonds. In all cases where any law of the state of Montana now authorizes the investment of any of the funds of any insurance company, organized and doing business under the laws of the state of Montana, in state, county, city, or

school district bonds or securities, such authorization is hereby extended in all such cases to the purchase of the bonds of any irrigation district heretofore or hereafter organized under the laws of the state of Montana.

History: En. Sec. 1, Ch. 24, L. 1913;
re-en. Sec. 6127, R. C. M. 1921.

Collateral References

Insurance 8.

44 C.J.S. Insurance §§ 72, 96.

CHAPTER 14

INSURANCE COMPANIES OTHER THAN LIFE

- Section 40-1401. Notice and certificate.
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40-1401. (6128) Notice and certificate. When any number of persons associate themselves together for the purpose of forming an insurance corporation for any other purpose than life insurance, they shall publish a notice of such intention once a week for four consecutive weeks in some public newspaper in the county in which such insurance corporation is

proposed to be located; and they shall also make articles of incorporation, as provided in section 15-108, and forward to the state auditor, who shall submit the same to the attorney-general for examination, and if it shall be found by the attorney-general to be in accordance with the provisions of this chapter, and not in conflict with the constitution and laws of the United States and this state, he shall make a certificate of the facts and return it to the state auditor, who shall reject the name or title applied for by any persons, when he shall deem the same so similar to any one already appropriated by any other company or corporation as to be likely to mislead the public.

History: En. Sec. 650, Civ. C. 1895; re-en. Sec. 4042, Rev. C. 1907; re-en. Sec. 6128, R. C. M. 1921. (Earlier acts regulating insurance companies, other than life insurance, were secs. 1-39, pp. 67-84, L. 1883, ap. as secs. 564-602, 5th Div. Comp. Stat. 1887.)

Cross-Reference

Formation of insurance companies, sec. 15-104.

Operation and Effect

This chapter contains a distinct system with relation to stock and mutual insurance companies. This system extends

to associations to be formed in the state, and to foreign insurance companies as well. State ex rel. Aachen & Munich F. Ins. Co. v. Rotwitt, 17 M 41, 50, 41 P 1004.

References

Cited or applied as section 650, Civil Code, in Northwestern Mut. Life Ins. Co. v. Lewis and Clark County, 28 M 484, 489, 72 P 982.

Collateral References

Insurance—32, 52.
44 C.J.S. Insurance §§ 94, 95, 104, 105.

40-1402. (6129) Approval of insurance commissioner of articles. When the articles of incorporation shall have received the approval of the insurance commissioner, such articles, with said approval, must be filed, recorded, and certified, as required by law for the filing of articles of incorporation. All proposed amendments and changes in such articles of incorporation must likewise be submitted to the insurance commissioner and approved by him before the same become effective.

History: En. Sec. 651, Civ. C. 1895; 1, Ch. 31, L. 1921; re-en. Sec. 6129, R. C. re-en. Sec. 4043, Rev. C. 1907; amd. Sec. M. 1921.

40-1403. (6130) Amount of capital stock. The capital of every corporation formed under the provisions of this chapter shall not be less than two hundred thousand dollars, nor more than one million dollars, as may be specified in the articles of incorporation. Any such corporation shall issue stock divided into shares of the par value of one hundred dollars each, at least fifty per cent of which stock shall be fully paid up in cash, the remaining unpaid portion of such stock, if any there shall be, shall be paid up within such time as the directors or trustees of said corporation shall order, but not later than two years after the issuance of the certificate of authorization by the insurance commissioner. Promissory notes shall be executed for the payment of the unpaid portion of said stock, which notes shall be executed by the stockholders, payable to the corporation, and such notes shall be secured by at least one surety or by mortgages on unencumbered real estate within the state of Montana, worth at least twice the amount of such notes, and said security shall be approved by the insurance commissioner.

History: En. Sec. 652, Civ. C. 1895; re-en. Sec. 4044, Rev. C. 1907; amd. Sec. 1, Ch. 218, L. 1919; re-en. Sec. 6130, R. C. M. 1921.

Collateral References
Insurance 33.
44 C.J.S. Insurance § 96.

40-1404. (6131) Mutual insurance. No corporation on the plan of mutual insurance shall commence business in this state until agreements shall have been entered into for insurance with at least two hundred applicants, the premiums upon which shall amount to not less than twenty-five thousand dollars, of which at least five thousand dollars shall have been paid in cash, and for the remainder of which notes of solvent parties, founded upon actual and bona fide applications for insurance, shall have been received; no one of the notes received, as aforesaid, shall amount to more than five hundred dollars, and no two thereof shall be given for the same risk, or made by the same person or firm, except when the whole amount of such notes does not exceed the sum of five hundred dollars, nor shall any note be regarded or represented as capital stock unless a policy be issued upon the same within thirty days after the organization of the corporation taking the same, upon a risk which shall be for no shorter period than twelve months, each of said notes shall be payable, in whole or in part, at any time when the directors shall deem the same requisite for the payment of losses by fire or inland navigation, and such incidental expenses as may be necessary for transacting the business of said corporation; and no notes shall be accepted as a part of such capital stock, unless the same shall be sufficiently indorsed or secured, if security is required by the directors, and no such note shall be surrendered while the policy for which it was given continues in force.

History: En. Sec. 653, Civ. C. 1895; re-en. Sec. 4045, Rev. C. 1907; re-en. Sec. 6131, R. C. M. 1921.

Collateral References

Insurance 52.
44 C.J.S. Insurance §§ 104, 105.
29 Am. Jur. 86, Insurance, §§ 52 et seq.

Mutual companies and benefit or fraternal societies as insurance companies. 63 ALR 735.

Insurance companies, which are members of Federal reserve banks or similar Federal agencies or national banks, as within state social security or unemployment compensation act. 145 ALR 1074.

40-1405. (6132) Books for capital stock opened. Having published the notice, and filed the publisher's affidavit of the publication thereof with the state auditor, together with the articles of incorporation, as required by section 40-1401 of this chapter, the persons named in the articles of incorporation, or a majority of them, shall open books for the subscription of stock to the corporation, at such times and places as to them may seem convenient and proper, and shall keep the same open until the full amount specified in the articles of incorporation is subscribed; or in case the business of such corporation is proposed to be conducted on the plan of mutual insurance then they shall open books and receive propositions and enter into agreements in the manner and to the extent specified in sections 40-1403 and 40-1404.

History: En. Sec. 654, Civ. C. 1895; re-en. Sec. 4046, Rev. C. 1907; re-en. Sec. 6132, R. C. M. 1921.

Collateral References
Insurance 33.
44 C.J.S. Insurance § 96.

40-1406. (6133) Directors, number and election of. The affairs of any corporation organized under the provisions of this chapter shall be man-

aged by not more than thirteen nor less than three directors, all of whom shall be stockholders. Within thirty days after the requisite amount of stock has been subscribed, cash paid, and notes given and approved, a meeting for the election of directors shall be called and held and directors elected as provided for the election of directors of trust deposit and security corporations in (see note) section 3926 of this code, and the directors so elected shall continue in office until their successors have been duly elected and qualified, and thereafter directors shall be annually elected as provided in section 15-403.

History: En. Sec. 655, Civ. C. 1895; re-en. Sec. 4047, Rev. C. 1907; re-en. Sec. 6133, R. C. M. 1921.

Collateral References

Insurance 35, 56.
44 C.J.S. Insurance §§ 98, 109.

NOTE.—Section 3926, referred to above, was repealed by chapter 89, Laws of 1915.

40-1407. (6134) Investment of funds. It shall be lawful for any insurance corporation organized under this chapter, or incorporated under any law of this state, to invest its capital and the funds accumulated in the course of its business, or any part thereof, in bonds and mortgages on unencumbered real estate within this state worth double the sum loaned thereon, exclusive of buildings, unless such buildings are insured in some responsible company or companies, and the policy or policies transferred to said corporation, and also in stocks of this state, or stocks or treasury notes of the United States, in the stocks and bonds of any county or incorporated city in this state, and to lend the same, or any part thereof, on the security of such stocks, or lands, or treasury notes, or upon bonds and mortgages, as aforesaid, and not otherwise, and to change and reinvest the same in like securities, as occasion may from time to time require; but any surplus money over and above the paid-up capital stock of any such corporation organized under this chapter, or incorporated under any law of this state, may be invested in or loaned upon the pledge of public stocks of the United States, or any of the states, or stocks, bonds, or other evidences of indebtedness of any solvent dividend-paying institution incorporated under the laws of this state or the United States, except their own stock; provided, always, that the current market value of such stocks, bonds, or other evidences of indebtedness shall be at all times, during the continuance of such loans, at least twenty per cent more than the sum loaned thereon.

History: En. Sec. 656, Civ. C. 1895; re-en. Sec. 4048, Rev. C. 1907; re-en. Sec. 6134, R. C. M. 1921.

Investments in certain federally guaranteed bonds, secs. 35-142, 35-143.

Cross-References

Contributions to fire department relief associations, secs. 11-1918, 11-1919.

Collateral References

Insurance 38.
44 C.J.S. Insurance §§ 72, 96.

40-1408. (6135) Examination by auditor. (1) Upon receiving notification that the requirements of the preceding sections have been complied with, the state auditor shall make an examination, or cause one to be made, by some disinterested person officially appointed by him for that purpose, and if it shall be found (if the examination shall be made other than by the auditor, then the finding shall be certified under oath) that the capital herein required by the corporation named, according to the nature of the

business proposed to be transacted by such corporation, has been paid in and possessed by it in money, or in such stock, notes, bonds, or mortgages as are required by sections 40-1403, 40-1404 and 40-1407, then he shall so certify, and if the examination be made by any other than the auditor, then the finding shall be certified under oath; or, in the case of a mutual insurance corporation, that it has received and is in actual possession of the capital, premiums, or bona fide agreements of insurance, and securities to the extent and value required by sections 40-1403, 40-1404 and 40-1407, and the name and residence of the maker of each premium note forming part of the capital of any such proposed mutual insurance corporation, and the amount of such note shall be returned to the auditor.

(2) The incorporators or officers of any such corporation or proposed corporation contemplated by this chapter shall be required to certify, under oath, to the state auditor, that the capital exhibited to the person making the examination directed in this section was bona fide property of the corporation so examined; the certificates above named shall be filed in the office of the said auditor, who shall thereupon deliver to such corporation a certified copy of the same, with his written permission for it to commence business as proposed in its articles of incorporation, which certificate and permission, on being recorded in the office of the county clerk of the county in which the corporation is to be located, in a book prepared for that purpose, shall be its authority to commence business and issue policies, and such certified copy of said certificate and permission may be used in evidence for or against said corporation with the same effect as the originals.

History: En. Sec. 657, Civ. C. 1895;
re-en. Sec. 4049, Rev. C. 1907; re-en. Sec.
6135, R. C. M. 1921.

40-1409. (6136) Powers of insurance companies. It shall be lawful for any corporation organized under this chapter, and doing business in this state:

1. To insure houses, buildings, and all other kinds of property against loss or damage by fire or other casualty, and to make all kinds of insurance on goods, merchandise, or other property in the course of transportation, whether on land or water or air; to insure against loss or damage to motor vehicles resulting from accident, collision, or marine and inland navigation and transportation perils; to insure growing crops against loss or damage resulting from hail or the elements; to insure against loss or damage by water to any goods or premises arising from the breakage or leakage of sprinklers, pumps or other apparatus placed for extinguishing fires, and of water pipes, against accidental injury to such sprinklers, pumps, or other apparatus; and to insure against loss or legal liability for loss because of damage to property caused by the use of teams or vehicles whether by accident or collision or by explosion of any engine or tank or boiler or pipe or tire of any vehicle, and also including insurance against theft of the whole or any part of any vehicle.

2. To make insurance on the health of persons and against the personal injury, disablement, or death, resulting from traveling or general accident by land or water or air.

3. To insure the fidelity of persons holding places of public or private trust, and to furnish surety on official bonds, and for the performance of other obligations; and to receive on deposit and insure the safe-keeping of books, papers, moneys, stocks, bonds and all kinds of personal property.

4. To insure horses, cattle, and other stock against loss or damage by accident, theft, or any unknown or contingent event whatever, which may be the subject of legal insurance; to lend money on bottomry or respondentia, and cause itself to be insured against any loss or risk it may have incurred in the course of its business, and upon the interest which it may have in any property by means of any loan or loans which it may make on mortgages, bottomry, or respondentia, and generally to do all things proper to promote these objects; to insure plate glass against breakage, and steam-boilers against explosion, and against loss or damage to life or property resulting therefrom; against loss by burglary or theft, or both; against damage by water caused by the breakage or leakage of sprinklers, pumps, water-pipes, or plumbing and its fixtures, and accidental injury to such apparatus; and to permit liability insurance in all its branches.

5. To insure titles and credit.

No corporation organized under this chapter, or transacting business in this state, shall expose itself to loss on any one risk or hazard to an amount exceeding ten per centum (10%) of its paid-up capital, or write on a risk within the corporate limits of any one city an amount representing more than the paid-up capital of the corporation unless the excess shall be insured by the same in some other good and reliable company or companies. The restriction as to the amount of risk any such corporation shall assume shall not apply to corporations organized to guarantee the fidelity of persons in places of public or private trust, or to corporations that receive on deposit and guarantee the safe-keeping of books, moneys, papers and other property.

History: En. Sec. 1, p. 71, L. 1883; re-en. Sec. 571, 5th Div. Comp. Stat. 1887; re-en. Sec. 658, Civ. C. 1895; re-en. Sec. 4050, Rev. C. 1907; amd. Sec. 1, Ch. 48, L. 1911; amd. Sec. 1, Ch. 114, L. 1911; re-en. Sec. 6136, R. C. M. 1921; amd. Sec. 1, Ch. 28, L. 1931.

Collateral References

29 Am. Jur. 87, Insurance, § 55.

40-1410. (6137) Combination of certain classes permitted. Nothing in the act shall be construed as to alter, change, modify, or repeal any existing statute, which provided or established the amount of the capital required of any or all classes of insurance corporations herein mentioned. Combinations may be permitted of the different classes herein established, under one incorporation, and provided further, that where such combinations may be formed, the minimum capital shall be equal to the amount provided by law for each of the different classes so combined.

History: En. Sec. 2, Ch. 114, L. 1911; re-en. Sec. 6137, R. C. M. 1921; amd. Sec. 1, Ch. 65, L. 1947.

Collateral References

Insurance 36, 57.
44 C.J.S. Insurance §§ 99, 110.

40-1411. (6138) Construction of law. Nothing in this act shall be construed preventing the transaction of health and accident insurance in combination with life insurance; provided, however, that the minimum capital of such corporation shall equal the amount required of both classifications.

History: En. Sec. 3, Ch. 114, L. 1911; re-en. Sec. 6138, R. C. M. 1921.

40-1412. (6139) Policies—how made. All policies or contracts of insurance made or entered into by any such corporation may be made either with or without the seal of the corporation, but such policies shall be subscribed by the president, or such other officer as may be designated by the directors for that purpose, and shall be attested by the secretary thereof.

History: En. Sec. 659, Civ. C. 1895; re-en. Sec. 4051, Rev. C. 1907; re-en. Sec. 6139, R. C. M. 1921.

Collateral References

Insurance—133(3).

44 C.J.S. Insurance §§ 227, 249, 256.

29 Am. Jur. 141, Insurance, §§ 126 et seq.

40-1413. (6140) Increase of stock. If the capital stock of said corporation shall be increased as provided in section 3894 (see note), of this code, a certificate showing such increase shall be filed with the state auditor, who shall make, or cause to be made, an examination of the securities composing such capital stock thus increased as provided in section 40-1408, and if satisfied therewith, such auditor shall thereupon deliver to such corporation a certified copy of such examination, with his written permission to do business upon such increased capital, a copy of which certificate and permission shall be filed in the office of the secretary of state and of the county clerk of the county where the principal place of business of said corporation is located.

History: En. Sec. 660, Civ. C. 1895; re-en. Sec. 4052, Rev. C. 1907; re-en. Sec. 6140, R. C. M. 1921.

NOTE.—Section 3894, referred to above, was repealed by chapter 56, Laws of 1921. See secs. 15-201 to 15-213.

40-1414. (6141) Dividends and profits. It shall not be lawful for the directors of any insurance corporation organized under this chapter, or incorporated under any law of this state, to make any dividend except from the surplus profits arising from their business, and in estimating such profits there shall be reserved therefrom a sum equal to fifty per cent. of the amount received as premiums on unexpired risks and policies, which amount so reserved is hereby declared to be unearned premiums; and there shall also be reserved all sums due the corporation on bonds and mortgages, bonds, stocks, and book accounts, of which no part of the principal or interest thereon has been paid during the year preceding such estimate of profits, and upon which action for foreclosure or collection has not been commenced, or which, after judgment has been obtained thereon, shall have remained more than two years unsatisfied, and upon which interest shall not have been paid; and in case of any such judgment the interest due or accrued thereon and remaining unpaid shall also be reserved. The making of a dividend contrary to these provisions shall subject the corporation making it to a forfeiture of its charter.

History: En. Sec. 661, Civ. C. 1895; re-en. Sec. 4053, Rev. C. 1907; re-en. Sec. 6141, R. C. M. 1921.

29 Am. Jur., Insurance, p. 83, § 49; p. 93, §§ 64-67.

Collateral References

Insurance—38, 59.

44 C.J.S. Insurance §§ 103, 114.

Apportionment of divisible surplus between different policies. 108 ALR 1212.

Illustrations concerning accumulation, surplus, etc. 127 ALR 1464.

40-1415. (6142) Real estate—limitations upon the purchasing, holding or conveying. No corporation organized under this chapter shall purchase,

hold, or convey any real estate, except for the purpose and in the manner herein set forth, to-wit:

1. Such as shall be necessary in the proper transaction of its business;
2. Such as shall have been mortgaged to it in good faith by way of security for loans previously contracted, or for money due; or,
3. Such as shall have been conveyed to it in satisfaction of debts previously contracted in the legitimate business of the corporation, or for money due; or,
4. Such as shall have been purchased at sales, upon judgments, decrees, or mortgages obtained or made for debt or security; and it shall not be lawful for any such corporation to purchase, hold, or convey real estate which shall be found in the course of its business not necessary for the transaction thereof; and all such last-mentioned real estate shall be sold and conveyed within three years after the same shall have been declared by the state auditor unnecessary for its business, unless the corporation shall procure a certificate from the said auditor that the interest of said corporation will materially suffer by a sale within the time limited, in which event the sale may be postponed for such a period as said auditor shall direct in said certificate.

History: En. Sec. 662, Civ. C. 1895;
re-en. Sec. 4054, Rev. C. 1907; re-en. Sec.
6142, R. C. M. 1921.

Collateral References

Insurance 36, 57(1).
44 C.J.S. Insurance §§ 99, 110.
29 Am. Jur. 84, Insurance, § 51.

40-1416. (6143) Notes given for capital stock. All notes deposited with any mutual insurance corporation at the time of its organization, as provided for in sections 40-1403 and 40-1404, shall remain security for losses and claims until the accumulation of the profits invested as required by section 40-1407 shall equal the amount of cash capital required to be possessed by stock corporations organized under this chapter, the liability upon each note decreasing proportionately as the profits are accumulated; but any note which may have been deposited with any mutual insurance corporation subsequent to its organization, in addition to cash premiums, or any insurance effected with such corporation may, after the expiration of the time of such insurance, or upon the cancellation by the corporation of the policy, be relinquished and given to the maker thereof, or his legal representatives, upon paying his proportion of the losses and expenses which may have accrued thereon during such term. The directors of any such corporation shall have the right to determine the amount of the note to be given in addition to the premiums by any person insured in such corporation; and every person effecting insurance in any mutual corporation, and his heirs, executors, administrators, and assigns, continuing to be so insured, shall thereby become members of said corporation during the period of insurance, and shall be bound to pay for losses and such necessary expenses as aforesaid accruing to said corporation, in proportion to his or their deposit note or notes. Any person insured in any mutual corporation, except in the case of notes required by this chapter to be deposited at the time of its organization, may at any time return the policy for cancellation, and upon the payment of the amount due at such time upon the premium note or notes shall be discharged from further liability thereon.

History: En. Sec. 663, Civ. C. 1895;
re-en. Sec. 4055, Rev. C. 1907; re-en. Sec.
6143, R. C. M. 1921.

Collateral References
Insurance 33, 55.
44 C.J.S. Insurance §§ 96, 108.

40-1417. (6144) Assessments. The directors shall, as often as they deem necessary, after receiving notice of any loss or damage, determine the sums to be paid by the several members as their respective portions of such loss, and publish the same in such manner as they shall deem proper, or the by-laws shall have prescribed; but the sum to be paid by each member shall always be in proportion to the original amount of his deposit note or notes, and shall be paid to the officers of the corporation within thirty days after the publication of said notice; and if any member shall, for the space of thirty days after demand made personally or by letter for payment, neglect or refuse to pay the sum assessed upon him as a proportion of any loss aforesaid, the directors may sue for and recover the whole amount of his deposit note or notes, with costs of suit, but execution shall issue for assessment and costs as they accrue only, and every such execution shall be accompanied by a list of losses for which such assessment was made. If the whole amount of deposit notes shall be insufficient to pay the loss, the sufferers insured by the said corporation shall receive, toward making good their respective losses, a proportionate share of the whole amount of said notes, according to the sums to them respectively insured; but no member shall ever be required to pay for any loss more than the whole amount of his deposit note or notes.

History: En. Sec. 664, Civ. C. 1895;
re-en. Sec. 4056, Rev. C. 1907; re-en. Sec.
6144, R. C. M. 1921.

Right to set off loss under mutual insurance policy against premium or assessment. 31 ALR 1281.

Collateral References

Insurance 39, 55.
44 C.J.S. Insurance §§ 99, 108.

Liability of member of mutual fire insurance company as affected by period of membership. 53 ALR 343.

Liability of policyholders in mutual insurance companies to assessments. 137 ALR 945.

40-1418. (6145) Name of company. Every insurance corporation hereafter organized as provided in this chapter shall, if it be a mutual corporation, embody the word "mutual" in its title, which shall appear upon the first page of every policy and renewal receipt; and every corporation doing business as a cash stock company, shall, upon the face of its policies, express in some suitable manner that such policies were issued by a stock corporation.

History: En. Sec. 665, Civ. C. 1895;
re-en. Sec. 4057, Rev. C. 1907; re-en. Sec.
6145, R. C. M. 1921.

Collateral References
Insurance 52.
44 C.J.S. Insurance § 104.

40-1419. (6146) Annual statement. It shall be the duty of the president or of the vice-president and secretary of each corporation organized under this chapter, or incorporated under any laws of this state, or doing business in this state, annually, on the first day of January of each year, or within sixty days thereafter, to prepare under oath and deposit in the office of the state auditor a full, true, and complete statement of the condition of such company on the thirty-first day of December preceeding the filing of such statement, which statement shall exhibit the following items and facts in the following forms, viz.:

1. The amount of capital stock of the corporation.
2. The names of the officers.
3. The name of the corporation, and where located.
4. The amount of capital paid up.
5. The property or assets held by the corporation, specifying the value, as near as may be, of the real estate owned by such corporation, and the amount of cash on hand deposited in banks to the credit of the corporation, and in what banks the same is deposited; the amount of moneys, stocks, or bonds deposited in any foreign country, state, or territory of the United States for the special benefit of the assured therein; the amount of cash in the hands of agents, and in the course of transmission; the amount of loans secured by first mortgages on real estate, with the rate of interest thereon, specifying the location of such real estate and its assessed valuation; the amount of all other bonds and loans, and how secured, with the rate of interest thereon; the amount due the corporation on which judgment has been obtained; the amount of stocks of this state, of the United States, of any incorporated city of this state, and of any stock owned by the corporation, specifying the amounts, number of shares, and par and market value of each kind of stock; the amount of stock held by such corporation as collateral security for loans, with amount loaned on each kind of stock, and premium notes paid and unpaid; the amount of interest actually due and unpaid; and all other securities and their value; the amount for which premium notes have been given on which policies have been issued.

6. The liabilities of such corporations, specifying the losses adjusted and due; losses adjusted and not due; losses unadjusted; losses in suspense, and the cause thereof; losses resisted in litigation; dividends either in scrip or cash, specifying the amount of each declared, but not due; dividends declared and due; the amount required to reinsure all outstanding risks on the basis of fifty per cent. of the premium on unexpired risks under one year, and pro rata on all unexpired risks having more than one year to run; the amount due banks or other creditors; the amount of money borrowed, and the security therefor; all other claims against the corporation. In the case of mutual fire insurance companies organized under the laws of the state of Montana with a policy-holder's contingent liability or deposit note or notes as provided in its by-laws and its policies to determine the amount of reinsurance reserve the commissioner shall take twenty-five per cent. of the aggregate premiums on policies running one year or less from date of policy, and fifty per cent. of the pro rata amount on policies running more than one year from the date of policy. A policy for a term of years on which the premium is payable annually shall be considered a policy for one year.

7. The income of the corporation during the previous year, specifying the amount received for premiums exclusive of premium notes; the amount of premium notes received; the amount received for interest; the amount received for assessments, calls on stocks or notes, or premium notes; the amount received from all other sources.

8. The expenditures during the preceding year, specifying the amount of losses paid during said term, stating how much of the same accrued

prior, and how much subsequent to the date of the preceding statement, and the amount at which losses were estimated in such preceding statement; the amount paid for dividends; the amount paid commissions; salaries, expenses, and other charges of agents, clerks and other employees; the amount paid for salaries, fees, and other charges of office and directors; the amount paid for local, state, national, and other taxes and duties; the amount paid for all other expenses, expenditures, including printing, stationery, rents, furniture, etc.

9. The largest amount insured in any one risk.

10. The amount of risks written during the year then ending.

11. The amount of risks in force having less than one year to run.

12. The amount of risks in force having more than one and not over three years to run.

13. The amount of risks having more than three years to run.

14. The following question must be answered, viz.: "Are dividends declared on premiums received for risk not terminated?"

The state auditor must withhold or withdraw the certificate of authority from any such corporation neglecting or failing to comply with the provisions of this section.

History: En. Sec. 666, Civ. C. 1895; amd. Sec. 1, Ch. 72, L. 1907; Sec. 4058, Rev. C. 1907; amd. Sec. 1, Ch. 118, L. 1919; re-en. Sec. 6146, R. C. M. 1921.

Collateral References

Insurance 9.

44 C.J.S. Insurance § 73.

29 Am. Jur. 64, Insurance, § 26.

40-1420. (6147) Auditor may demand report at any time. The state auditor is hereby authorized and empowered to address any inquiries to any insurance corporation in relation to its business and condition, or any other matter connected with its transactions, which he may deem necessary for the public good, or for a proper discharge of his duties, and it shall be the duty of any corporation so addressed to promptly reply in writing thereto.

History: En. Sec. 667, Civ. C. 1895; re-en. Sec. 4059, Rev. C. 1907; re-en. Sec. 6147, R. C. M. 1921.

40-1421. (6148) What statement shall show. The statement of any corporation, the capital of which is composed, in whole or in part, of notes, shall, in addition to the foregoing, exhibit the amount of notes originally forming capital, and also what proportion of said notes is still held by such corporation and considered capital.

History: En. Sec. 668, Civ. C. 1895; re-en. Sec. 4060, Rev. C. 1907; re-en. Sec. 6148, R. C. M. 1921.

References

Cited or applied as section 668, Civil Code, in Northwestern Mut. Life Ins. Co. v. Lewis and Clark County, 28 M 484, 489, 72 P 982.

40-1422. (6149) Foreign insurance companies. (1) It shall not be lawful for any insurance company, association, or partnership, organized or associated for any of the purposes specified in this chapter, incorporated by or organized under the laws of any other state, or the United States, or any foreign government, directly or indirectly, to take risks or transact any business of insurance in this state, unless possessed of two hundred thousand dollars of actual paid-up capital, exclusive of any assets of any

such company as shall be deposited in any other states or territories, or foreign countries, for the special benefit or security of the insured therein; provided, however, that such insurance companies coming within the provisions of this act shall be subject to all restrictions and duties which are now or may be imposed upon insurance companies of like character organized under the laws of this state, and shall have no other or greater powers; any such company desiring to transact any such business as aforesaid, by any agent or agents in this state, shall appoint, in writing, the commissioner of insurance and his successors in office to be its true and lawful attorney, upon whom legal process in any action or proceeding against it shall be served, and in such writing shall agree that any lawful process against it which is served upon such attorney shall be of the same legal force and validity as if served upon such company, and that the authority shall continue in force so long as any liability remains outstanding in this state.

(2) Copies of such appointment, certified by said commissioner of insurance, shall be deemed sufficient evidence thereof, and shall be admitted in evidence with the same force and effect as the original thereof might be admitted. Such service shall only be made upon such attorney, must be made in duplicate upon the commissioner of insurance, or, in his absence, upon the person in charge of his office, and shall be deemed sufficient service upon such company; provided, however, that in all cases where service is made upon the commissioner of insurance, as herein provided, the defendant shall have twenty days from the date of such service in which to file its answer or other appearance in the case. When legal process against any such company is served upon said commissioner of insurance, he shall forthwith forward, by registered mail, one of the duplicate copies prepaid and directed to its secretary or corresponding officer. For each copy of process the commissioner of insurance shall collect two dollars, which shall be paid by the plaintiff at the time of such service, the same to be recovered by him as part of the taxable costs, if he prevails in the suit. Legal process shall not be served upon any such company except in the manner provided herein.

(3) Said company shall also file a certified copy of their charter or deed of settlement, together with a statement under the oath of the president or vice-president, or other chief officer, and the secretary of the company for which they may act, stating the name of the company and the place where located, the amount of its capital, with a detailed statement of the facts and items, as required from companies organized under the laws of this state, as per section 40-1419. Such statement shall also show to the full satisfaction of the state auditor and insurance commissioner ex-officio that said company, if organized without the United States of America, has deposited, in some one of the United States or territories, a sum not less than one hundred thousand dollars for the special benefit or securities of the assured therein, and shall file also a copy of the last annual report made under any law of the state, territory, or foreign country by which said company was incorporated.

(4) No agent shall be allowed to transact business for any company whose capital is impaired by the liabilities, as stated in section 40-1419, to

the extent of twenty per cent. thereof while such deficiency shall continue; provided, that any company formed for the purpose of carrying on the business of plate-glass, health, accident, fidelity, surety, livestock, steam-boiler, hail and cyclone, credit, or other liability insurance, both foreign and domestic, or any combination of the said several businesses, to carry on and engage in said plural insurance businesses under one incorporation, shall have not less than one hundred thousand dollars of capital stock subscribed, fifty per cent. of which shall be paid up in cash, and invested as provided by the laws governing the investment of capital stock of fire insurance companies.

History: En. Sec. 670, Civ. C. 1895; amd. Sec. 1, Ch. 87, L. 1907; Sec. 4062, Rev. C. 1907; amd. Sec. 1, Ch. 25, L. 1909; amd. Sec. 1, Ch. 39, L. 1913; amd. Sec. 1, Ch. 220, L. 1919; re-en. Sec. 6149, R. C. M. 1921.

Operation and Effect

An unincorporated association, doing a fire insurance business and operating under the laws of another state under a common name, applied to the state insurance commissioner for a license to carry on a like business in Montana under section 40-1301, subdivision 1. Its plan of operation was, in brief, as follows: Each individual member deposited with the insurance commissioner of the state of the association's creation approved securities aggregating \$900,000, he being empowered to require additional securities in case those deposited should depreciate in value. The securities remained the property of the individuals but could not be withdrawn until all their proportionate liability against them had been discharged; there was no joint liability on the part of the members of the association; actions on the policies could be commenced against, and service of process had upon, the attorney-in-fact of the association, authorized to write insurance for it. Held, in an action to compel the insurance commissioner to issue a license, denied on the ground, *inter alia*, that the association was not possessed of the capital required by this section, that, since the deposited securities may not be withdrawn so long as there exists an outstanding obligation chargeable against them, but are set aside and dedicated to the business of the association as a final guaranty of the payment of all losses sustained under its policies of insurance, they constitute its capital stock in an amount in excess of that prescribed by this section, and that, therefore, refusal of a license based on insufficiency of capital was not warranted. *State ex rel. v. Porter*, 88 M 347, 351 et seq., 294 P 363.

References

Cited or applied as section 670, Civil Code, before amendment, in *State ex rel.*

Aachen & Munich F. Ins. Co. v. Rotwitt, 17 M 41, 42, 41 P 1104; *State ex rel. Travelers' Ins. Co. v. Rotwitt*, 18 M 87, 88, 44 P 409; *State ex rel. Fidelity & Casualty Co. v. Rotwitt*, 18 M 92, 93, 44 P 407.

Collateral References

Insurance 15-26.

44 C.J.S. *Insurance* §§ 75-85.

29 Am. Jur. 70, *Insurance*, §§ 34 et seq.

Failure to procure license as affecting validity or enforceability of contract. 30 ALR 866.

Discrimination by state against foreign insurance corporations in imposition of taxes and license fees. 49 ALR 740.

Constitutionality of statute requiring payment to state of fee on appointment of agent by foreign insurance company. 60 ALR 1172.

Subsequent compliance with conditions of doing business in state as affecting enforceability of contract of foreign corporation made before compliance with such conditions. 75 ALR 446.

Withdrawal of foreign insurance company from state as affecting conditions under which it may be readmitted to do business in state and its rights and duties if readmitted. 110 ALR 528.

Who, other than public official, may be served with process in action against foreign corporation doing business in state. 113 ALR 9.

Personal liability of agents or brokers in respect of policies of foreign insurance companies not authorized to do business in the state. 131 ALR 1079.

Personal liability of public officials or their bonds, for permitting insurance company to engage or continue in business without complying with statutory requirements. 131 ALR 275.

What constitutes doing business within state by foreign insurance corporation. 137 ALR 1128.

Insurance companies, which are members of Federal reserve banks or similar Federal agencies or national banks, as within state social security or unemployment compensation act. 145 ALR 1074.

40-1423. (6150) Foreign insurance companies—permission to transact business. Any corporation organized under the laws of any state, district, or territory of the United States other than the state of Montana, or under the laws of any foreign country, to transact the business of fire or casualty insurance on the mutual plan, in accordance with the law of the state or country of its organization, may be permitted to transact any business within the state of Montana which it is authorized to transact in the state or country where it is organized, upon complying with the laws of the state of Montana applicable to it; provided, that such company is possessed of a surplus of two hundred thousand dollars or more; provided, however, that nothing in this act shall apply to companies now authorized to transact business in the state of Montana.

History: En. Sec. 1, Ch. 135, L. 1919; re-en. Sec. 6150, R. C. M. 1921.

Constitutionality

Under rule that one who has acted under a statute or has claimed its benefits to the detriment of others may not question its constitutionality, held, that mutual fire insurance companies which have entered into contracts of insurance with the state with relation to its public buildings on the strength of this section, authorizing such companies to write insurance on the mutual plan (on the single cash premium plan) if permitted to do so

by the laws of their states, they will be estopped thereafter from asserting, in case of fire loss, that the section is unconstitutional in that, under it, they were given a right which by section 40-1431 is denied to domestic corporations of the same character, contrary to Sec. 11, Art. XV, Constitution of Montana. *McMahon v. Cooney et al.*, 95 M 138, 142 et seq., 25 P 2d 131.

Collateral References

Insurance—20-26.

44 C.J.S. Insurance §§ 75, 79.

29 Am. Jur. 70, Insurance, §§ 34 et seq.

40-1424. (6151) Annual statement. The statements and evidences of investments required of foreign companies, as above, shall be renewed annually, in such manner and form as required by this chapter, and as said auditor may direct, with any additional statement of the amount of the losses incurred and premiums received in this state, during the preceding year, so long as such agency continues; and the said auditor, on being satisfied that the capital, securities, and investments remain secure, as heretofore provided, shall furnish a renewal of his certificate.

History: En. Sec. 671, Civ. C. 1895; re-en. Sec. 4063, Rev. C. 1907; re-en. Sec. 6151, R. C. M. 1921.

Collateral References

Insurance—23.

44 C.J.S. Insurance § 78.

29 Am. Jur. 64, Insurance, § 26.

40-1425. (6152) Agent of foreign insurance companies. Every agent of any insurance company must, in all advertisements of such agency, publish the location of the company, giving the name of the city, town, or village in which the company is located, and the state or government under the laws of which it is organized, and must in no case advertise any merely authorized capital, but must in all such advertisements be limited to actual paid-up capital and cash assets liable for losses only. The term agent or agents, used in this chapter, includes an acknowledged agent or surveyor, or any other person or persons who in any manner, directly or indirectly, transact or aid in transacting the insurance business of any insurance company not incorporated by the laws of this state. The provisions of the foregoing sections relative to foreign companies apply to all companies, partnerships, associations, or individuals, whether incor-

porated or not, but the provisions of this chapter do not apply to insurance upon goods or merchandise in transit.

History: En. Sec. 672, Civ. C. 1895; re-en. Sec. 4064, Rev. C. 1907; re-en. Sec. 6152, R. C. M. 1921.

Collateral References

Insurance 22.
44 C.J.S. Insurance § 85.

References

State ex rel. v. Porter, 88 M 347, 353
et seq., 294 P 363.

40-1426. (6153) Deficiency in capital stock to be made good. Any corporation receiving such requisition from the state auditor must forthwith call upon its stockholders for such amounts as will make its paid-up capital equal to the amount required by this chapter or the charter or articles of incorporation of said corporation; and in case any stockholder shall refuse or neglect to pay the amount so called for, after notice personally given, or by advertisement, in such time and manner as such auditor shall approve, it is lawful for said corporation to require the return of the original certificate of stock held by such stockholder, and in lieu thereof to issue new certificates for such number of shares as the said stockholders may be entitled to in the proportion that the ascertained value of the funds of said corporation may be found to bear to its original capital, the value of such shares for which the new certificates must be issued to be ascertained under the direction of the said auditor, the corporation paying for the fractional part of shares; and it is lawful for the directors of such corporation to create new stock and dispose of the same, and to issue new certificates therefor, to an amount sufficient to make up the original capital of the corporation; and in the event of additional losses accruing upon new risks, taken upon the expiration of the period limited by the auditor in the aforesaid requisition for the filling up of the deficiency in the capital of such corporation, and before such deficiency has been made up, the directors are individually liable to the extent thereof.

History: En. Sec. 674, Civ. C. 1895; re-en. Sec. 4066, Rev. C. 1907; re-en. Sec. 6153, R. C. M. 1921.

Right to set off loss under mutual insurance policy against premium or assessment. 31 ALR 1281.

NOTE.—The requisition referred to in the above section was specified by section 4065, Revised Codes 1907, which was repealed by chapter 13, Laws of 1909; sections 40-1105 to 40-1107 of this code.

Liability of member of mutual fire insurance company as affected by period of membership. 53 ALR 343.

Liability of policyholders in mutual insurance companies to assessments. 137 ALR 945.

Collateral References

Insurance 34.
44 C.J.S. Insurance § 97.

40-1427. (6154) Deficiency in mutual companies. If, upon the examination, it appears to the said auditor that the assets of any corporation upon the plan of mutual insurance under this chapter are insufficient to justify the continuance of such corporation in business, it is his duty to proceed in relation to such corporation in the same manner as is herein required in regard to joint-stock corporations, and the directors of such corporations are hereby made personally liable for any losses which may be sustained upon risks taken after the expiration of the time limited by the auditor for filling up the deficiency in the capital, and before such de-

iciency is made up. Any transfer of the stock of any corporation organized under this chapter, made during the pending of any investigation herein required, does not release the party making the transfer from his liability for losses which may have accrued previous to such transfer.

History: En. Sec. 675, Civ. C. 1895; re-en. Sec. 4067, Rev. C. 1907; re-en. Sec. 6154, R. C. M. 1921.

Collateral References

Insurance 55.

44 C.J.S. Insurance § 108.

Personal liability of public officials or their bonds for permitting insurance company to engage or continue in business without complying with statutory requirements. 131 ALR 275.

40-1428. (6155) Deposits of security or payments required of domestic companies doing business in other states—reciprocal deposits and charges to be required. Whenever the existing or future laws of any other state or territory of the United States require of insurance corporations, incorporated by or organized under the laws of this state, having agencies in such other state or territory, or of the agents thereof, any deposit of securities in such state or territory for the protection of policy-holders or otherwise, or any payment for taxes, fines, penalties, certificates of authority, license fees, or otherwise, greater than the amount required for such purposes from similar companies of other states or territories by the existing laws of this state, then, and in every such case, all companies of such states or territories establishing, or having heretofore established, any agency or agencies in this state, are required to make the same deposit for a like purpose with the auditor of this state, and to pay said auditor for taxes, fines, penalties, certificates of authority, license fees, or otherwise, an amount equal to the amount of such charges and payments imposed upon or required by the laws of such state or territory of the companies of this state or the agents thereof.

History: En. Sec. 677, Civ. C. 1895; re-en. Sec. 4069, Rev. C. 1907; re-en. Sec. 6155, R. C. M. 1921.

paid under protest. Occidental Life Insurance Co. v. Holmes, 107 M 48, 61, 80 P 2d 383.

Applicable Only When Foreign State Imposes Greater Burden

This statute comes into play only when a foreign state imposes a greater burden upon a Montana corporation doing a like business in such state than does Montana upon a foreign corporation doing business here; in the instant case, held, that in that California imposes a lesser burden upon an outside life insurance corporation, by deducting the real estate tax from the ultimate amount due, the statute had no application. Occidental Life Insurance Co. v. Holmes, 107 M 48, 51, 80 P 2d 383.

Constitutional Provision Not Applicable

The purpose of Sec. 11, Art. XV of the Constitution, is to prevent the granting of any rights or immunities to foreign corporations not enjoyed by corporations of the same or similar kind created under the laws of and doing business in Montana, and has no application to a case where a foreign corporation sues to recover a refund of taxes illegally exacted and

Purpose of "Retaliatory Statute"

The purpose of this commonly called "retaliatory statute" is to place on such corporations the same total burden for doing business in Montana that the states where such corporations have their domicile would impose upon a Montana corporation doing a like business there, and to arrive at a fair and equitable adjustment and to give the statute such an effect, the total exactions must be taken into account, irrespective of how they may be characterized or named. Occidental Life Insurance Co. v. Holmes, 107 M 48, 51, 80 P 2d 383.

Collateral References

Insurance 19.

44 C.J.S. Insurance § 76.

29 Am. Jur. 68, Insurance, § 32.

Constitutionality, construction, and effect of retaliatory statutes. 91 ALR 795.

Remedy of creditor of corporation to reach funds or securities deposited with

state official as security for corporation's obligations. 101 ALR 496.

Character or class of claims protected

by deposit by foreign corporation as condition of doing business, and rank or priority of such claims. 104 ALR 748.

40-1429. (6156) Publication of report and certificate. It is the duty of every insurance corporation or company of the kind authorized to do and doing business in this state, organized under the laws of this state, or of any other state, territory, or country, to publish once, annually, in two newspapers of general circulation, one of which is published at the capital of the state, and in case of corporations organized in the state, one of which is published in the county where the principal office is located, a certificate from the state auditor that such company or corporation has in all respects complied with the laws of this state relating to insurance.

History: En. Sec. 678, Civ. C. 1895; re-en. Sec. 4070, Rev. C. 1907; re-en. Sec. 6156, R. C. M. 1921.

F. Ins. Co. v. Rotwitt, 17 M 41, 51, 41 P 1004.

References

Cited or applied as section 678, Civil Code, in State ex rel. Aachen & Munich

Collateral References

Insurance 9.

44 C.J.S. Insurance § 73.

40-1430. (6157) Insurance commissioner may require changes in annual report forms so as to elicit a true exhibit of company's condition. The state insurance commissioner may, from time to time, require insurance companies and companies operating under the provisions of this act to make such changes in their annual report forms, required to be filed with the state insurance department, as are best adapted to elicit from such corporations or companies a true exhibit of their condition in respect to the several matters hereinbefore enumerated.

History: En. Sec. 680, Civ. C. 1895; re-en. Sec. 4072, Rev. C. 1907; re-en. Sec. 6157, R. C. M. 1921; amd. Sec. 1, Ch. 145, L. 1953.

References

Cited or applied as section 680, Civil Code, in Mutual Benefit Life Ins. Co. v. Winne, 20 M 20, 36, 49 P 446; Northwestern Mut. Life Ins. Co. v. Lewis and Clark County, 28 M 484, 489, 72 P 982.

Compiler's Note

Sections 2 and 3 of Ch. 145, Laws 1953 are compiled as secs. 40-1919 and 40-2007 respectively.

40-1431 (6158) Stock plan and mutual plan. It is unlawful for any corporation organized upon the mutual plan to do business and take risks upon the stock plan, or for a corporation organized as a stock corporation to do business upon the plan of mutual insurance.

History: En. Sec. 682, Civ. C. 1895; re-en. Sec. 4074, Rev. C. 1907; re-en. Sec. 6158, R. C. M. 1921.

Operation and Effect

Held, under the rules in this case relating to presumptions, that where the authority of foreign mutual fire insurance companies to write single cash premium policies under the laws of their respective states was at issue and no proof in that behalf was offered, the court was justified

in holding that they had such authority as against the contention that in the absence of proof to the contrary the presumption is that the laws of the foreign states are the same as section 40-1431, which denies such authority to domestic mutual companies. McMahon v. Cooney et al., 95 M 138, 142, 25 P 2d 131.

Collateral References

Insurance 36, 57(1).

44 C.J.S. Insurance §§ 99, 110.

40-1432. (6159) Mutual benefit associations not prohibited. Nothing in this chapter must be so construed as to prevent any number of persons, not exceeding two hundred, from making mutual pledges, and giving valid

obligations to each other, for their own insurance from loss by fire or death; but such association of persons must in no case insure any property not owned and occupied by one of their number; and no life except that of one of their own number; nor are the provisions of this chapter applicable to such associations or companies. But such associations or companies must not pay any salaries or compensation to officers, agents, or other employees, or receive premiums, or make dividends.

History: En. Sec. 683, Civ. C. 1895; re-en. Sec. 4075, Rev. C. 1907; re-en. Sec. 6159, R. C. M. 1921.

Ambiguities in Contract Resolvable Against Mutual Death Benefit Associations

The rule prevailing in litigation concerning insurance policies that any ambiguity in the policy shall be resolved against the insurer since the latter is responsible for the form of the contract under section 13-720, is applicable to contracts between mutual death benefit societies and their members. *McDonald v. Northern Benefit Association*, 113 M 595, 605, 131 P 2d 479.

False Answers in Application Voids Certificate

In an action to recover on a death benefit certificate issued by a mutual association, operating under this section, which, though depending upon assessments on its members is not an assessment life insurance company under sections 40-2001 to 40-2012, nor a fraternal benefit society as defined under section 40-2101 et seq., resisted on the ground of falsity of decedent's answers in his application for membership as to freedom from disease and

consultation of physicians, etc., held, that under the facts presented plaintiff was not entitled to prevail. *McDonald v. Northern Benefit Association*, 113 M 595, 598, 131 P 2d 479.

What Concealment Amounts to Actual Fraud

An applicant for membership in a mutual death benefit association who intentionally conceals material facts in his application, or makes false representations with reference to them, intending to mislead the association, is guilty of actual fraud which, at the option of the latter, voids the certificate of membership, the concealment of a material fact being equivalent to a false representation that the fact does not exist. *McDonald v. Northern Benefit Association*, 113 M 595, 606, 131 P 2d 479.

References

Cited or applied as section 683, Civil Code, in *Mutual Benefit Life Ins. Co. v. Winne*, 20 M 20, 36, 49 P 446.

Collateral References

Insurance⇒688.
46 C.J.S. Insurance § 1436.

40-1433. (6160) Fire insurance company—must transact business through resident agent. It shall be unlawful for any fire insurance corporation, legally authorized to transact business in the state of Montana, to write, place, or cause to be written or placed, any policy or contract of indemnity or insurance upon property situate in the state of Montana, in or through any such legally authorized corporation outside of the state of Montana, or in or through any other corporation outside of the state of Montana, or to adjust, settle, or pay, or cause to be adjusted, settled, or paid, any loss arising from any contract of indemnity or insurance, except those made through a duly licensed agent of the insurance corporation, resident in the state of Montana.

History: En. Sec. 1, p. 79, L. 1897; re-en. Sec. 4031, Rev. C. 1907; re-en. Sec. 6160, R. C. M. 1921.

References

State ex rel. *Normile v. Cooney*, 100 M 391, 414, 47 P 2d 637.

Collateral References

Insurance⇒22.
44 C.J.S. Insurance § 85.

Power of state to control or regulate insurance agents or brokers. 36 ALR 1512.

40-1434. (6161) State auditor may revoke license. Any corporation or corporations violating the provisions of the first section of this act, upon

notice and satisfactory proof thereof being made to the state auditor, shall have its or their authority to transact business in the state of Montana revoked for a period of not less than ninety days, and any insurance corporation, whose license to do business may be revoked by the state auditor, shall not again be permitted to do business in the state of Montana until all taxes and penalties due thereon shall have been paid, together with any expenses that may be due under the provisions of this act to the state auditor, and such corporation shall be only readmitted to transact business in the state of Montana upon a complete compliance with the laws now in force in regard to the admission of insurance corporations to do business in Montana. And no action shall be maintained in the courts of this state upon any policy or contract of indemnity or insurance, written or placed in violation of the provision of this act.

History: En. Sec. 2, p. 79, L. 1897;
re-en. Sec. 4032, Rev. C. 1907; re-en. Sec.
6161, R. C. M. 1921.

Collateral References

Insurance 20.
44 C.J.S. Insurance § 79.

40-1435. (6162) Duty of state auditor to inspect. When notice of the violation of the first section of this act is received by the state auditor, it shall be his duty, in person or by deputy, to forthwith visit the office of such corporation or corporations where such contract of insurance may have been written or made, and demand an inspection of the books and records of such corporation or corporations. Any corporation or corporations refusing to exhibit its or their books and records for his inspection shall be deemed guilty of a violation of the provisions of this act, and the penalty provided in this act shall be immediately enforced against such corporation or corporations by the state auditor.

History: En. Sec. 3, p. 79, L. 1897;
re-en. Sec. 4033, Rev. C. 1907; re-en. Sec.
6162, R. C. M. 1921.

Collateral References

Insurance 23.
44 C.J.S. Insurance § 78.

40-1436. (6163) Compensation of auditor. The state auditor shall receive as a compensation for the services rendered under the provisions of this act his necessary traveling expenses and ten dollars per diem, which sum shall be charged against the corporation or corporations so visited by him, and collected from such corporation or corporations.

History: En. Sec. 4, p. 79, L. 1897;
re-en. Sec. 4034, Rev. C. 1907; re-en. Sec.
6163, R. C. M. 1921.

40-1437. (6165) Repealed—Chapter 66, Laws of 1947.

40-1438. (6166) Duties and powers of state auditor. Whenever the state auditor shall have or receive information that any fire insurance company or association, not incorporated under the laws of this state, has violated any of the provisions of section 6164 of this code, he is authorized, at the expense of such company or association, to examine, by himself or his accredited representative, at the principal office or offices of such company or association, located in the United States of America, or in any foreign country, and also at such other offices or agencies of such company or association as he may deem proper all books, records, and papers of such company or association, and may examine under oath the officers, managers, and agents of such company or association as to such violation

or violations. The refusal of any such company or association to submit to such examination, or to exhibit its books and records for inspection, shall be presumptive evidence that it has violated the provisions of the first section of this act, and shall subject it to the penalties prescribed and imposed by this act.

History: En. Sec. 3, p. 118, L. 1899; re-en. Sec. 4038, Rev. C. 1907; re-en. Sec. 6166, R. C. M. 1921.

Collateral References

Insurance 23.
44 C.J.S. Insurance § 78.

NOTE.—Section 6164, referred to above, was repealed by Sec. 5, Ch. 95, Laws 1937. See secs. 40-1318 to 40-1324.

40-1439. (6167) Report of reinsurance or cessation of risks. Every fire insurance company or association shall annually, and at such other times as the state auditor may require, in addition to all returns now by law required of it or its agents or managers, make a return to the state auditor, in such form and detail as may be prescribed by him, of all reinsurance or cessations of risk or liability contracted for or effected by it, whether by issue of policy, entry, or bordereau, or general participation agreement, or by excess loss, reinsurance, or in any other manner whatsoever, upon property located in this state, or covering, whether specified or otherwise, any risk or liability upon property so located, such return to be certified by the oath of its president and secretary, if a company or association of one of the United States, and if a company or association of a foreign country, by the oath of its managers in the United States, as to such reinsurance or cessations effected through its branch office in the United States, and by the oath of its president and secretary, or by officers corresponding thereto, at its home office, wherever located, as to reinsurance or cessations as aforesaid contracted for or effected through the foreign office. The refusal of any such company or association to make the returns herein required shall be presumptive evidence that it is guilty of violating the provisions of the second section of this act, and shall subject it to the penalties prescribed and imposed by this act.

History: En. Sec. 4, p. 119, L. 1899; re-en. Sec. 4039, Rev. C. 1907; re-en. Sec. 6167, R. C. M. 1921.

Collateral References

Insurance 23.
44 C.J.S. Insurance § 78.

40-1440. (6168) Penalties. Any insurance company or association willfully violating or failing to observe and comply with any of the provisions of this act, applicable thereto, shall be subject to and liable to pay a penalty of five hundred dollars for each violation thereof, and for each failure to observe and comply with any provisions of this act; such penalty may be collected and recovered in an action brought in the name of the state in any court having jurisdiction thereof. Any insurance company or association which shall neglect and refuse, for thirty days after judgment in any such action, to pay and discharge the amount of such judgment, shall have its authority to transact business in this state revoked by the state auditor, and such revocation shall continue for at least one year from the date thereof; nor shall any insurance company or association whose authority to transact business in this state shall have been so revoked be again authorized or permitted to transact business herein, until it shall have paid the amount of any such judgment and shall have filed in the

office of the state auditor a certificate, signed by its president or other chief officer, to the effect that the terms and obligations of the provisions of this act are accepted by it as a part of the conditions of its right and authority to transact business in this state.

History: En. Sec. 5, p. 120, L. 1899;
re-en. Sec. 4040, Rev. C. 1907; re-en. Sec.
6168, R. C. M. 1921.

Collateral References

Insurance—27.
44 C.J.S. Insurance § 86.

References

State ex rel. v. Porter, 88 M 347, 294 P
363.

40-1441. (6169) Insurance agents must be residents of state. The state auditor is hereby prohibited from issuing a certificate of authority to write policies of fire insurance, or to solicit and obtain and transact fire insurance business, to any person, agent, firm, or corporation, unless such person, agent, firm, or corporation is a legal resident of the state of Montana, at the time such authority is issued. And whenever any person, agent, firm, or corporation, so authorized to issue policies of fire insurance and solicit and transact fire insurance business, shall remove from the state of Montana, the authority issued to such person, agent, firm, or corporation shall be revoked, and the same shall be null and void.

History: En. Sec. 6, p. 120, L. 1899;
re-en. Sec. 4041, Rev. C. 1907; re-en. Sec.
6169, R. C. M. 1921.

Collateral References

Insurance—12, 22.
44 C.J.S. Insurance § 85.

References

State ex rel. Normile v. Cooney, 100 M
391, 414, 47 P 2d 637.

Power of state to control or regulate
insurance agents or brokers. 36 ALR 1512.

CHAPTER 15

MUTUAL HAIL, FIRE AND OTHER CASUALTY INSURANCE OF FARM PROPERTY AND STOCK AND RURAL BUILDINGS

- Section 40-1501. Who may form company.
40-1502. Articles of incorporation.
40-1503. Directors.
40-1504. Officers.
40-1505. Bonds of officers.
40-1506. Powers of corporations—annual meetings.
40-1507. Who may become members.
40-1508. Policies—liability of members.
40-1509. Duty of insured in case of loss.
40-1510. When obligations due.
40-1511. Actions against members and against company.
40-1512. Annual statement.
40-1513. Members may withdraw.
40-1514. Examination of company—annual statement.
40-1515. General insurance laws not applicable.
40-1516. Existing laws not affected.
40-1517. Foreign mutual hail, cyclone and tornado insurance companies.

40-1501. (6170) Who may form company. Any number of members, not less than one hundred (100), residing in the state of Montana, who collectively own not less than five thousand (5,000) acres of grain, which they desire to have insured, may form an incorporated company for the purpose of mutual insurance of growing crops against loss or damage by

hail; any number of persons not less than one hundred (100), residing in the state of Montana, may form an incorporated company for the purpose of mutual insurance of farm buildings, including the usual contents therein, farm livestock, machinery and vehicles, and other forms of farm property, rural school buildings, rural community houses and churches, against loss or damage by fire or other casualty. Provided that no such contract of insurance effected upon the property of any school district shall be deemed to constitute such school district a member of such mutual insurance corporation. Nor shall any such contract of insurance be invalid by reason of the fact that the directors or any director or officer of such mutual insurance corporation, at the time of issuing the contract or policy of insurance, is a trustee, director, agent, custodian or manager, or otherwise in control, supervision or management of such school house and building, community house, church or other rural public building or property so insured; and provided, that no property situated within the limits of incorporated towns or cities shall be subject to such insurance.

History: En. Sec. 1, Ch. 58, L. 1905; re-en. Sec. 4076, Rev. C. 1907; amd. Sec. 1, Ch. 120, L. 1917; re-en. Sec. 6170, R. C. M. 1921; amd. Sec. 1, Ch. 73, L. 1931; amd. Sec. 1, Ch. 129, L. 1935.

Cross-Reference

State board of hail insurance, secs. 82-1501 to 82-1519.

Collateral References

Insurance↔52.

44 C.J.S. Insurance § 105.

40-1502. (6171) Articles of incorporation. Such persons shall file with the state auditor a declaration of their intention to form a company for the purposes expressed in the preceding section, which declaration shall be signed by at least one hundred (100) incorporators; and shall be accompanied by a copy of the proposed articles of incorporation subscribed by three (3) or more persons and acknowledged by each before some person authorized to take and verify acknowledgments of conveyance of real property, in which must be stated the name or title by which such corporation or company shall be known in law, the location of its principal business office, which office must be located in this state, the name and residence of the incorporators, the object of the corporation, with its plan of doing business clearly and fully defined, the number of its directors, and the names of those elected to serve until its first annual meeting, which articles of incorporation shall be by the state auditor submitted to the attorney-general for examination, and if such articles shall be found by the attorney-general to be in accordance with the provisions of this chapter, and not in conflict with the constitution and laws of the United States or of this state, he shall make a certificate of the fact and return it to the state auditor, who shall reject the name or title applied for by any persons when he shall deem the same so similar to one already appropriated by another company or corporation as to be likely to mislead the public. When the articles of incorporation shall have received the approval of the attorney-general and the state auditor, the auditor must deliver the same to said incorporators, with such approval, and the same must be filed, recorded and certified as required by section 15-111. Such articles of incorporation may be amended by a two-thirds ($\frac{2}{3}$) vote of a quorum at any annual or special meeting called for that purpose. Such amendments must be signed by the president and secretary and filed with the state auditor.

History: En. Sec. 2, Ch. 58, L. 1905;
re-en. Sec. 4077, Rev. C. 1907; re-en. Sec.
6171, R. C. M. 1921; amd. Sec. 2, Ch. 73,
L. 1931.

Collateral References
Insurance 54.
44 C.J.S. Insurance § 107.

40-1503. (6172) Directors. The number of directors shall not exceed seven, the majority of whom shall constitute a quorum to do business, to be elected by the members by ballot, and they shall hold their offices until their successors are elected and qualified.

History: En. Sec. 3, Ch. 58, L. 1905;
re-en. Sec. 4078, Rev. C. 1907; re-en. Sec.
6172, R. C. M. 1921.

Collateral References
Insurance 56.
44 C.J.S. Insurance § 109.

40-1504. (6173) Officers. The directors shall elect from their number a president, a vice-president, a treasurer and a secretary, or a secretary-treasurer, all of whom shall hold office for one (1) year, and until their successors are elected and qualified.

History: En. Sec. 4, Ch. 58, L. 1905;
re-en. Sec. 4079, Rev. C. 1907; re-en. Sec.

6173, R. C. M. 1921; amd. Sec. 3, Ch. 73,
L. 1931.

40-1505. (6174) Bonds of officers. The treasurer and secretary shall each give bonds to the company for the faithful performance of their duties, in such amounts as shall be prescribed by the board of directors.

History: En. Sec. 5, Ch. 58, L. 1905;
re-en. Sec. 4080, Rev. C. 1907; re-en. Sec.
6174, R. C. M. 1921.

40-1506. (6175) Powers of corporations—annual meetings. Such corporation and its directors shall possess the usual powers and be subject to the usual duties of corporations and directors thereof, and may make such by-laws, not inconsistent with the constitution or this act, as may be deemed necessary for the management of its affairs in accordance with the provisions of this act, and shall have the right to spend in any one year up to five per centum of its net earnings of the preceding year for educational purposes, provided that a complete and itemized report of such expenditures shall be filed at the same time and in conjunction with the annual report of said corporation filed in accordance with the provisions of section 40-1514, and may prescribe the duties of its officers and employees and fix their compensation, and may alter and amend its by-laws when necessary. Annual meetings of such corporation may be held at or adjourned to other places in the state of Montana than the location of its principal business office. Notice of any adjourned meeting shall be given to the members of such corporation in the same manner as provided in the by-laws for the regular annual meeting.

History: En. Sec. 6, Ch. 58, L. 1905;
re-en. Sec. 4081, Rev. C. 1907; re-en. Sec.
6175, R. C. M. 1921; amd. Sec. 1, Ch. 163,
L. 1943; amd. Sec. 1, Ch. 107, L. 1945;
amd. Sec. 1, Ch. 98, L. 1949.

Collateral References
Insurance 57.
44 C.J.S. Insurance § 110.

40-1507. (6176) Who may become members. Any person owning property in this state, insurable under this act, may become a member of this company, by insuring therein and not otherwise, and shall be entitled to all the rights and privileges pertaining thereto. The membership in such company shall consist of the persons insuring therein; provided, that such

number shall never be less than the number required by section 40-1501 for the purposes of incorporation.

History: En. Sec. 7, Ch. 58, L. 1905;
re-en. Sec. 4082, Rev. C. 1907; re-en. Sec.
6176, R. C. M. 1921.

Collateral References
InsuranceⒸ55.
44 C.J.S. Insurance § 108.

40-1508. (6177) Policies—liability of members. All persons desiring insurance shall make applications in writing, and give their obligations to the company for the payment of losses and expenses as shall be required by the by-laws of such company; all liability of the members may be limited by the by-laws of such company; provided, that in case the whole amount of such obligation shall be insufficient to pay all losses sustained after necessary expenses in any year, then sufferers insured by such company shall receive their proportionate share of the funds realized from such obligation in full satisfaction of such losses, and no member shall ever be called on to pay more than the full amount of his obligation.

History: En. Sec. 8, Ch. 58, L. 1905;
re-en. Sec. 4083, Rev. C. 1907; amd. Sec.
1, Ch. 32, L. 1921; re-en. Sec. 6177, R. C.
M. 1921.

44 C.J.S. Insurance § 232; 45 C.J.S. In-
surance § 410.

Construction of hail insurance policy.
4 ALR 1298.

Collateral References
InsuranceⒸ130, 199.

40-1509. (6178) Duty of insured in case of loss. Every member of such company, who may sustain loss or damage by hail or fire, shall immediately notify the secretary thereof, stating the amount of damage or loss claimed; then the person or persons authorized by the by-laws of such company to adjust losses shall proceed to ascertain the amount of such loss or damage and adjust the same. If there is a failure of the parties to agree upon the amount of such damage or loss, the same shall be submitted to three persons as committee of reference, one of whom shall be selected by the claimant, one by the company, and the third by such two persons, who shall be sworn to a faithful and impartial investigation and award, as may be provided by the by-laws of said company, who shall have authority to examine witnesses and determine all matters in dispute, and shall make their award in writing to the secretary of the company, and such award shall be final, unless either party to the action shall appeal to the court within thirty days after such award; provided, such final award shall not be made before the time for the maturity of said crop or loss by fire. The pay of the membership of such committee shall be two dollars per day for each day of service so rendered in the discharge of their duties, which shall be paid by the claimant unless the award of such committee shall exceed the sum offered by the company in liquidation of such loss or damage, in which case said expense shall be paid by the company.

History: En. Sec. 9, Ch. 58, L. 1905;
re-en. Sec. 4084, Rev. C. 1907; re-en. Sec.
6178, R. C. M. 1921.

Collateral References
InsuranceⒸ533.
45 C.J.S. Insurance § 982.

40-1510. (6179) When obligations due. All obligations shall be due at such time as the company in its by-laws provides, and losses shall not be due and payable until thirty days after said obligations are due and

payable; provided, that it shall be the duty of such company to use due diligence in the collection of such obligation.

History: En. Sec. 10, Ch. 58, L. 1905;
re-en. Sec. 4085, Rev. C. 1907; re-en. Sec.
6179, R. C. M. 1921.

Collateral References
Insurance—195, 196.
44 C.J.S. Insurance §§ 369, 372.

40-1511. (6180) Actions against members and against company. Suits at law may be brought against any member of such company who shall neglect or refuse to pay any obligation given by him or her according to the provisions of this act, and the directors or officers of any company so formed, who shall wilfully refuse or neglect to perform the duties imposed upon them by the provisions of this act, shall be liable in their individual capacity to the person sustaining such loss. Suit at law may also be brought and maintained against any such company by members thereof for losses sustained, if payment is withheld after such losses become due.

History: En. Sec. 11, Ch. 58, L. 1905;
re-en. Sec. 4086, Rev. C. 1907; re-en. Sec.
6180, R. C. M. 1921.

Collateral References
Insurance—608.
46 C.J.S. Insurance § 1244.

40-1512. (6181) Annual statement. It shall be the duty of the secretary to prepare an annual statement showing the condition of such company and the business transacted the preceding year, and present the same at the annual meeting, and file a verified copy of same with the state auditor as provided by law.

History: En. Sec. 12, Ch. 58, L. 1905;
re-en. Sec. 4087, Rev. C. 1907; re-en. Sec.
6181, R. C. M. 1921.

Collateral References
Insurance—9.
44 C.J.S. Insurance § 73.

40-1513. (6182) Members may withdraw. Any member of such company may withdraw therefrom by surrendering his policy for cancellation and paying all obligations for the year's insurance; provided, that the company shall have power to cancel the certificate of any member for good and sufficient cause by giving the insured notice to that effect, and not otherwise.

History: En. Sec. 13, Ch. 58, L. 1905;
re-en. Sec. 4088, Rev. C. 1907; re-en. Sec.
6182, R. C. M. 1921.

Collateral References
Insurance—228, 229, 238-240.
45 C.J.S. Insurance §§ 446, 450, 454, 455,
458.

40-1514. (6183) Examination of company—annual statement. It shall be the duty of the president and secretary of every such company, on the first day of January of each year, or within a month thereafter, to prepare under oath and transmit to the state auditor a statement of the condition of the company on the last day of the month preceding, which said statement shall exhibit the names of the president and secretary, the date of annual meeting, the amount of insurance in force, the number of members, the number and amount of assessments made during the year, the amount paid in losses, the amount of the losses claimed and not paid, with the reasons for non-payment, the number of persons withdrawn, suspended, or expelled, the number of new members admitted, the expense during the year, and the amount of money on hand; if, upon examination, the state auditor finds that such company is doing business in accordance with the provisions of this act, he must thereupon furnish the company a certifi-

cate of authority to continue business during the ensuing year. For such examination and certificate of approval the company shall pay to the state auditor ten dollars (\$10.00) which shall be paid into the state treasury and applied to the general fund. No agent of any corporation organized under the provisions of this act shall be required to pay any fee or obtain any license for the transaction of corporation business.

History: En. Sec. 14, Ch. 58, L. 1905;
re-en. Sec. 4089, Rev. C. 1907; re-en. Sec.
6183, R. C. M. 1921; amd. Sec. 4, Ch. 73,
L. 1931; amd. Sec. 2, Ch. 129, L. 1935.

Collateral References

Insurance⇒9, 10.
44 C.J.S. Insurance §§ 57, 73, 74.

40-1515. (6183.1) General insurance laws not applicable. The provisions of sections 40-1401 to 40-1430 and the provisions of sections 40-1301 to 40-1325 inclusive, of this code shall not apply to any corporation organized under the provisions of this act.

History: En. Sec. 5, Ch. 73, L. 1931.

Collateral References

Insurance⇒4.
44 C.J.S. Insurance §§ 59, 78.

40-1516. (6183.2) Existing laws not affected. Nothing in this law shall be construed as being in conflict with or repealing any law or act relating to the licensing of insurance companies.

History: En. Sec. 6, Ch. 73, L. 1931.

40-1517. (6184) Foreign mutual hail, cyclone and tornado insurance companies. All mutual hail, cyclone, and tornado insurance companies or associations, organized under the laws of another state and transacting business in this state, shall be required to comply with the provisions of the laws governing fire and miscellaneous insurance corporations doing business in this state; provided, that such companies shall be possessed of assets in excess of all liabilities of an amount equal to at least fifty thousand dollars.

History: En. Sec. 1, Ch. 180, L. 1907;
Sec. 4090, Rev. C. 1907; re-en. Sec. 6184,
R. C. M. 1921.

Collateral References

Insurance⇒17, 18.
44 C.J.S. Insurance §§ 77, 78.

CHAPTER 16

MUTUAL RURAL INSURANCE COMPANIES

- Section 40-1601. Formation of mutual rural insurance company.
40-1602. Articles of incorporation—contents.
40-1603. Execution and filing of articles.
40-1604. Certified copies as evidence.
40-1605. Fees for filing articles.
40-1606. Adoption of by-laws.
40-1607. What matters may be embraced in by-laws.
40-1608. By-laws binding upon members.
40-1609. Board of directors and officers.
40-1610. When company may commence to issue policies.
40-1611. Minimum aggregate of insurance.
40-1612. Annual statement.
40-1613. Failure to file statement—injunction.
40-1614. Insurance limited to members and schools, churches, community houses—not to be written on property within city or town limits.
40-1615. Amendment of by-laws to authorize additional insurance.
40-1616. Property which shall not be insured.

- 40-1617. No profits or dividends.
- 40-1618. Voting of members.
- 40-1619. Amendment of articles.
- 40-1620. License to do business not required.
- 40-1621. General insurance laws not applicable.
- 40-1622. Existing laws not affected.
- 40-1623. Rural mutual insurance companies—assignments.
- 40-1624. Mutual insurance companies may create reserve fund.
- 40-1625. Investment of reserves.

40-1601. (6185) Formation of mutual rural insurance company. Any number of persons, not less than twenty-five, who collectively shall own, in any county or counties, which are adjoining and adjacent to each other in this state, property of the value of twenty-five thousand dollars, which they desire to have insured, may form a corporation, under the provisions of this act, for the purpose of insuring the property of the members, situate within the counties where the operations of the corporation are to be carried on, against loss or damage by fire or the elements, or any such agencies as may be specified in the articles of incorporation.

History: En. Sec. 1, Ch. 21, L. 1907;
Sec. 4092, Rev. C. 1907; amd. Sec. 1, Ch.
104, L. 1911; re-en. Sec. 6185, R. C. M.
1921.

Collateral References
Insurance 52.
44 C.J.S. Insurance § 105.

References

Hier v. Farmers Mutual Fire Insurance
Co., 104 M 471, 488, 67 P 2d 831.

40-1602. (6186) Articles of incorporation—contents. Articles of incorporation must be prepared setting forth:

1. The name of the corporation, as follows: "Mutual Rural Insurance Company,County" in which the operations of said company are to be carried on.

2. The name of the county or counties in which the operations of said company are to be carried on, and the place within such county where its principal business shall be transacted.

3. The purpose for which it is formed.

4. The terms for which it is to exist, not exceeding twenty (20) years.

5. The number of its directors, which shall not be less than five (5), nor more than thirteen (13), and the names of those who are appointed to manage the affairs of the corporation or association until the first annual meeting of the members, and until their successors are elected and qualified.

6. The names of the incorporators, and the value of the property desired insured, owned by each in the county, or counties, where the operations of the company are to be carried on.

History: En. Sec. 2, Ch. 21, L. 1907;
Sec. 4093, Rev. C. 1907; re-en. Sec. 6186,
R. C. M. 1921; amd. Sec. 1, Ch. 62, L.
1931.

Collateral References
Insurance 54.
44 C.J.S. Insurance § 107.

40-1603. (6187) Execution and filing of articles. The articles of incorporation must be executed in duplicate by at least three of the incorporators, and acknowledged before some officer authorized to take and certify acknowledgments of conveyances of real property, and one of the instruments shall be filed with the county clerk and recorder of the county where

the operations of the corporation are to be carried on, and the other with the state auditor. The copy of articles of incorporation filed with the state auditor shall first be certified by the county clerk as being a true and correct copy of the articles filed with such county clerk, and thereupon the persons named in the articles of incorporation, and the members thereafter of such corporation, shall be a body politic and corporate for the term stated in the articles, not exceeding twenty years.

History: En. Sec. 3, Ch. 21, L. 1907;
Sec. 4094, Rev. C. 1907; re-en. Sec. 6187,
R. C. M. 1921.

40-1604. (6188) Certified copies as evidence. A copy of any articles of incorporation, filed in pursuance of this act, and certified by the state auditor, must be received in all courts and other places as prima facie evidence of the facts therein stated, and of the due incorporation of the company named in such articles.

History: En. Sec. 4, Ch. 21, L. 1907;
Sec. 4095, Rev. C. 1907; re-en. Sec. 6188,
R. C. M. 1921.

Collateral References

Evidence 343(5).
32 C.J.S. Evidence § 660.

40-1605. (6189) Fees for filing articles. The fee for filing the articles of incorporation with the county clerk and recorder shall be one dollar, and the fee for filing the articles of incorporation with the state auditor shall be ten dollars.

History: En. Sec. 5, Ch. 21, L. 1907;
Sec. 4096, Rev. C. 1907; re-en. Sec. 6189,
R. C. M. 1921.

40-1606. (6190) Adoption of by-laws. Upon filing the articles of incorporation, by-laws shall be adopted by a majority of the members present at a meeting called for that purpose by a majority of those executing the articles of incorporation, upon at least five days' notice by mail to each member.

History: En. Sec. 6, Ch. 21, L. 1907;
Sec. 4097, Rev. C. 1907; re-en. Sec. 6190,
R. C. M. 1921.

40-1607. (6191) What matters may be embraced in by-laws. A corporation, organized under the provisions of this act, may by its by-laws provide:

1. The terms of the directors; provided, that at least part of the directors shall be elected at each annual meeting, and that the term of no director shall be longer than three years.

2. The date of the annual meeting of the members, at which directors shall be elected; provided, that each member shall be permitted to cast one vote, either in person or by proxy, for each director to be elected, and each member shall be permitted to cumulate his votes for one or more directors, not exceeding the number to be elected.

3. How the directors shall be elected in case no election occurs at the annual meeting.

4. How the by-laws shall be amended.

5. The duties and compensation of the officers, and the bonds to be required of them.

6. The manner and time of giving notice of all annual and special meetings of the members.

7. The character of property to be insured, and under what restrictions and limitations.

8. Restrictions and limitations as to membership, and the powers, duties, and obligations of members.

9. The form of application and form of policy.

10. The manner of making and collecting assessments.

11. The manner of making proof, adjustment, and payment of losses.

12. The manner of the withdrawal, suspension, and expulsion of members.

13. The books and records to be kept by the corporation, reports required of the officers, and the manner of examining and auditing their accounts.

14. What shall be contained on the corporate seal, and when it shall be required to be used.

15. Such other matters as may be deemed necessary for the management of the affairs of the company, and the carrying out of the purposes for which it is incorporated.

History: En. Sec. 7, Ch. 21, L. 1907; Sec. 4098, Rev. C. 1907; re-en. Sec. 6191, R. C. M. 1921.

References

Hier v. Farmers Mutual Fire Insurance Co., 104 M 471, 488, 67 P 2d 831.

40-1608. (6192) By-laws binding upon members. The by-laws of any corporation organized under the provisions of this act shall be binding on all members, and be, and become, as from time to time amended, a part of the contract of insurance between the company and the members.

History: En. Sec. 8, Ch. 21, L. 1907; Sec. 4099, Rev. C. 1907; re-en. Sec. 6192, R. C. M. 1921.

40-1609. (6193) Board of directors and officers. The general management of the affairs of the corporation shall be vested in the board of directors, who shall be members of the company, and such board shall elect, from their number, a president and vice-president, and shall also elect a secretary and a treasurer, who may or may not be members of the company, all of whom shall hold their offices until the first meeting of the directors following the annual meeting of the members, unless removed by the board of directors.

History: En. Sec. 9, Ch. 21, L. 1907; Sec. 4100, Rev. C. 1907; re-en. Sec. 6193, R. C. M. 1921.

Collateral References

Insurance 56
44 C.J.S. Insurance § 109.

40-1610. (6194) When company may commence to issue policies. No policies of insurance shall be issued by any company organized under the provisions of this act until such company shall have received applications aggregating fifty thousand dollars, and, when applications aggregating that amount have been received, the company shall cause to be filed with the county clerk and recorder of the county where its operations are carried on a statement to that effect, certified to by its president and secretary, with its corporate seal attached.

History: En. Sec. 10, Ch. 21, L. 1907;
Sec. 4101, Rev. C. 1907; re-en. Sec. 6194,
R. C. M. 1921.

Collateral References
Insurance 57(2).
44 C.J.S. Insurance §§ 68, 110.

40-1611. (6195) Minimum aggregate of insurance. Whenever insurance, carried by any corporation organized under the provisions of this act, shall in the aggregate amount to less than fifty thousand dollars, no further applications shall be received or policies written, and all policies existing shall become null and void, notice of which shall be given to each member by mail, and the directors of the company shall proceed to wind up its affairs in such manner as a majority of the members present at a meeting called for that purpose may direct.

History: En. Sec. 11, Ch. 21, L. 1907;
Sec. 4102, Rev. C. 1907; re-en. Sec. 6195,
R. C. M. 1921.

40-1612. (6196) Annual statement. Every corporation organized under the provisions of this act shall, within twenty days after the thirty-first day of December of each year, cause to be filed with the county clerk and recorder of the county where its operations are carried on, a statement in writing, signed by its president and secretary, with its corporate seal attached, showing the condition of the company on that date, exhibiting the following facts:

1. The name of the president and secretary.
2. The date of the annual meeting.
3. The amount of insurance in force.
4. The number of members.
5. The number of assessments made during the year.
6. The amount paid in losses during the year.
7. The amount of the losses claimed and not paid, with the reason for non-payment.
8. The number of members withdrawn, suspended, and expelled during the year.
9. The number of new members admitted during the year.
10. The expenses during the year.
11. The amount of money on hand.

A true copy of said statement, verified by the county clerk, shall be sent by mail to the state auditor, who shall file the same in his office, and said state auditor shall have and is hereby granted authority to, at any time, investigate and examine the affairs and books of any such corporation, or such examination may be made by the state examiner, who shall report his findings to the state auditor.

History: En. Sec. 12, Ch. 21, L. 1907;
Sec. 4103, Rev. C. 1907; re-en. Sec. 6196,
R. C. M. 1921.

40-1613. (6197) Failure to file statement—injunction. No report, statement, or return of any nature shall be required of any corporation organized under the provisions of this act, other than that required by the preceding section. Any corporation failing to file such statement may, on suit brought by any member, be enjoined by the district court of the county from carrying on any business until such statement is filed.

History: En. Sec. 13, Ch. 21, L. 1907;
Sec. 4104, Rev. C. 1907; re-en. Sec. 6197,
R. C. M. 1921.

Collateral References

Injunction⇒67; Insurance⇒9.
43 C.J.S. Injunctions § 99; 44 C.J.S.
Insurance § 73.

40-1614. (6198) Insurance limited to members and schools, churches, community houses—not to be written on property within city or town limits. No corporation organized under the provisions of this chapter shall insure any property not owned by a member, or by his wife; provided, however, that any such corporation may insure school houses and buildings used in connection therewith, community houses or churches and no such contract of insurance effected upon the property of any school district shall be deemed to constitute such school district a member of such mutual rural fire insurance company, nor shall any such contract of insurance be invalid by reason of the fact that the directors or any director or officer of such mutual rural fire insurance company, at the time of issuing the contract or policy of insurance, is a trustee, director, agent, custodian or manager, or in anywise in control, supervision or management of such school house and buildings, community house, church or other rural public buildings or property so insured. It is further provided that no insurance shall be written, or taken by any such corporation upon any property situated within the limits of an incorporated city or town.

History: En. Sec. 14, Ch. 21, L. 1907;
Sec. 4105, Rev. C. 1907; re-en. Sec. 6198,
R. C. M. 1921; amd. Sec. 1, Ch. 96, L. 1933.

Collateral References

Insurance⇒11, 57(2).
44 C.J.S. Insurance §§ 60, 68.

40-1615. (6198.1) Amendment of by-laws to authorize additional insurance. Any mutual rural insurance company organized under sections 40-1601 to 40-1622 may so amend its by-laws so as to authorize such company to insure any of the properties mentioned in section 40-1614.

History: En. Sec. 3, Ch. 96, L. 1933.

40-1616. (6199) Property which shall not be insured. No company, corporation or association organized under the provisions of this act shall insure any property not situated within the county in which its principal place of business is located, or counties adjoining such county.

Provided, further, that this act shall not conflict with the operation of any company, corporation or association whose original operation was confined to one county but which has since been divided into two or more counties.

History: En. Sec. 15, Ch. 21, L. 1907; Ch. 104, L. 1911; re-en. Sec. 6199, R. C. M.
re-en. Sec. 4106, Rev. C. 1907; amd. Sec. 2, 1921; amd. Sec. 2, Ch. 62, L. 1931.

40-1617. (6200) No profits or dividends. No corporation, organized under the provisions of this chapter, shall accumulate any profits or pay any dividends.

History: En. Sec. 16, Ch. 21, L. 1907;
re-en. Sec. 4107, Rev. C. 1907; re-en. Sec.
6200, R. C. M. 1921.

Collateral References

Insurance⇒59.
44 C.J.S. Insurance § 114.

40-1618. (6201) Voting of members. Each member of a corporation, organized under the provisions of this act, shall have but one vote at all meetings of the members, and no vote shall be cast by proxy, except as may

be prescribed by the by-laws; provided, however, that the provisions of this section shall not apply to the election of directors.

History: En. Sec. 17, Ch. 21, L. 1907;
re-en. Sec. 4108, Rev. C. 1907; re-en. Sec.
6201, R. C. M. 1921.

Collateral References

Insurance⌚55.
44 C.J.S. Insurance § 108.

40-1619. (6202) Amendment of articles. Any corporation, organized under the provisions of this act, may, by a vote of two-thirds of the members present at any annual meeting, or at any special meeting called for that purpose, amend its articles of incorporation in any particular within the scope of this act, by causing amended articles of incorporation to be filed in the same form and manner as required for articles of incorporation, which amended articles of incorporation shall only be required to be signed by the president and secretary of the corporation with the corporate seal attached.

History: En. Sec. 18, Ch. 21, L. 1907;
re-en. Sec. 4109, Rev. C. 1907; re-en. Sec.
6202, R. C. M. 1921.

40-1620. (6203) License to do business not required. No agent of any corporation, organized under the provisions of this act, shall be required to procure any certificate of authority from any public official to transact business for the corporation, nor shall the corporation or any of its officers, agents, or employees be required to pay any fee or license for the transaction of the business of the corporation, except as provided in this act.

History: En. Sec. 19, Ch. 21, L. 1907;
re-en. Sec. 4110, Rev. C. 1907; re-en. Sec.
6203, R. C. M. 1921.

Collateral References

Insurance⌚12.
44 C.J.S. Insurance § 85.

40-1621. (6204) General insurance laws not applicable. The provisions of sections 40-1401 to 40-1430 and the provisions of sections 40-1301 to 40-1325 shall not apply to any corporation organized under the provisions of this act.

History: En. Sec. 20, Ch. 21, L. 1907;
re-en. Sec. 4111, Rev. C. 1907; re-en. Sec.
6204, R. C. M. 1921.

Collateral References

Insurance⌚4.
44 C.J.S. Insurance §§ 68, 78.

40-1622. (6205) Existing laws not affected. Nothing in this chapter shall be construed as being in conflict with or repealing any law or act relating to the licensing of insurance companies.

History: En. Sec. 21, Ch. 21, L. 1907;
re-en. Sec. 4112, Rev. C. 1907; re-en. Sec.
6205, R. C. M. 1921.

40-1623. Rural mutual insurance companies—assignments. In addition to the powers now granted by law to rural mutual insurance companies organized under sections 40-1501 to 40-1622, such corporations shall have the power to cede and accept insurance to and from any other mutual insurance corporation, domiciled in Montana or licensed to do business in the state of Montana.

History: En. Sec. 1, Ch. 95, L. 1939;
amd. Sec. 1, Ch. 247, L. 1947.

Collateral References

Insurance⌚57.
44 C.J.S. Insurance § 110.

40-1624. Mutual insurance companies may create reserve fund. Any mutual insurance company as defined under and by virtue of sections 40-1601 to 40-1622 may create a safety or reserve fund for the purpose of paying any claim or claims for losses on any policies of insurance issued by said company or for the purpose of paying any lawful expenses or obligations which said company may from time to time incur. Such reserve fund shall not exceed an amount equal to three per centum of the total amount of insurance which may be in force in said company at any one time. Provided that such safety or reserve fund shall not be used for any purpose whatsoever except as herein authorized.

History: En. Sec. 1, Ch. 121, L. 1939;
amd. Sec. 1, Ch. 97, L. 1949.

Collateral References

Insurance 58.

44 C.J.S. Insurance § 112.

40-1625. Investment of reserves. When so directed by a majority vote of the members present of the company the directors shall have the power to invest the reserve fund of the company or any part thereof in bonds or other securities of the United States government, or any government agency, or any investment the safety of which is guaranteed by the United States, in such general obligation, bonds or warrants of any state, county or city as are recommended by the state auditor and approved by the state examiner, or in loans secured by a first mortgage on real estate situated in the state of Montana. At the time of making such investments the document evidencing the obligation must be stamped with the name of the company with the following notation printed thereon, "negotiable only upon the order of the directors of (naming the company)." No real estate loan shall be for more than sixty per centum of the appraised value of the real estate securing [secured] by the loan, and appraisal must have been made within thirty days prior to the date of the loan, and such loans shall not be for a longer term than ten years. The foregoing provisions, however, shall not prevent the renewal or extension of loans already made, and shall not apply to real estate loans which are insured under the provisions of any act of the congress of the United States, nor to the making, extension or renewal of any loans which are made under subchapter II of the act of congress, known as the servicemen's readjustment act of 1944, or any amendment thereof or supplement thereto, as to any part of such loans; nor shall these provisions prevent any company from taking another and immediately subsequent mortgage or deed of trust when it already holds a first mortgage or deed of trust thereon on such real estate, nor from accepting a second lien on real estate to secure the re-payment of a debt previously contracted in good faith; nor shall it prevent subsequent liens of any kind from being taken to secure the payment of a debt previously contracted in good faith, when, in the judgment of the directors of such company, such subsequent liens are necessary further to secure the payment of any debts and save such company from loss.

History: En. Sec. 2, Ch. 121, L. 1939;
amd. Sec. 1, Ch. 97, L. 1949.

Compiler's Notes

The bracketed word "secured" was inserted by the compiler.

The reference in this section to the servicemen's readjustment act apparently refers to Title 3 of the Act of June 22, 1944, Ch. 268, 58 U. S. Stat. 384 compiled in the United States Code as Title 38, Secs. 694 to 694e.

CHAPTER 17

SURETY COMPANIES

- Section 40-1701. Foreign surety companies—admission into state.
 40-1702. Execution of official bonds.
 40-1703. Deposit of money in bank for safekeeping by executors and other fiduciaries on agreement with surety.
 40-1704. Release of surety company from liability.
 40-1705. Statement to commissioner of insurance.
 40-1706. When foreign surety companies may transact business in state.
 40-1707. Deposit of articles and statement with commissioner of insurance.
 40-1708. Appointment of commissioner of insurance to receive service of process.
 40-1709. Service of process.
 40-1710. Annual statement to be filed with commissioner.
 40-1711. License to transact business in state.
 40-1712. When persons shall not act as agents of company.
 40-1713. Who deemed agent of surety company.
 40-1714. Agent to procure certificate from commissioner of insurance.
 40-1715. Penalty for acting as agent in violation of law.
 40-1716. Examination into affairs of surety company.
 40-1717. Revocation of license of surety company.
 40-1718. Fees and taxes exacted of surety companies.
 40-1719. Same.
 40-1720. Reserve fund for reinsurance.
 40-1721. Annual statement of surety company—order to cease business.
 40-1722. Limit of liability to be incurred by surety company.
 40-1723. Estoppel to deny corporate power.
 40-1724. Cost of surety bond to be allowed in account of officer.
 40-1725. Surety companies not permitted to furnish bonds where indemnity required.
 40-1726. Penalty for violation of law.
 40-1727. Bonds which may be furnished by public officers.

40-1701. (6206) Foreign surety companies—admission into state. Any company with a paid-up capital of not less than two hundred and fifty thousand dollars, incorporated and organized under the laws of any state of the United States for the purpose of transacting business as surety on obligations of persons or corporations, and which has complied with all the requirements of the law regulating the admission of such companies to transact business in this state, may be accepted as surety upon the bond of any person or corporation required by the laws of this state to execute a bond; it being the intent of this chapter to enable corporations created for that purpose to become the surety on bonds required by law, subject to all the rights and liabilities of private persons.

History: This Act supersedes Secs. 4178-4189, Rev. C. 1907.
 This section En. Sec. 1, Ch. 139, L. 1909; re-en. Sec. 6206, R. C. M. 1921.

References

Stabler v. Porter, 72 M 62, 64, 232 P 187.

Collateral References

Insurance—20.
 44 C.J.S. Insurance § 79.
 23 Am. Jur. 203, Foreign Corporations,
 §§ 234 et seq.; 29 Am. Jur. 70, Insurance,
 §§ 34 et seq.

Failure to procure license as affecting validity or enforceability of contract. 30 ALR 866.

Discrimination by state against foreign insurance corporations in imposition of taxes and license fees. 49 ALR 740.

Constitutionality of statute requiring payment to state of fee on appointment of agent by foreign insurance company. 60 ALR 1172.

Subsequent compliance with conditions of doing business in state as affecting enforceability of contract of foreign corporation made before compliance with such conditions. 75 ALR 446.

Withdrawal of foreign insurance company from state as affecting conditions

under which it may be readmitted to do business in state and its rights and duties if readmitted. 110 ALR 528.

Who, other than public official, may be served with process in action against foreign corporation doing business in state. 113 ALR 9.

Personal liability of public officials or their bonds, for permitting insurance company to engage or continue in business without complying with statutory requirements. 131 ALR 275.

Personal liability of agents or brokers in respect of policies of foreign insurance companies not authorized to do business in the state. 131 ALR 1079.

What constitutes doing business within state by foreign insurance corporation. 137 ALR 1128.

Insurance companies, which are members of Federal reserve banks or similar Federal agencies or national banks, as within state social security or unemployment compensation act. 145 ALR 1074.

40-1702. (6207) Execution of official bonds. Whenever any bond, undertaking, recognizance, or other obligation is by law, or the charter, ordinance, rules, or regulations of any municipality, board, body, organization, or public officer, required or permitted to be made, given, tendered, or filed, with surety or sureties, and whenever the performance of any act, duty, or obligation, or the refraining from any act, is required or permitted to be guaranteed, such bond, undertaking, obligation, recognizance, or guaranty may be executed by a surety company qualified to act as surety or guarantor as above provided, and such execution by such company of such bond, undertaking, obligation, recognizance, or guaranty shall be in all respects a full and complete compliance with every requirement of the law, charter, ordinance, rule, or regulation, that such bond, undertaking, obligation, recognizance, or guaranty shall be executed by one surety or by one or more sureties, or that such surety shall be a resident, or householder, or freeholder, or either or both, or possessed of any other qualifications; and all courts, judges, heads of departments, boards, bodies, municipalities, and public officers of every character shall accept and treat accordingly such bond, undertaking, obligation, recognizance, or guaranty when so executed by such company, as conforming to and fully and completely complying with every such requirement of every such law, charter, ordinance, rule, or regulation.


History: En. Sec. 2, Ch. 139, L. 1909; re-en. Sec. 6207, R. C. M. 1921.

Corporations as sureties, secs. 93-8711 to 93-8713.

Cross-References

Bonds by surety companies in civil cases, sec. 93-8711.

Collateral References

Insurance  20.
44 C.J.S. Insurance § 79.

40-1703. Deposit of money in bank for safekeeping by executors and other fiduciaries on agreement with surety. It shall be lawful for any executor, administrator, guardian, receiver, trustee or other party of whom a bond, undertaking or other obligation is required, to agree with his surety or sureties for the deposit of any or all moneys and assets for which he and his surety or sureties are or may be held responsible, with a bank, savings bank, safe-deposit or trust company, authorized by law to do business as such, or with other depository approved by the court or a judge thereof, if such deposit is otherwise proper, for the safekeeping thereof, and in such manner as to prevent the withdrawal of such money or assets or any part thereof, without the written consent of such surety or sureties, or an order of court, or a judge thereof made on such notice to such surety or sureties as such court or judge may direct; provided, however, that such

agreement shall not in any manner release from or change the liability of the principal or sureties as established by the terms of the said bond.

History: En. Sec. 1, Ch. 146, L. 1943.

40-1704. (6208) Release of surety company from liability. Such company may be released from its liability on a bond on the same terms and conditions as are by law prescribed for the release of individual sureties.

History: En. Sec. 3, Ch. 139, L. 1909;
re-en. Sec. 6208, R. C. M. 1921.

References

Stabler v. Porter, 72 M 62, 64, 232 P 187.

Operation and Effect

This section having reference only to official bonds, it has no application to the bond of a contractor for construction for a county. National Surety Co. v. Lincoln County, 238 Fed 705, 711.

Collateral References

Insurance 250(1).
45 C.J.S. Insurance § 666.

40-1705. (6209) Statement to commissioner of insurance. Every surety company chartered by this state shall annually, within sixty days after December 31st of the preceding year, render to the insurance commissioner a statement, signed and sworn to by its president and secretary, stating: The amount of its capital, and the manner of its investment, particularizing each item of investment; the amount of bonds upon which such company is surety; and the amount of its liabilities. Such statement shall be made on a printed form furnished by the insurance commissioner, and shall include such other information as the said commissioner may require.

History: En. Sec. 4, Ch. 139, L. 1909;
re-en. Sec. 6209, R. C. M. 1921.

40-1706. (6210) When foreign surety companies may transact business in state. Any company incorporated and organized under the laws of any state of the United States other than this state, for the purpose of transacting business as surety on obligations of persons or corporations, may transact such business in this state upon complying with the provisions of this chapter, and not otherwise.

History: En. Sec. 5, Ch. 139, L. 1909;
re-en. Sec. 6210, R. C. M. 1921.

40-1707. (6211) Deposit of articles and statement with commissioner of insurance. Every such company, before transacting any business in this state, shall deposit with the insurance commissioner a copy of its charter or articles of association and a statement, signed and sworn to by its president and secretary, stating: The amount of its capital, which shall not be less than two hundred and fifty thousand dollars, whether such company does surety business solely or other insurance business together with surety insurance, and the manner of its investment, designating the amount invested in mortgages, in the stock of incorporated companies, stating what companies, in public securities, and also the amount invested in other securities, particularizing each item of investment; the amount of existing bonds upon which such company is surety, stating what portion thereof is secured by the deposit with such company of collateral security, the amount of premium thereon and the amount of its liabilities, specifying therein the amount of outstanding claims, adjusted or unadjusted, due or not due, and giving such other information as the insurance commissioner

shall require. The insurance commissioner may thereafter issue to such company a license authorizing it to transact business in this state.

History: En. Sec. 6, Ch. 139, L. 1909;
re-en. Sec. 6211, R. C. M. 1921.

40-1708. (6212) Appointment of commissioner of insurance to receive service of process. No company shall, directly or indirectly, take risks or transact business in this state until it shall have first appointed, in writing, the insurance commissioner of this state, to be the attorney of such company in this state, upon whom all process in any proceeding against such company may be served. Said power of attorney shall stipulate and agree on the part of the company, corporation, or association, that any lawful process against the same which is served on said attorney shall be of the same legal force and validity as if served on the company, corporation, or association, and that the authority shall continue in force so long as the certificate of membership, policy, or liability remains outstanding against the company, corporation, or association, in this state. A certificate of such appointment, duly certified and authenticated, shall be filed in the office of the insurance commissioner, and copies certified by him shall be sufficient evidence. Service upon such attorney, or, in his absence, upon the person in charge of his office, shall be sufficient upon the principal.

History: En. Sec. 7, Ch. 139, L. 1909;
re-en. Sec. 6212, R. C. M. 1921; amd. Sec.
1, Ch. 56, L. 1943.

Operation and Effect

Service upon insurance commissioner held invalid service upon foreign surety company, where it did not appoint commissioner its attorney for that purpose. *Ulmen v. National Surety Co.*, 4 F Supp 194.

References

Mieyr v. Federal Surety Co. of Davenport, 94 M 508, 528, 23 P 2d 959.

Collateral References

23 Am. Jur. 526, Foreign Corporations, §§ 505 et seq.

40-1709. (6213) Service of process. Whenever lawful process against an insurance company, corporation, or association shall be served upon the insurance commissioner, he shall forthwith mail a copy of such process to the secretary of the company, or, in the case of companies of foreign countries, to the resident manager, if any, in this country. For each copy of process the commissioner shall collect two dollars, which shall be paid by the plaintiff at the time of such service, the same to be recovered by him as part of the taxable costs if he prevails in the suit.

History: En. Sec. 8, Ch. 139, L. 1909;
re-en. Sec. 6213, R. C. M. 1921.

Operation and Effect

Service upon insurance commissioner

Cessation by foreign corporation of business within state as affecting designation of agent for service of process. 45 ALR 1447.

Constitutionality, construction and effect of statute providing for service of process upon statutory agent in action against foreign corporation as regards communications to corporation of fact of service. 89 ALR 658.

Service by mail or service upon, or acknowledgment of service by, deputy or other subordinate of the public officer named in statute providing for service of process in action against foreign corporation. 98 ALR 1437.

Who, other than public official, may be served with process in action against foreign corporation doing business in state. 113 ALR 9, 100.

held invalid service upon a foreign surety company, where it did not appoint commissioner its attorney for that purpose. *Ulmen v. National Surety Co.*, 4 F Supp 194.

40-1710. (6214) Annual statement to be filed with commissioner. Every such company shall deposit with the insurance commissioner, annual-

ly, within sixty days after December 31st of the preceding year, a statement similar to that required by section 40-1707, signed and sworn to as therein directed, of the capital of such company, and its investments and risks as aforesaid, to be made up to the thirty-first day of December next preceding, together with such other information as the insurance commissioner may require.

History: En. Sec. 9, Ch. 139, L. 1909;
re-en. Sec. 6214, R. C. M. 1921.

40-1711. (6215) License to transact business in state. If the insurance commissioner be satisfied with the statements required by sections 40-1705 and 40-1707 of this code, and if such company shall have complied with all other provisions of law, he shall issue his license to it to transact business in this state, said license to continue in force for one year unless sooner revoked, but no such license shall be issued unless such statements are furnished; provided, that the first license may issue upon the filing of the statement required by section 40-1707 of this code; provided, that all licenses shall expire March 31st of each year.

History: En. Sec. 10, Ch. 139, L. 1909;
re-en. Sec. 6215, R. C. M. 1921.

40-1712. (6216) When persons shall not act as agents of company. No person shall act within this state as agent for such company, unless it is possessed of two hundred and fifty thousand dollars capital, and such capital to the extent of one hundred thousand dollars is invested in obligations of the United States, or obligations created by or under the laws of the state in which such company is located, or in other safe stocks or securities, the value of which at the time of such deposit shall be at or above par, and such investments are deposited with the insurance commissioner, auditor, comptroller, or chief financial officer of the state under whose laws such company is incorporated; nor unless the insurance commissioner of this state is furnished with the certificate of such insurance commissioner, auditor, comptroller, or chief financial officer aforesaid, under his hand and official seal, that he, as such insurance commissioner, auditor, comptroller, or chief financial officer of such state, holds in trust and on deposit for the benefit of all obligees of such company the securities before mentioned, which certificate shall describe the items of security so held, and shall state that he is satisfied that such securities are worth one hundred thousand dollars.

History: En. Sec. 11, Ch. 139, L. 1909;
re-en. Sec. 6216, R. C. M. 1921.

Collateral References

Power of state to regulate and control insurance agents or brokers. 36 ALR 1512.

40-1713. (6217) Who deemed agent of surety company. Every person who shall receive or transmit applications for suretyship or receive for delivery bonds founded on applications forwarded from this state, or otherwise procure suretyship to be effected by such company upon the bonds of, or the bonds given to, persons or corporations in this state, shall be deemed an agent of such company.

History: En. Sec. 12, Ch. 139, L. 1909;
re-en. Sec. 6217, R. C. M. 1921.

Collateral References

Statutory declaration that one who

does certain prescribed acts for a surety company shall be deemed as acting as its agent as affected by other party's knowledge of, or opportunity to know, limitations of his actual authority. 88 ALR 291.

40-1714. (6218) Agent to procure certificate from commissioner of insurance. No person shall act as agent for such company without first procuring from the insurance commissioner a certificate of authority to act as such agent, the fees for such certificate of authority to be the same as those required of all insurance companies.

History: En. Sec. 13, Ch. 139, L. 1909;
re-en. Sec. 6218, R. C. M. 1921.

40-1715. (6219) Penalty for acting as agent in violation of law. Every person who shall act as agent of any such company before it shall have complied with all the requirements of the laws of this state relating to such companies shall be fined one thousand dollars.

History: En. Sec. 14, Ch. 139, L. 1909; not authorized to do business in the state.
re-en. Sec. 6219, R. C. M. 1921. 131 ALR 1079.

Collateral References

See generally, 23 Am. Jur. 1, Foreign Corporations.

What constitutes doing business within state by foreign insurance corporation. 137 ALR 1128.

Personal liability of agent in respect of policies of foreign insurance companies

40-1716. (6220) Examination into affairs of surety company. The insurance commissioner, either personally or by committee appointed by him, consisting of one or more persons not directors, officers, or agents of any surety company doing business in this state, may at any time examine the affairs of any surety company incorporated by or doing business in this state. The officer or agents of such company shall exhibit its books to said commissioner or committee, and otherwise facilitate such examination, and the commissioner or committee may examine under oath the officers and agents of any such company in relation to its affairs. Said commissioner may, if he deem best, publish the result of such investigation in one or more newspapers published in this state; provided, that nothing in this section shall be construed to repeal, limit, or change the provisions of sections 40-1105 to 40-1107 relating to the examination of insurance companies.

History: En. Sec. 15, Ch. 139, L. 1909;
re-en. Sec. 6220, R. C. M. 1921.

40-1717. (6221) Revocation of license of surety company. When it shall appear to said commissioner from the statement of any such company or from an examination of its affairs that it is insolvent or is conducting its business fraudulently, or refuses or neglects to comply with the laws of the state relating to such companies, or, if any such company shall neglect or refuse to pay any final judgment or decree rendered against it upon any such bond, undertaking, recognizance, or other obligation made or guaranteed by it under the provisions of this act, from which no appeal, writ of error, or supersedeas has been taken for ninety days after the rendition of such judgment or decree, it shall be the duty of the clerk of the court in which said judgment or decree was rendered to certify a copy thereof to the insurance commissioner, together with the fact that it remains un-

paid; said commissioner shall revoke all licenses and the certificates of authority issued to such company and its agents, and he shall cause a notice thereof to be published in one or more newspapers published in this state, and the agent or agents of such company after such notice shall transact no further business in this state. All the expenses of an examination made under the provisions of section 40-1716 shall be paid to said commissioner by the company examined; provided, that nothing in this section shall be construed to repeal, limit, or change the provisions of sections 40-1105 to 40-1107, relating to examination of insurance companies.

History: En. Sec. 16, Ch. 139, L. 1909; re-en. Sec. 6221, R. C. M. 1921.

Operation and Effect

This section provides that where a surety company refuses to pay a judgment against it on a bond furnished by it and fails to take an appeal for ninety days after its rendition, the insurance commissioner shall revoke its license. Such a company did not perfect its appeal from a judgment in an action on a constable's bond until the ninety-fifth day after rendition. Its undertaking on appeal was satisfactory to the judgment creditor. In action by the latter against the insurance commissioner for writ of mandate to com-

pel revocation of the company's license, held that since plaintiff's rights were fully protected and could not be affected either by the issuance or denial of the writ, and the effect of its issuance would have been the destruction of the company's business in the state without an opportunity to be heard, it not being a party to the action, refusal to issue it was not error. *Stabler v. Porter*, 72 M 62, 64, 232 P 187.

Id. Obiter: Where the license of a surety company is sought to be revoked under this section, for failure to pay a judgment rendered against it in an action on a bond furnished by it, quo warranto may be resorted to.

40-1718. (6222) Fees and taxes exacted of surety companies. Every such company organized in this state applying for admission to transact business in this state shall pay to the insurance commissioner, for the use of the state, ten dollars for filing the copy of its charter or articles of association, ten dollars for filing the statement preliminary to admission, and a like sum for each annual statement thereafter. Every such company organized under the laws of any other state and admitted to transact business in this state, and each agent of every such company shall pay the same fees and taxes to the insurance commissioner of this state as are required by the laws of Montana from general insurance companies.

History: En. Sec. 17, Ch. 139, L. 1909; re-en. Sec. 6222, R. C. M. 1921.

Collateral References

Power of state to regulate and control insurance agents or brokers. 36 ALR 1512.

Discrimination by state against foreign insurance corporations in imposition of taxes and license fees. 49 ALR 726.

Constitutionality of statutes requiring payment to state of fee on appointment of agent by foreign insurance company. 60 ALR 1172.

40-1719. (6223) Same. Every such company organized under the laws of any other state and admitted to transact business in this state, and each agent of every such company, shall pay the same fees and taxes to the insurance commissioner of this state as are imposed by such other states upon any similar companies incorporated by or organized under the laws of this state or upon the agents of any such companies transacting business in such other state.

History: En. Sec. 18, Ch. 139, L. 1909; re-en. Sec. 6223, R. C. M. 1921.

Collateral References

Insurance \Rightarrow 20.

44 C.J.S. Insurance § 80.

40-1720. (6224) Reserve fund for reinsurance. Every surety company or association chartered by or doing business in this state, and having the

power to execute or guarantee surety or fidelity bonds or obligations, or guarantee the validity of titles or written instruments, shall at all times keep and maintain a reserve fund for reinsurance equal to fifty per centum of the gross amount of premiums received on business in force.

History: En. Sec. 19, Ch. 139, L. 1909; Reciprocal or interinsurance. 94 ALR 836.
re-en. Sec. 6224, R. C. M. 1921.

Collateral References

29 Am. Jur., Insurance, p. 55, §§ 16 et seq.; p. 67, § 31; p. 1017, §§ 1359 et seq.

Reinsurance by foreign insurance corporation as doing business within state. 137 ALR 1141.

40-1721. (6225) Annual statement of surety company—order to cease business. Every such company or association shall, in its annual statement to the insurance commissioner, report the gross amount of its risk outstanding on the thirty-first day of the previous December, classifying such risks in such manner as the commissioner shall direct, and shall report the amount of its reserve fund as a liability in such annual statement; and the commissioner may order any such company or association to cease doing business in this state whenever, upon examination of such company or association, he shall find that it has failed to comply with any provision of sections 40-1720, 40-1721 or 40-1722.

History: En. Sec. 20, Ch. 139, L. 1909;
re-en. Sec. 6225, R. C. M. 1921.

40-1722. (6226) Limit of liability to be incurred by surety company. No such company shall incur, in behalf or on account of any one person, partnership, association, or corporation, a liability for an amount larger than one-fourth of its paid-up capital and surplus, unless it shall be secured from loss thereon beyond that amount by suitable and sufficient collateral agreements of indemnity by deposit with it in pledge or conveyance to it in trust for its protection, of property equal in value to the excess of its liability over such limit; or, in case such liability is incurred in behalf or on account of a fiduciary holding property in a trust capacity, by such deposit or other disposition of a sufficient portion of the estate so held that no further sale, mortgage, pledge, or other disposition can be made thereof without such company's approval, except by the decree of a court having proper jurisdiction.

History: En. Sec. 21, Ch. 139, L. 1909;
re-en. Sec. 6226, R. C. M. 1921.

40-1723. (6227) Estoppel to deny corporate power. No company which has executed any bond as surety under the provisions of this act shall deny, in any proceedings for enforcing the liability which it assumed to incur, its corporate power to execute such instrument or assume such liability.

History: En. Sec. 22, Ch. 139, L. 1909;
re-en. Sec. 6227, R. C. M. 1921.

40-1724. (6228) Cost of surety bond to be allowed in account of officer. Any court or officer whose duty it is to pass upon the account of any person or corporation required by law to give a bond may, whenever such person or corporation has given any such surety company as surety upon such bond, allow in the settlement of such account a reasonable sum for the expense of procuring such surety.

History: En. Sec. 23, Ch. 139, L. 1909;
re-en. Sec. 6228, R. C. M. 1921.

Collateral References
Officers⇒91.
67 C.J.S. Officers § 102.

40-1725. (6234) Surety companies not permitted to furnish bonds where indemnity required. No foreign or other surety company shall hereafter be permitted to furnish the bond for any state, county, or city official, where such company requires, in addition to the payment of reasonable premiums, any indemnity or other security.

History: En. Sec. 1, Ch. 6, L. 1911;
re-en. Sec. 6234, R. C. M. 1921.

40-1726. (6235) Penalty for violation of law. Whenever it shall appear to the satisfaction of the insurance commissioner that any surety company has violated the provisions of this act, its license shall be by him thereupon declared forfeited, and such company shall not again be admitted to do business in this state until a period of four years shall have elapsed, nor until such company has shown a willingness to comply with the provision of this act.

History: En. Sec. 2, Ch. 6, L. 1911;
re-en. Sec. 6235, R. C. M. 1921.

40-1727. (6236) Bonds which may be furnished by public officers. Whenever an official bond is required of any state, county, city or township officer, such officer may furnish either a surety company bond, or a good and sufficient individual bond, executed and approved as required by law or may furnish such other security as may be approved by the person, officer, or board authorized by law to examine and approve such official bond; provided, that where such officer shall furnish a surety company bond, the premium therefor shall be a proper charge against the general fund of the state, county, or city, as the case may be; provided, further, that the provisions of this section, making such premium a charge against the general fund of the state, county, city, town or township shall not be construed to include any deputy, clerk or subordinate officer, where a bond is required to be furnished by the principal or body appointing the same.

History: En. Sec. 3, Ch. 6, L. 1911;
re-en. Sec. 6236, R. C. M. 1921; amd. Sec.
1, Ch. 145, L. 1923; amd. Sec. 1, Ch. 45,
L. 1935.

Collateral References
Officers⇒37.
67 C.J.S. Officers § 39.

CHAPTER 18

ASSESSMENT ACCIDENT INSURANCE COMPANIES

- Section 40-1801. Incorporation of assessment accident insurance companies.
40-1802. Corporations subject to this act.
40-1803. Reincorporation of existing companies.
40-1804. Payment of maximum amount of policy.
40-1805. Reserve or emergency fund.
40-1806. Transfer of risks.
40-1807. Visitation by the auditor—proceedings to restrain corporations from doing business.
40-1808. Hearing thereon.
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40-1810. Designation of commissioner of insurance for service of process.
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- 40-1812. Penalties for fraudulent acts.
- 40-1813. Change of beneficiaries.
- 40-1814. Exemption from execution.
- 40-1815. Penalties.
- 40-1816. Annual report.
- 40-1817. Fees.
- 40-1818. Proceedings to enjoin.
- 40-1819. Regulations for conduct of business.
- 40-1820. Quorum—amendment of by-laws.

40-1801. (6237) Incorporation of assessment accident insurance companies. Nine or more persons may become a corporation for the purpose of transacting the business of accident insurance upon the assessment plan, by filing in the office of the secretary of state a declaration, signed by each of them and duly acknowledged, setting forth their intention to form such a corporation, the name of the proposed corporation, the place where its principal office shall be located in the state, the mode in which its corporate powers are to be exercised, and of electing directors, or other persons, by whatsoever name or title designated, who are to have and exercise the general control and management of its affairs and its funds, and a majority of whom shall be citizens of this state, which election shall be in the manner prescribed by its by-laws. Such declaration shall have indorsed thereon or annexed thereto, and as a part thereof, the sworn statement of three such persons, that at least five hundred persons eligible under the proposed laws of the corporation to be assured therein have, in good faith, made application in writing for such an insurance. If all the requirements of this act have been complied with, the state auditor shall file such declaration and record it, with the certificate of the attorney-general, in a book to be kept for that purpose, and deliver to the corporation a certified copy of the papers so filed and recorded, with his license, in writing, to the corporation to engage in the business proposed in the declaration, which certified copy and license shall be filed in the office of the clerk of the county where the office of the corporation is to be located. Such corporation shall not commence the business of insurance until at least five hundred persons have subscribed in writing to be insured therein in the aggregate amount of at least five hundred thousand dollars, and have each paid in one per cent. on the amount of the insurance severally subscribed for in cash, and the same is deposited in bank to the credit of the indemnity fund, to be held in trust for the benefit of the insured or their beneficiaries; and the state auditor shall have further certified that it has complied with the provisions of this act, and is authorized to transact business.

History: En. Sec. 1, p. 93, L. 1893; re-en. Sec. 720, Civ. C. 1895; re-en. Sec. 4158, Rev. C. 1907; re-en. Sec. 6237, R. C. M. 1921.

Collateral References

Insurance 8, 52.
44 C.J.S. Insurance §§ 72, 105.

40-1802. (6238) Corporations subject to this act. Any corporation, association, or society, which issues any certificate, policy, or other contract whereby, upon the death or other physical disability of the assured thereunder resulting from accidental injuries, any benefit is to accrue to the assured, or to his legal representatives, or to the beneficiaries designated by him, which benefit, the accumulation of reserve or emergency funds, and the expenses of the management and prosecution of the business, are provided for by payments to be made, either at periods named in the contract

or upon assessment as required by persons holding similar contracts, and wherein the assured's liability to contribute to the payments of benefits accrued or to accrue is not limited to a fixed sum, shall be deemed to be engaged in the business of accident insurance upon the assessment plan, and the business involving the issuance of such contracts shall be carried on in this state only by duly organized and authorized corporations, which shall be subject only to the provisions and requirements of this act. Nothing contained in this act shall be construed to apply to secret or fraternal societies, lodges, or councils now doing business in this state, which conduct their business and secure members on the lodge system exclusively, having ritualistic work and ceremonies in their societies, lodges, or councils, and which are under the supervision of a grand or supreme body, nor to any association organized solely for benevolent purposes and not for profit, and which do not employ paid agents in soliciting business.

History: En. Sec. 2, p. 93, L. 1893; 4159, Rev. C. 1907; re-en. Sec. 6238, R. C. re-en. Sec. 721, Civ. C. 1895; re-en. Sec. M. 1921.

40-1803. (6239) Reincorporation of existing companies. Any existing domestic corporation, transacting the business of accident insurance upon the assessment plan, may reincorporate under the provisions of this act, under its existing corporate name, by filing with the secretary of state the declaration required by this act, signed and duly acknowledged by a majority of its board of directors, with a statement in like manner signed and acknowledged by them that such corporation has accumulated the fund required by this act of corporations formed hereunder, and that the same is deposited in bank or trust company, to the credit of the indemnity fund, to be held in trust for the benefit of the assured or their beneficiaries, and the certificate of the attorney-general of the state, whereupon the secretary of state shall record and deliver to such corporation a certified copy of such declaration and of such certificate, together with his license to transact business, and upon filing the same in the office of the clerk of the county wherein its principal office is located, the same shall thereupon be deemed to be incorporated under the provisions of this act. It shall not be obligatory upon any such existing corporation to reincorporate hereunder, and any such domestic corporation may continue to exercise all the rights, powers, and privileges not inconsistent with this act, pursuant to its articles of association or incorporation, the same as if reincorporated under this act.

History: En. Sec. 3, p. 94, L. 1893; re- Rev. C. 1907; re-en. Sec. 6239, R. C. M. en. Sec. 722, Civ. C. 1895; re-en. Sec. 4160, 1921.

40-1804. (6240) Payment of maximum amount of policy. Every policy or certificate hereafter issued by any corporation doing business under this act, and promising a payment to be made upon a contingency of death or disablement by accident, shall specify the sum of money which it promises to pay upon the happening of each contingency insured against, and the number of days, after satisfactory proof of the happening of such contingency, on which payment shall be made. Upon the occurrence of such contingency, unless the contract shall have been voided by fraud or by breach of its conditions, the corporation shall be obligated to the insured or his beneficiaries for such payment at the time and to the maximum

amount specified in the policy or certificate for such contingency. If the state auditor shall be satisfied upon investigation that any such corporation has refused or failed to make such payment for thirty days after it became due, and after proper demand, he shall notify the corporation to issue no new policies or certificates until such indebtedness is fully paid, and no officer or agent of the corporation shall make, sign, or issue any policy or certificate of insurance when such notice is in force.

History: En. Sec. 4, p. 94, L. 1893; re-en. Sec. 723, Civ. C. 1895; re-en. Sec. 4161, Rev. C. 1907; re-en. Sec. 6240, R. C. M. 1921.

Collateral References

Insurance 57(2), 133(1), 599.
44 C.J.S. Insurance §§ 61, 110, 227, 249;
46 C.J.S. Insurance § 1201.

40-1805. (6241) Reserve or emergency fund. Every such corporation, association, or society shall accumulate and maintain a reserve or emergency fund of at least five thousand dollars. Such fund, if not already accumulated, shall be accumulated by every such existing corporation, association, or society, within six months from the time this act takes effect, and by every corporation, association, or society organized under this act, within six months of the completion of its organization and the receipt of its certificate of authority to transact business in this state, and every corporation subject to the provisions of this act shall add to such emergency fund thereafter two and one-half per cent. of the amount realized from every premium, assessment, or periodical call, until such fund shall be equal to the amount of two dollars for every five thousand dollars of insurance in force. Such emergency fund, or any part thereof, may be used for the payment of death and indemnity claims; provided, that if the amount of such fund be thereby reduced below the amount contemplated in this act, the amount by which such fund is reduced be made up and restored within six months thereafter. Such fund may be held in cash, or invested in the same class of securities required by law for the investment of funds by insurance corporations; and nothing herein contained shall prevent the creation and accumulation of other funds in excess of the amount herein required to provide for the purposes of such corporation. This act shall not be construed to limit the accumulation of a reserve or emergency fund by any corporation, association, or society subject to the provisions hereof, where such fund and its accretions are for the benefit or protection of the assured, their legal representatives or beneficiaries. Any such corporation, association, or society may, in its discretion, through its officers or directors, deposit with the auditor such securities, and for such amounts as may be approved by him. Such deposit shall be received and held by the auditor for the sole benefit of the assured in such corporations, and subject to the provisions of such deed of trust as shall be approved by the auditor and accepted by him from the officers or directors of the corporation; but the deposits with the insurance department, and all other investments of reserve funds, shall be made in the same class of securities as are required by law for the investment of funds by other insurance corporations.

History: En. Sec. 5, p. 95, L. 1893; re-en. Sec. 724, Civ. C. 1895; re-en. Sec. 4162, Rev. C. 1907; re-en. Sec. 6241, R. C. M. 1921.

Collateral References

29 Am. Jur. 67, Insurance, § 31.

40-1806. (6242) Transfer of risks. No such corporation, association, or society, organized under the laws of this state, shall transfer its risks to or reinsure them in any other corporation, unless the contract or transfer or reinsurance is first submitted to and approved by a two-thirds vote of a meeting of the policy-holders or certificate-holders of such corporation, called to consider the same, of which meeting a written or printed notice shall be mailed to each policy- or certificate-holder at least thirty days before the day fixed for such meeting. Such vote of approval of a contract of reinsurance or transfer shall act as a dissolution of the corporation, and all liability upon its certificates shall cease at the expiration of five days following such vote, but its officers may thereafter perform any act necessary to close its affairs. No such corporation, association, or society, organized under the laws of this state, shall transfer its risks or assets, or any part thereof, to, or reinsure its risks or any part thereof in, any insurance corporation or association of any other state or country which is not, at the time of such transfer or reinsurance, authorized to do business in this state under the laws thereof.

History: En. Sec. 6, p. 95, L. 1893; re-en. Sec. 725, Civ. C. 1895; re-en. Sec. 4163, 1921. Rev. C. 1907; re-en. Sec. 6242, R. C. M. 1921.

40-1807. (6243) Visitation by the auditor—proceedings to restrain corporations from doing business. All corporations, associations, and societies to which this act is applicable, with their books, papers, and vouchers, shall be subject to visitation and inspection by the state auditor, or by such person as he may designate. The auditor may address any inquiries to any such corporation, association, or society in relation to its doings or condition, or any other matter connected with its transactions, relative to the business contemplated by this act. All officers of such corporation, association, or society shall promptly reply in writing to all such inquiries, under the oath of its president, secretary, or other officers if required. When the auditor, on investigation, shall be satisfied that any corporation organized under the laws of this state, or doing business in this state, of the character defined in this act is insolvent because of matured death claims, or other obligations due and unpaid, exceeding its assets and death and disability premiums, assessments, or periodical payments called or in process of collection, or has exceeded its powers, failed to comply with any provisions of this act, or is conducting business fraudulently, he shall report the facts to the attorney general, who, if he shall be of the opinion that the facts require such action, must thereupon apply to the district court, at a special term thereof, within the judicial district in which the principal office of such corporation within this state is located, for an order requiring the officers of such corporation to show cause, at a reasonable time and place within such district, why such corporation should not be restrained from continuing to transact business, with power to the court to adjourn the hearing thereon from time to time, not exceeding sixty days in all.

History: En. Sec. 7, p. 96, L. 1893; re-en. Sec. 726, Civ. C. 1895; re-en. Sec. 4164, Rev. C. 1907; re-en. Sec. 6243, R. C. M. 1921.

Collateral References

Insurance—10, 62.
44 C.J.S. Insurance §§ 57, 74, 127.

40-1808. (6244) Hearing thereon. Such corporation, association, or society shall be entitled to be heard, and to a trial by jury of the facts

stated in the report, if the same shall be traversed, and to examine papers and witnesses under oath in the usual mode of trials of actions. If the trial is by jury, the court shall submit to the jury specific requests to find covering the matters in issue separately, and the jury shall return a special verdict on each question submitted; and if by such verdict it shall be found that the corporation is insolvent because of matured death claims, or other obligations due and unpaid, exceeding its assets as hereinbefore provided, the court may render judgment that it and each officer thereof be perpetually enjoined from exercising any corporate rights, privileges, or franchises of such corporation and that it be dissolved, and that a receiver be appointed, and an account taken and an equitable distribution of its property, including all deposits with public officers, among its creditors and policy-holders be made. If no charge of insolvency be made in such report, or if made be not established by the verdict of the jury, but it shall be found by such verdict that the corporation has exceeded its corporate powers or failed to comply with any provision of this act, or has conducted its business unlawfully, the court may make and enter a judgment enjoining and restraining it from the commission of such acts, or such of them as the court may determine, and in case of failure to desist therefrom within the time to be specified in such judgment, that the corporation be dissolved.

History: En. Sec. 8, p. 96, L. 1893; re-en. Sec. 727, Civ. C. 1895; re-en. Sec. 4165, Rev. C. 1907; re-en. Sec. 6244, R. C. M. 1921.

Collateral References

Insurance—10, 64.
44 C.J.S. Insurance §§ 57, 74, 123, 132.

40-1809. (6245) Foreign corporations. Any corporation organized under authority of another state or government to issue, or which is engaged in the business of issuing, policies or certificates of insurance on the assessment plan, as a condition precedent to transacting business in this state, shall deposit with the secretary of state a certified copy of its charter, a statement under oath of its president and secretary in the form by the auditor required, of its business during the year ending on the thirty-first day of December immediately preceding; a certificate under oath of its president and secretary that it is paying, and for the twelve months then next preceding has paid, the maximum amount named in its policies or certificates in full; a copy of its policy or certificate and application, which must show that the liability of the assured to contribute to the payment of benefit is not limited to a fixed sum; a certificate from the proper authority of its home state, that corporations of this state, engaged according to the provisions of this act in accident insurance on the assessment plan are, upon compliance with the laws of such state, legally entitled to do business in such state; that such corporation is properly authorized to transact business in its own state, and evidence satisfactory to the auditor that such corporation has accumulated and maintains a reserve or emergency fund equal to that required of similar corporations in this state, as provided in section 40-1805, that such accumulation is permitted by the law of its corporation and is for the benefit of policy- or certificate-holders only, and is invested as authorized under the law of its incorporation.

Upon the filing of such statements and continued compliance with the above requirements, it shall be the duty of the auditor to issue annually to such corporation a proper authority to transact business in this state. Such corporation shall annually thereafter report to the auditor, on or before the first day of March, a complete statement of its business for the year ending December the thirty-first next preceeding, as provided in section 40-1816. The license or authority of such corporation to do business in this state shall be revoked by the auditor whenever he is satisfied on investigation that such corporation is not paying the maximum amount named in its policies or certificates in full. Upon such revocation the auditor shall cause notice thereof to be published in the newspaper in which the general laws are published, and no new business shall be thereafter done by it or its agents in this state.

When any other state or country shall impose any license fees, taxes, or penalties, upon any corporation of this state, transacting the business herein provided for which are not imposed, or which are in excess of those imposed by this act, like license fees, taxes, or penalties shall be imposed upon corporations of the same kind and their agents of such state or country doing business in this state. If the laws of such state where such company is organized will not admit companies organized in this state, or doing business under this act, to do business in such state, then such company shall not be admitted to do business in this state. The state auditor is authorized to place such construction upon the minor provisions of the insurance laws of other states as will, in his judgment, harmonize with this law when justice and equity will so warrant.

History: En. Sec. 9, p. 97, L. 1893; re-en. Sec. 728, Civ. C. 1895; re-en. Sec. 4166, Rev. C. 1907; re-en. Sec. 6245, R. C. M. 1921.

Collateral References

Insurance—19, 20.

44 C.J.S. Insurance §§ 76, 79.

23 Am. Jur. 203, Foreign Corporations, §§ 234 et seq.; 29 Am. Jur. 70, Insurance, §§ 34 et seq.

Discrimination by state against foreign insurance corporations in imposition of taxes and license fees. 49 ALR 740.

Constitutionality of statute requiring payment to state of fee on appointment of agent by foreign insurance company. 60 ALR 1172.

Subsequent compliance with conditions of doing business in state as affecting enforceability of contract of foreign corporation made before compliance with such conditions. 75 ALR 446.

Withdrawal of foreign insurance com-

pany from state as affecting conditions under which it may be readmitted to business in state and its rights and duties if readmitted. 110 ALR 528.

Who, other than public official, may be served with process in action against foreign corporation doing business in state. 113 ALR 9.

Personal liability of public officials or their bonds, for permitting insurance company to engage or continue in business without complying with statutory requirements. 131 ALR 275.

Personal liability of agents or brokers in respect of policies of foreign insurance companies not authorized to do business in the state. 131 ALR 1079.

What constitutes doing business within state by foreign insurance corporation. 137 ALR 1128.

Insurance companies, which are members of Federal reserve banks or similar Federal agencies or national banks, as within state social security or unemployment compensation act. 145 ALR 1074.

40-1810. (6246) Designation of commissioner of insurance for service of process. Every such corporation organized under the laws of another state or country shall, before doing business in this state, appoint in writing the commissioner of insurance and his successors in office to be its true and lawful attorney, upon whom all legal process in any action or

proceeding against it shall be served, and in such writing shall agree that any lawful process against it which is served upon such attorney shall be of the same legal force and validity as if served upon the corporation or company, and that the authority shall continue in force as long as any liability remains outstanding in this state.

Copies of such appointment, certified by such commissioner of insurance, shall be deemed sufficient evidence thereof, and shall be admitted in evidence with the same force and effect as the original thereof might be admitted. Such service shall only be made upon such attorney, must be made in duplicate upon the commissioner of insurance, or, in his absence, upon the person in charge of his office, and shall be deemed sufficient service upon such society, corporation, or company; provided, however, that in all cases where service is made upon the commissioner of insurance, wherein provided, the defendant shall have twenty days from the date of said service in which to file its answer or other appearance in the case. When legal process against any society, corporation, or company is served upon said commissioner of insurance, he shall forthwith forward by registered mail one of the duplicate copies prepaid and directed to its secretary or corresponding officer, or in case of a corporation of a foreign country, to the resident manager, if any, in this country. For each copy of process the commissioner of insurance shall collect the sum of two dollars, which shall be paid by the plaintiff at the time of such service, the same to be recovered by him as part of the taxable costs if he prevails in the suit. Legal process shall not be served upon any such corporation or company except in the manner provided herein.

History: En. Sec. 10, p. 97, L. 1893; re-en. Sec. 729, Civ. C. 1895; re-en. Sec. 4167, Rev. C. 1907; amd. Sec. 1, Ch. 216, L. 1919; re-en. Sec. 6246, R. C. M. 1921.

Collateral References

Insurance—627.

46 C.J.S. Insurance § 1270.

23 Am. Jur. 526, Foreign Corporations, §§ 505 et seq.

Cessation by foreign corporation of business within state as affecting designation of agent for service of process. 45 ALR 1447.

Constitutionality, construction and effect of statute providing for service of process upon statutory agent in action against foreign corporation as regards communications to corporation of fact of service. 89 ALR 658.

Service by mail or service upon, or acknowledgment of service by, deputy or other subordinate of the public officer named in statute providing for service of process in action against foreign corporation. 98 ALR 1437.

40-1811. (6247) Refusal or revocation of license. Any corporation subject to the provisions of this act the license of which is refused or revoked, may make application to the district court for an order directing the state auditor to show cause at special term why such revocation of said license should not be set aside, or license issued. On the return of such order the issues of fact shall be put in writing, and shall be tried at special term in the usual mode of trials of fact in actions, unless said corporation shall request a trial by jury. If a jury trial is requested by said corporation, the court shall order said case to be placed on the general term calendar for trial. If the verdict or decision shall be in favor of said corporation, the court shall direct the auditor to issue a license to said corporation forthwith.

History: En. Sec. 11, p. 98, L. 1893; re-en. Sec. 730, Civ. C. 1895; re-en. Sec. 4168, Rev. C. 1907; re-en. Sec. 6247, R. C. M. 1921.

Collateral References

Insurance 5, 20.
44 C.J.S. Insurance §§ 69, 79.

40-1812. (6248) Penalties for fraudulent acts. Any solicitor, agent, examining physician, applicant, or other person, who shall knowingly or wilfully make any false or fraudulent statement or representation in or with reference to any application for insurance; or for the purpose of obtaining any money or benefit, knowingly or wilfully presents or causes to be presented a false or fraudulent claim; or any proof in support of such a claim for the payment of the loss upon a contract of insurance issued by any corporation incorporated or doing business under the provisions of this act; or prepares, makes, or subscribes a false or fraudulent account, certificate, affidavit of proof of loss, or other document or writing, with intent that the same may be presented or used in support of such a claim, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than two hundred and fifty dollars or more than one thousand dollars, or by imprisonment in the county jail for not less than three months or more than six months, or both such fine and imprisonment at the discretion of the court.

History: En. Sec. 12, p. 99, L. 1893; re-en. Sec. 731, Civ. C. 1895; re-en. Sec. 4169, Rev. C. 1907; re-en. Sec. 6248, R. C. M. 1921.

Collateral References

Insurance 30.
44 C.J.S. Insurance § 89.
29 Am. Jur., Insurance, p. 64, § 27; p. 110, §§ 85 et seq.

Duty of insurer to give notice of termination of agency. 14 ALR 846.

Power of the state to regulate and control insurance agents or broker. 36 ALR 1512.

Meaning of the term "solicit" in statute providing that any person who shall solicit insurance shall be regarded as agent of insurance company. 48 ALR 1173.

Insertion by insurer's agent in application of false answers to questions correctly answered by insured, or answers suggested by agent, as affected by limitations or restrictions upon the authority of the agent. 81 ALR 855.

Payment or tender of premium to agent as binding principal. 85 ALR 749.

Knowledge of other party, or opportunity to know, limitations of agent's actual authority as affecting statutory declaration that one who does certain prescribed acts for insurance company shall be deemed as acting as its agent. 88 ALR 291.

Misrepresentations by insurance agent to applicant, insured, or beneficiary, as basis of action by them, other than on policy itself, or as defense to action against them. 136 ALR 5.

40-1813. (6249) Change of beneficiaries. Membership in any such corporation shall give to any policy- or certificate-holder thereof the right at any time, with the consent of such corporation, to make a change in his payee or beneficiary or beneficiaries, without requiring the consent of such payee or beneficiaries.

History: En. Sec. 13, p. 99, L. 1893; re-en. Sec. 732, Civ. C. 1895; re-en. Sec. 4170, Rev. C. 1907; re-en. Sec. 6249, R. C. M. 1921.

Collateral References

Insurance 587.
46 C.J.S. Insurance § 1175.

40-1814. (6250) Exemption from execution. The money or benefit provided or rendered by any corporation authorized to do business under this act shall be exempt from execution, and shall not be liable to attachment by trustee or to be seized, taken, or appropriated by any legal or equitable process to pay any debt or liability of the policy- or certificate-holder, or the beneficiary or beneficiaries of a deceased policy- or certifi-

cate-holder, unless such policy or certificate shall be expressly made payable to a creditor, and then for no more than his claim with lawful interest.

History: En. Sec. 14, p. 100, L. 1893; re-en. Sec. 733, Civ. C. 1895; re-en. Sec. 4171, Rev. C. 1907; re-en. Sec. 6250, R. C. M. 1921.

Collateral References

Exemptions 50; Insurance 590.
35 C.J.S. Exemptions § 39 et seq.; 46 C.J.S. Insurance § 1178.

40-1815. (6251) Penalties. Any officer or agent of any such corporation, association, or society, subject to any of the provisions of this act, who shall neglect or refuse to comply with any such provision, or who shall make in any report or statement any intentionally false or fraudulent statement, or shall refuse to permit the state auditor or any examiner duly authorized by him for the purpose to make an examination of its condition and business, books, papers, and vouchers, or any person who shall act within this state as agent, solicitor, or collector for any such corporation which shall have failed, neglected, or refused to comply with or violated any of the provisions of this act, or shall have failed or neglected to procure from the auditor the certificate of authority required by law to transact business in this state, shall forfeit to the people of this state the sum of one hundred dollars for every such offense. If an examination of the condition and business of any such corporation transacting business in this state shall be prevented by any such refusal, the auditor shall revoke the certificate of authority issued to such corporation, and it shall thereafter be unlawful for it to do business in this state until it shall have submitted to an examination and the auditor shall have issued to it a new certificate of authority authorizing it to continue business in this state.

History: En. Sec. 15, p. 100, L. 1893; re-en. Sec. 734, Civ. C. 1895; re-en. Sec. 4172, Rev. C. 1907; re-en. Sec. 6251, R. C. M. 1921.

Collateral References

Insurance 27.
44 C.J.S. Insurance §§ 60, 86.

40-1816. (6252) Annual report. Every such corporation, association, or society, doing business under this act, shall, on or before the first day of March in each year, make and file with the state auditor a report of its affairs and operations, during the year ending on the thirty-first day of December, immediately preceding, which report shall be in lieu of all other reports required by the insurance law of this state, shall be verified by such officers of the corporation as the auditor may require, and shall contain answer to the following questions:

1. Number of certificates or policies issued during the year, or applicants admitted.
2. Amount of death indemnity effected thereby.
3. Number of death losses incurred.
4. Number of death losses paid, and amount thereof.
5. Total number of indemnity claims paid, and amount thereof.
6. Number of death and number of indemnity claims unpaid.
7. Does corporation charge annual dues or membership fees? If so, how much?
8. Total amount received, and whether from assessments, annual dues, membership fees, or other sources, and the disposition thereof.

9. Does corporation use moneys received for payment of claims to pay expenses in whole or in part; and if so, state the amount used.

10. What is the amount of emergency fund, and how invested.

11. If organized under the laws of this state, state such fact and the date of organization.

12. Number of policies in force and death insurance in force at the beginning and end of year.

Any corporation refusing or neglecting to make such report or to make payment of any of the fees required by this act, may, upon the suit of the auditor, be enjoined by the supreme court from carrying on any business until such report and payment shall be made, and until the cost of such action be paid.

History: En. Sec. 16, p. 101, L. 1893; re-en. Sec. 735, Civ. C. 1895; re-en. Sec. 4173, Rev. C. 1907; re-en. Sec. 6252, R. C. M. 1921.

Collateral References

Insurance 39.
44 C.J.S. Insurance § 73.
29 Am. Jur. 64, Insurance, § 26.

40-1817. (6253) Fees. The fees for filing statements, certificates, or other documents required by this act, or for any service or act of the auditor, shall be the same as are provided in the case of life insurance companies, and each corporation authorized to transact business under this act shall pay, on filing its application and charter, thirty dollars, and for each annual statement thereafter twenty dollars, which shall be in lieu of all other fees for the state, county, or municipality, except as provided in section 40-1810.

History: En. Sec. 17, p. 101, L. 1893; re-en. Sec. 736, Civ. C. 1895; re-en. Sec. 4174, Rev. C. 1907; re-en. Sec. 6253, R. C. M. 1921.

References

Security State Bank v. McIntyre, 71 M 186, 228 P 618.

40-1818. (6254) Proceedings to enjoin. No order, judgment, or decree providing for an accounting, or enjoining or restraining or interfering with the prosecution of the business of any domestic insurance corporation subject to the provisions of this act, or appointing a temporary or permanent receiver thereof, shall be made or granted otherwise than upon the application of the attorney-general on his own motion, or after his approval of a request in writing thereof of the state auditor, except in an action by a judgment creditor, or in proceedings supplementary to execution.

History: En. Sec. 18, p. 102, L. 1893; re-en. Sec. 737, Civ. C. 1895; re-en. Sec. 4175, Rev. C. 1907; re-en. Sec. 6254, R. C. M. 1921.

40-1819. (6255) Regulations for conduct of business. The trustees or directors, or the persons designated in the by-laws of corporations subject to the provisions of this act, shall fix the fees, rates, and amounts of premiums, assessments, or periodical calls, and the time and manner of the payment thereof, and the risk to be assumed by such corporation and the duration thereof, and may change the same from time to time as the experience of the corporation may require. An affidavit made by the officer, bookkeeper, or clerk of any such corporation, having charge of the mailing of notices of premiums, assessments, or periodical calls, that any such notice was mailed, stating the day of mailing, shall be presumptive evidence thereof.

History: En. Sec. 19, p. 103, L. 1893;
re-en. Sec. 738, Civ. C. 1895; re-en. Sec.
4176, Rev. C. 1907; re-en. Sec. 6255, R. C.
M. 1921.

Collateral References
Insurance 56.
44 C.J.S. Insurance § 109.

40-1820. (6256) Quorum—amendment of by-laws. At the stated meetings for the election of officers, trustees, directors, or managers of any such corporation, association, or society, a majority of the persons entitled to vote at such meeting shall not be necessary to constitute a quorum. Subject to the by-laws, if any, adopted by the members of the corporation, the directors or other persons, by whatsoever title designated, who are to have and exercise the general control and management of affairs, may make necessary by-laws for the corporation, and the same from time to time alter or amend.

History: En. Sec. 20, p. 103, L. 1893;
re-en. Sec. 739, Civ. C. 1895; re-en. Sec.
4177, Rev. C. 1907; re-en. Sec. 6256, R. C.
M. 1921.

Collateral References
Insurance 54-56.
44 C.J.S. Insurance §§ 107-109.

CHAPTER 19

LIFE INSURANCE COMPANIES

- Section 40-1901. Incorporation of life insurance companies.
40-1902. Stock insurance companies.
40-1903. Mutual companies—minimum number of applications.
40-1904. Stock or premium notes.
40-1905. Valuation of policies—deposit of securities.
40-1906. Foreign companies—capital or surplus—investment.
40-1907. Collection of interest on securities deposited with state auditor.
40-1908. Return of deposit by state auditor.
40-1909. Valuation of bonds and securities of insurance companies.
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- 40-1938. By-law may be extended but not revoked.
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- 40-1940. Inducing owner to forfeit, surrender policy or allow to lapse forbidden.
- 40-1941. Penalty for violations.
- 40-1942. Revocation of license for violations—appeal.
- 40-1943. Operation of undertaking establishment prohibited.
- 40-1944. Agreement with funeral director for burial of insured prohibited.
- 40-1945. Funeral director or employee not to be licensed as life insurance agent.
- 40-1946. Penalty for violation of sections 40-1943 to 40-1945.

40-1901. (6257) Incorporation of life insurance companies. Every life insurance company, except those organized upon the assessment plan and fraternal beneficiary associations, created under the laws of this or any other state or country, shall, before issuing policies in this state, comply with the provisions of this act applicable to such companies. When any number of persons associate themselves together for the purpose of forming a life insurance corporation as provided for in this act, they shall publish a notice of such intention once a week for four consecutive weeks, in some public newspaper in the county in which such insurance corporation is proposed to be located, and they shall also make articles of incorporation, as provided in section 15-108, and forward to the state auditor, who shall submit the same to the attorney-general for examination, and if it shall be found by the attorney-general to be in accordance with the provisions of this act and not in conflict with the constitution and the laws of the United States and this state, he shall make a certificate of the facts and return it to the state auditor. The state auditor shall reject the name or title applied for by any person, company, or corporation, when he shall deem the same so similar to any one already appropriated by any other company or corporation as to be likely to be misleading to the public. When the articles of incorporation shall have received the approval of the state auditor, such articles, with such approval, must be filed, recorded, and certified as required by section 15-111; provided, that the articles of incorporation, as filed with the secretary of state, shall be in duplicate, one copy of which shall be certified by him to the state auditor, the expenses of such certification to be borne by the insurance company. Having published the notice, and filed the publisher's affidavit of the publication thereof with the state auditor, together with the articles of incorporation, the persons named in the articles of incorporation, or a majority of them, shall open books for the subscription of stock to the corporation, at such times and places as to them may seem convenient and proper, and shall keep the same open until the full amount specified in the articles of incorporation is subscribed; or in case the business of such corporation is proposed to be conducted on the plan of mutual insurance, then they shall open books and receive propositions, and enter into agreements in the manner and to the extent specified in this act.

History: En. Sec. 1, Ch. 171, L. 1907;
 Sec. 4113, Rev. C. 1907; re-en. Sec. 6257,
 R. C. M. 1921.

Collateral References

Insurance 32, 52.
 44 C.J.S. Insurance §§ 95, 105.

Cross-Reference

Formation of insurance companies, sec.
 15-104.

40-1902. (6258) Stock insurance companies. Stock companies organized under the laws of this state shall have not less than one hundred thousand dollars of capital subscribed, fifty per cent. of which shall be paid up and invested in bonds of the United States or this state, bonds issued by authority of the legislative assembly of this state secured by land grants, bonds, or warrants of any school district, county, or city in this state, or in bonds or mortgages upon unencumbered real estate in this state, worth, exclusive of improvements, at least double the sum loaned thereon, which security shall be deposited with the state auditor, and upon such deposit and evidence by affidavits or otherwise, satisfactory to the auditor, that the capital is all subscribed in good faith, and that the company is the actual and unqualified owner of the securities representing the paid-up capital, he shall issue to such company the certificate hereinafter provided for, but no part of the fifty per cent. aforesaid shall be loaned to any stockholder or officer of the company. The remainder of such capital shall be paid within such time as the directors or trustees of the company may order, or as the state auditor may direct, but not later than two years from date of issuance of auditor's certificate, and until paid it shall be secured by the notes of the stockholders of the company; provided, further, that the additional fifty per cent. of the capital stock may also be deposited with the state auditor under the conditions as the original fifty per cent., or any additional amount which is necessary for the purpose of complying with the laws of any other state to enable said company to do business in such state, and the company making such deposit shall be entitled to the income thereof, and may, from time to time, with the consent of the state auditor, when not forbidden by the law under which the deposit is made, change in whole or in part the securities which compose the deposit for other competent securities of equal par value.

History: En. Sec. 2, Ch. 171, L. 1907;
re-en. Sec. 4114, Rev. C. 1907; amd. Sec. 1,
Ch. 68, L. 1911; re-en. Sec. 6258, R. C. M.
1921.

Collateral References
Insurance 8, 33.
44 C.J.S. Insurance § 96.

40-1903. (6259) Mutual companies—minimum number of applications. Life insurance companies organized under the laws of this state upon the mutual plan shall, before issuing any policies, have actual applications on at least two hundred and fifty lives for an average amount of at least one thousand dollars each, a list of which, giving the name, age, residence, amount of insurance, and annual premium of each applicant, shall be filed with the state auditor, accompanied by the certificate, under oath, of the president, Secretary, and a majority of the board of directors of such company that the whole amount of the annual premium has been paid for in cash at adequate rates.

History: En. Sec. 3, Ch. 171, L. 1907;
Sec. 4115, Rev. C. 1907; re-en. Sec. 6259,
R. C. M. 1921.

40-1904. (6260) Stock or premium notes. No note shall be accepted as part of the capital of a stock company, unless accompanied by a certificate of the clerk of the district court, or other court of record, of the county in which the person executing it resides, to the effect that the

person making it is in his opinion pecuniarily good and responsible therefor in property not exempt from execution.

History: En. Sec. 4, Ch. 171, L. 1907;
Sec. 4116, Rev. C. 1907; re-en. Sec. 6260,
R. C. M. 1921.

40-1905. (6261) Valuation of policies—deposit of securities. (1) The state auditor shall annually value, or cause to be valued, the reserve liabilities (hereinafter called reserves) for all outstanding life insurance policies and annuity and pure endowment contracts of every life insurance company doing business in this state, and may certify the amount of any such reserves, specifying the mortality table or tables, rate or rates of interest and methods (net level premium method or other) used in the calculation of such reserves. In calculating such reserves, he may use group methods and approximate averages for fractions of a year or otherwise. For the purpose of making such valuation he may employ a competent actuary who shall be paid by the company for which the service is rendered; but a company organized under the laws of this state may make such valuation and it may be received by the state auditor upon satisfactory proof of its correctness. In lieu of the valuation of the reserves herein required of any foreign or alien company, he may accept any valuation made, or caused to be made, by the insurance supervisory official of any state or other jurisdiction when such valuation complies with the minimum standard herein provided and if the official of such state or jurisdiction accepts as sufficient and valid for all legal purposes the certificate of valuation of the state auditor when such certificate states the valuation to have been made in a specified manner according to which the aggregate reserves would be at least as large as if they had been computed in the manner prescribed by the law of that state or jurisdiction.

Any company which at any time shall have adopted any standard of valuation producing greater aggregate reserves than those calculated according to the minimum standard herein provided may, with the approval of the state auditor, adopt any lower standard of valuation, but not lower than the minimum herein provided.

The net value of all policies in force in any company organized under the laws of this state being ascertained the state auditor shall notify the company of the amount thereof, and within thirty days thereafter such company shall deposit with the state auditor the amount of the ascertained valuation in the securities specified by the insurance laws of this state. No stock company organized under the laws of this state shall be required to make such deposit until the net value of the policies in force as ascertained by the state auditor, exceeds the amount deposited by such company as capital stock; provided that mutual life companies shall deposit with the state auditor at least one-half of the first annual premium in securities as provided for by the insurance laws of this state; provided further that all companies included in this act shall have the right at any time, with the approval of the state auditor, to change the securities on deposit by substituting a like amount of the character required in the first instance. If any valuation of the policies in force is less than the amount of securities already on deposit, then the company, in the case of a stock company, may withdraw such excess.

(2) This subsection shall apply to only those policies and contracts issued prior to the operative date of section 40-1926 (the standard non-forfeiture law).

The minimum standard of valuation on all policies of life insurance companies organized under the laws of this state issued prior to January 1, 1922, shall be the American experience table of mortality and interest at three and one-half per centum per annum, with preliminary term insurance for the first policy year, and for policies of such companies issued subsequent to December 31, 1921, shall be the American experience table of mortality with interest at three and one-half per centum per annum, with preliminary term insurance for the first policy year, except as follows: If the premium charged for term insurance under a limited payment life preliminary term policy providing for the payment of all premiums thereon in less than twenty years from the date of the policy, or under an endowment preliminary term policy, exceeds that charged for life insurance under twenty payment life preliminary term policies of the same company, the reserve thereon at the end of any year, including the first, shall not be less than the reserve on a twenty payment life preliminary term policy issued in the same year and at the same age, together with an amount which shall be equivalent to the accumulation of a net level premium reserve sufficient to provide for a pure endowment at the end of the premium payment period, equal to the difference between the value at the end of such period of such a twenty payment life preliminary term policy and the full net level premium reserve at such time of such a limited payment life or endowment policy.

Reserves for all such policies and contracts may be calculated, at the option of the company, according to any standards which produce greater aggregate reserves for all such policies and contracts than the minimum reserves required by this subsection.

(3) This subsection shall apply to only those policies and contracts issued on or after the operative date of section 40-1926 (the standard nonforfeiture law).

(a) The minimum standard for the valuation of all such policies and contracts shall be the commissioners reserve valuation method defined in paragraph (b), three and one-half per cent ($3\frac{1}{2}\%$) interest, and the following tables:

(i) For all ordinary policies of life insurance issued on the standard basis, excluding any disability and accidental death benefits in such policies,—the commissioners 1941 standard ordinary mortality table.

(ii) For all industrial life insurance policies issued on the standard basis, excluding any disability and accidental death benefits in such policies,—the 1941 standard industrial mortality table.

(iii) For annuity and pure endowment contracts, excluding any disability and accidental death benefits in such policies,—the 1937 standard annuity mortality table.

(iv) For total and permanent disability benefits in or supplementary to ordinary policies or contracts—class (3) disability table (1926) which, for active lives, shall be combined with a mortality table permitted for calculating the reserves for life insurance policies.

(v) For accidental death benefits in or supplementary to policies—the inter-company double indemnity mortality table combined with a mortality table permitted for calculating the reserves for life insurance policies.

(vi) For group life insurance, life insurance issued on the substandard basis and other special benefits—such tables as may be approved by the state auditor.

(b) Reserves according to the commissioners reserve valuation method, for the life insurance and endowment benefits of policies providing for a uniform amount of insurance and requiring the payment of uniform premiums shall be the excess, if any, of the present value, at the date of valuation, of such future guaranteed benefits provided for by such policies, over the then present value of any future modified net premiums therefor. The modified net premiums for any such policy shall be such uniform percentage of the respective contract premiums for such benefits that the present value, at the date of issue of the policy, of all such modified net premiums shall be equal to the sum of the then present value of such benefits provided for by the policy and the excess of (A) over (B), as follows:

(A) A net level annual premium equal to the present value, at the date of issue, of such benefits provided for after the first policy year, divided by the present value, at the date of issue, of an annuity of one [per cent] per annum payable on the first and each subsequent anniversary of such policy on which a premium falls due; provided, however, that such net level annual premium shall not exceed the net level annual premium on the nineteen year premium whole life plan for insurance of the same amount at an age one year higher than the age at issue of such policy.

(B) A net one year term premium for such benefits provided for in the first policy year.

Reserves according to the commissioners reserve valuation method for (i) life insurance policies providing for a varying amount of insurance or requiring the payment of varying premiums, (ii) annuity and pure endowment contracts, (iii) disability and accidental death benefits in all policies and contracts, and (iv) all other benefits, except life insurance and endowment benefits in life insurance policies, shall be calculated by a method consistent with the principles of this paragraph (b).

(c) In no event shall a company's aggregate reserves for all life insurance policies, excluding disability and accidental death benefits, be less than the aggregate reserves calculated in accordance with the method set forth in paragraph (b) and the mortality table or tables and rate or rates of interest used in calculating nonforfeiture benefits for such policies.

(d) Reserves for any category of policies, contracts or benefits as established by the state auditor, may be calculated, at the option of the company, according to any standards which produce greater aggregate reserves for such category than those calculated according to the minimum standard herein provided, but the rate or rates of interest used shall not be higher than the corresponding rate or rates of interest used in calculating any nonforfeiture benefits provided for therein. Provided, however, that reserves for participating life insurance policies may, with the consent of the state auditor, be calculated according to a rate of interest lower

than the rate of interest used in calculating the nonforfeiture benefits in such policies, with the further proviso that if such lower rate differs from the rate used in the calculation of the nonforfeiture benefits by more than one-half per cent ($\frac{1}{2}\%$) the company issuing such policies shall file with the state auditor a plan providing for such equitable increases, if any, in the cash surrender values and nonforfeiture benefits in such policies as the state auditor shall approve.

(e) If the gross premium charged by any life insurance company on any policy or contract is less than the net premium for the policy or contract according to the mortality table, rate of interest and method used in calculating the reserve thereon, there shall be maintained on such policy or contract a deficiency reserve in addition to all other reserves required by law. For each such policy or contract the deficiency reserve shall be the present value, according to such standard, of an annuity of the difference between such net premium and the premium charged for such policy or contract, running for the remainder of the premium-paying period.

History: En. Sec. 5, Ch. 171, L. 1907; Sec. 4117, Rev. C. 1907; amd. Sec. 1, Ch. 181, L. 1921; re-en. Sec. 6261, R. C. M. 1921; amd. Sec. 1, Ch. 105, L. 1945.

Remedy of creditor of corporation to reach funds or securities deposited with state official as security for corporation's obligations. 101 ALR 496.

Collateral References

29 Am. Jur. 68, Insurance, § 32.

Character or class of claims protected by deposit by foreign corporation as condition of doing business, and rank or priority of such claims. 104 ALR 748.

40-1906. (6262) Foreign companies—capital or surplus—investment.

No company incorporated by or organized under the laws of any other state or government shall transact business in this state unless it is possessed of the actual amount of capital required of any company organized by the laws of this state, or, if it be a mutual company, of surplus equal to the amount required of capital stock companies, and the same is invested in bonds of the United States or of this state or in interest-paying bonds, when they are at or above par, of the state in which the company is located, or of some other state, or in notes or bonds secured by mortgages on unencumbered real estate within this or the state where such company is located, worth double the amount loaned thereon, which securities shall, at the time, be on deposit with the superintendent of insurance, auditor, controller, or chief financial officer of the state by whose laws the company is incorporated, or of some other state, and the auditor of this state is furnished with a certificate of such officer, under his official seal, that he, as such officer, holds in trust and on deposit for the benefit of all the policy-holders of such company the securities above mentioned. This certificate shall embrace the items of security so held, and show that such officer is satisfied that such securities are worth one hundred thousand dollars. Nothing herein contained shall invalidate the agency of any company incorporated in another state by reason of its having exchanged the bonds or securities so deposited with such officer for other bonds or securities authorized by this act, or by reason of its having drawn its interest and dividends on the same.

History: En. Sec. 6, Ch. 171, L. 1907; Sec. 4118, Rev. C. 1907; re-en. Sec. 6262, R. C. M. 1921.

Collateral References

Insurance—18.
44 C.J.S. Insurance § 78.

29 Am. Jur., Insurance, p. 68, § 32; p. 70, §§ 34 et seq.

Discrimination by state against foreign insurance corporation in imposition of taxes and license fees. 49 ALR 740.

Constitutionality of statute requiring payment to state of fee on appointment of agent by foreign insurance company. 60 ALR 1172.

Subsequent compliance with conditions of doing business in state as affecting enforceability of contract of foreign corporation made before compliance with such conditions. 75 ALR 446.

Constitutionality, construction, and effect of retaliatory statutes. 91 ALR 795.

Remedy of creditor of corporation to reach funds or securities deposited with state official as security for corporation's obligations. 101 ALR 496.

Character or class of claims protected by deposit by foreign corporation as condition of doing business, and rank or priority of such claims. 104 ALR 748.

Withdrawal of foreign insurance com-

pany from state as affecting conditions under which it may be readmitted to do business in state and its rights and duties if readmitted. 110 ALR 528.

Who, other than public official, may be served with process in action against foreign corporation doing business in state. 113 ALR 9.

Personal liability of public officials or their bonds, for permitting insurance company to engage or continue in business without complying with statutory requirements. 131 ALR 275.

Personal liability of agents or brokers in respect of policies of foreign insurance companies not authorized to do business in the state. 131 ALR 1079.

What constitutes doing business within state by foreign insurance corporation. 137 ALR 1128.

Insurance companies, which are members of Federal reserve banks or similar Federal agencies or national banks, as within state social security or unemployment compensation act. 145 ALR 1074.

40-1907. (6263) Collection of interest on securities deposited with state auditor. Companies having on deposit with the state auditor bonds or other securities may collect the dividends or interest thereon, delivering to their authorized agents the coupons or other evidence of interest as the same become due, but if any company fails to deposit additional security when and as called for by the auditor, and as provided for in this act, or pending any proceedings to close up or enjoin it, the auditor shall collect such dividends or interest and add the same to such securities.

History: En. Sec. 7, Ch. 171, L. 1907; Sec. 4119, Rev. C. 1907; re-en. Sec. 6263, R. C. M. 1921.

40-1908. (6264) Return of deposit by state auditor. Upon the request of any domestic insurance company, the state auditor must return to such company the whole or any portion of the securities of such company held by him on deposit, when he shall be satisfied that the securities so asked to be returned are subject to no liability and not required to be longer held by any provision of law or purpose of the original deposit. If such company has, with the approval of the state auditor, reinsured all of its outstanding risks in another life insurance company or companies authorized to do business in this state then the state auditor must deliver said securities to such other company or companies so assuming such outstanding risks, upon written notice to him by such domestic insurance company that such securities have been duly assigned, transferred, and set over to such reinsuring company or companies, which notice shall be accompanied by a duly verified copy of such assignment or assignments. And he must return to the trustees or other representative authorized for that purpose of a foreign insurance company any deposit made by such company, when it shall appear that such company has ceased to do business in this state, or in the United States, and that such company is not subject to any liability in this state for whose benefit such deposit was made; provided,

however, that none of such securities shall be delivered to such reinsuring company until such reinsuring company shall present to the state auditor satisfactory evidence that such reinsuring company has deposited with the proper officer or commission in the state in which it is organized, securities in such amount as may be required by the laws of such state as a reserve to the holders of the policies so reinsured.

History: En. Sec. 8, Ch. 171, L. 1907;
Sec. 4120, Rev. C. 1907; amd. Sec. 1, Ch.
30, L. 1919; re-en. Sec. 6264, R. C. M. 1921.

40-1909. (6265) Valuation of bonds and securities of insurance companies. All bonds or other evidences of debt having a fixed term and rate held by any life insurance company, assessment life association or fraternal beneficiary association authorized to do business in this state may, if amply secured and not in default as to principal and interest, be valued as follows: If purchased at par, at the par value; if purchased above or below par, on the basis of the purchase price adjusted so as to bring the value to par at maturity, and so as to yield in the meantime the effective rate of interest at which the purchase was made; provided that the purchase price shall in no case be taken at a higher figure than the actual market value at the time of purchase; and provided further, that the commissioner of insurance shall have full discretion in determining the method of calculating values according to the foregoing rule.

History: En. Sec. 1, Ch. 214, L. 1921;
re-en. Sec. 6265, R. C. M. 1921.

40-1910. (6266) Service of process. Every life insurance company or organization organized under the laws of another state or country shall before receiving a certificate to do business in this state, or any renewal thereof, file in the office of the state auditor a power of attorney, executed by the president and secretary of the company, or such other qualified officer authorized to sign such instrument, appointing the commissioner of insurance and his successors in office to be its true and lawful attorney, upon whom all legal process in any action or proceeding against it shall be served, and in such writing shall agree that any lawful process against it which is served upon such attorney shall be of the same legal force and validity as if served upon the corporation or company, and that the authority shall continue in force so long as any liability remains outstanding in this state.

Copies of such appointment, certified by said commissioner of insurance, shall be deemed sufficient evidence thereof, and shall be admitted in evidence with the same force and effect as the original thereof might be admitted. Such service shall only be made upon such attorney, must be made in duplicate upon the commissioner of insurance, or, in his absence, upon the person in charge of his office, and shall be deemed sufficient service upon such society, corporation, or company; provided, however, that in all cases where service is made upon the commissioner of insurance, as herein provided, the defendant shall have twenty days from the date of such service in which to file its answer or other appearance in the case. When legal process against any society, corporation, or company is served upon said commissioner of insurance, he shall forthwith forward by

registered mail one of the duplicate copies, prepaid, and directed to its secretary or corresponding officer. For each copy of process the commissioner of insurance shall collect the sum of two dollars, which shall be paid by the plaintiff at the time of such service, the same to be recovered by him as part of the taxable costs if he prevails in the suit. Legal process shall not be served upon any such corporation or company except in the manner provided herein.

History: En. Sec. 9, Ch. 171, L. 1907; Sec. 4121, Rev. C. 1907; amd. Sec. 1, Ch. 217, L. 1919; re-en. Sec. 6266, R. C. M. 1921.

Collateral References.

Insurance 627.

46 C.J.S. Insurance § 1430.

23 Am. Jur. 526, Foreign Corporations, §§ 505 et seq.

Cessation by foreign corporation of business within state as affecting designation of agent for service of process. 45 ALR 1447.

Constitutionality, construction and ef-

fect of statute providing for service of process upon statutory agent in action against foreign corporation as regards communications to corporation of fact of service. 89 ALR 658.

Service by mail or service upon, or acknowledgment of service by, deputy or other subordinate of the public officer named in statute providing for service of process in action against foreign corporation. 98 ALR 1437.

Who, other than public official, may be served with process in action against foreign corporation doing business in state. 113 ALR 9, 100.

40-1911. (6267) Publication of auditor's certificate. Every insurance company of the character provided for in this act, doing business in the state, organized under the laws of this or any other state or country, shall publish annually, before the first day of May, in two newspapers of general circulation, to be approved by the state auditor, one of which shall be published at the capital city, and, in case of companies organized in the state, one in the county where the principal office is located, a certificate from the auditor that such company has in all respects complied with the law of the state relating to insurance, and an affidavit of such publication made by the publisher or foreman of such newspaper shall be filed in the office of the auditor within thirty days from the date of such publication. Such certificate shall also contain a statement made up from the annual report of said company of the actual amount of paid-up capital, the aggregate amount of assets and liabilities at the date of such report, together with the aggregate income and expenditures of such company for the preceding year, as shown by said report.

History: En. Sec. 10, Ch. 171, L. 1907; Sec. 4122, Rev. C. 1907; re-en. Sec. 6267, R. C. M. 1921.

Collateral References.

Insurance 9.

44 C.J.S. Insurance § 73.

40-1912. (6268) Vouchers for expenditures. No life insurance company organized in this state shall make any disbursement of one hundred dollars or more, unless the same be evidenced by a voucher signed by or on behalf of the person, firm, or corporation receiving the money, and correctly describing the consideration for the payment. If the expenditure be for both services and disbursements the voucher shall set forth the services rendered, and an itemized statement of the disbursement made. If the expenditure be in connection with any matter pending before any legislative or public body, or before any department or officer of any state or government, the voucher shall correctly describe, in addition, the nature of the matter and of the interest of such company therein. When such

voucher cannot be obtained, the expenditure shall be evidenced by an affidavit describing the character and object of the expenditure, and stating the reasons for not obtaining such voucher.

History: En. Sec. 11, Ch. 171, L. 1907;
Sec. 4123, Rev. C. 1907; re-en. Sec. 6268,
R. C. M. 1921.

40-1913. (6269) The investment of funds and loaning of money. The capital stock and reserve funds required by law in accordance with section 40-1905, of any domestic life insurance company incorporated under the laws of Montana, may be invested as follows:

(a) In or upon securities which are direct obligations of the United States Government; securities which are guaranteed as to principal and interest by the United States Government; securities issued by instrumentalities of the United States Government, and securities issued by or guaranteed by the government of the Dominion of Canada.

(b) In securities which are direct obligations of, or secured by the pledge of specific revenues by, any state of the United States, or the District of Columbia, or any province of the Dominion of Canada.

(c) In securities which are direct obligations of, or secured by the pledge of specific revenues by, any county, city, town, village, duly organized school district, or other political subdivision or municipal corporation of any state of the United States, or the District of Columbia, or of any province of the Dominion of Canada.

(d) In evidences of indebtedness, having preference over common and preferred stock issues, issued or guaranteed by any railroad, street railway, public utility, or industrial corporation organized and operated under the laws of the United States or the Dominion of Canada, or any state, or province thereof.

(e) In first mortgages on improved unencumbered real estate or the entire issue of bonds secured thereby, located within any of the states of the United States, or the District of Columbia, provided that the appraised value of such real estate is worth at least fifty per cent (50%) more than the sum so invested, said worth to be substantiated by an experienced real estate appraiser of the board of directors making or authorizing such investment on behalf of the company.

By improved real estate is meant all farm land which is used for tillage or pasture, and all real property on which permanent buildings suitable for residence or commercial use are situated.

(f) In loans secured by promissory notes amply secured by the pledge of any securities which such insurance companies by this act are authorized to invest in; and may also make loans upon the securities of its own policies, provided that no loan on any policy shall exceed the reserve value thereof.

(g) No investment or loan, except policy loans, shall be made by any such life insurance company, unless the same shall first have been authorized by the board of directors, or by a committee thereof charged with the duty of supervising such investment or loan. No such company shall subscribe to, or participate in, any underwriting of the purchase or sale of securities or property, or enter into any transaction for such purchase or

sale on account of said company, jointly with any other person, firm, or corporation; nor shall any such company enter into any agreement to withhold from sale any of its property, but the disposition of its property shall be at all times within the control of its board of directors.

History: En. Sec. 12, Ch. 171, L. 1907; Sec. 4124, Rev. C. 1907; re-en. Sec. 6269, R. C. M. 1921; amd. Sec. 1, Ch. 59, L. 1925; amd. Sec. 1, Ch. 173, L. 1939.

References

Stanton v. Occidental Life Ins. Co., 81 M 44, 261 P 620.

Cross-Reference

Investments in certain federally guaranteed bonds, secs. 35-142, 35-143.

Collateral References.

Insurance—8, 11, 36, 57(1).
44 C.J.S. Insurance §§ 60, 65, 110.
29 Am. Jur. 85, Insurance, § 51.

40-1914. (6270) Real estate holdings permitted. Every such life insurance company organized in this state may acquire, hold, and convey real property only for the following purposes, and in the following manner:

1. Such as shall be requisite for convenient accommodations in the transaction of its business.

2. Such as shall have been mortgaged to it in good faith by way of security for loans previously contracted for, or for moneys due.

3. Such as shall have been conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

4. Such as shall have been purchased at sales on judgments, decrees, or mortgages obtained or made for such debts.

5. Such real estate, or any interest therein, as may be held or acquired by purchase, lease or otherwise, as an investment for the production of income, and any such real estate or interest therein may thereafter be held, improved, developed, maintained, managed, leased, sold or conveyed. The aggregate investment by any such life insurance company permitted under this subdivision, including the cost of all land so purchased or leased and the estimated cost of all improvements to be made thereon, shall not exceed five per cent (5%) of the total admitted assets of such life insurance company on the thirty-first day of December next preceding the date of such purchase.

All such real property specified in subdivisions 2, 3, and 4 of this section, which shall not be necessary for its accommodation in the convenient transaction of its business, shall be sold and disposed of within two years after the company shall have acquired title to the same, or within two years after the same shall have ceased to be necessary for the accommodation of its business, and it shall not hold such property for a longer period unless it shall procure a certificate from the state auditor that its interest will suffer materially by the forced sale thereof, in which event the time for the sale may be extended to such time as the state auditor shall direct in such certificate, or unless such company shall elect to hold such property pursuant to subdivision 5 hereof.

History: En. Sec. 13, Ch. 171, L. 1907; R. C. M. 1921; amd. Sec. 1, Ch. 198, L. Sec. 4125, Rev. C. 1907; re-en. Sec. 6270, 1953.

40-1915. (6271) Bonds of officers of mutual companies. The president and secretary of every mutual insurance company or association organized in this state under the provisions of this act shall be required to file with the state auditor a bond each in the amount of ten thousand dollars for

the faithful performance of their duties as the respective officers of such company or association.

History: En. Sec. 14, Ch. 171, L. 1907;
Sec. 4126, Rev. C. 1907; re-en. Sec. 6271,
R. C. M. 1921.

Collateral References.
Insurance 56.
44 C.J.S. Insurance § 109.

40-1916. (6272) Increase of capital stock. If the capital stock of any insurance company or association organized in this state and provided for in this act shall be increased, a certificate showing such increase shall be filed with the state auditor, who shall make, or cause to be made, an examination of the securities composing such capital stock thus increased, and if satisfied therewith, such auditor shall thereupon deliver to such corporation a certified copy of such examination with his written permission to do business upon such increased capital, a copy of which certificate and permission shall be filed in the office of the secretary of state and of the county clerk of the county where the principal place of business of said corporation is located.

History: En. Sec. 15, Ch. 171, L. 1907;
Sec. 4127, Rev. C. 1907; re-en. Sec. 6272,
R. C. M. 1921.

Collateral References
Insurance 33.
44 C.J.S. Insurance § 96.

40-1917. (6273) Annual statements. It shall be the duty of the president, or the vice-president and secretary of each corporation organized under this act, annually on the first day of January of each year, or within sixty days thereafter, to prepare under oath and deposit in the office of the state auditor a full, true, and complete statement of the condition of such company on the thirty-first day of December preceding the filing of such statement, which statement shall exhibit the following items and facts in the following forms, viz.:

Name and Capital.

- The name of the company, and where located.
- The names of the officers.
- The amount of capital stock.
- The amount of capital stock paid in.

Assets.

- The value of real estate owned by such company.
- The amount of cash on hand.
- The amount of cash deposited in bank, giving name of bank or banks.
- The amount of cash in the hands of agents, and in the course of transmission.
- The amount of bank stocks, with the name of the bank, giving par value and market value of the same.
- The amount of stocks and bonds of the United States, and all other bonds, giving names and amounts, with the par and market value of each kind.
- The amount of loans secured by first mortgage on real estate.
- The amount of all other bonds and loans, and how secured, with the rate of interest.
- The amount of premium notes on policies in force.

The amount of notes given for unpaid stock, and how secured.
 The amount of assessments unpaid on stock or premium notes.
 The amount of interest due and unpaid.
 All other securities.

Liabilities.

The amount of losses due and unpaid.
 The amount of losses adjusted, but not due.
 The amount of losses unadjusted.
 The amount of claims for losses resisted.
 The amount of money or evidence of investment borrowed.
 The amount of dividends unpaid.
 The amount required to safely reinsure all outstanding risks.
 All other claims against the company.

Income During the Year.

The amount of net cash premiums received.
 The amount of premium notes received.
 The amount of interest received from all sources.
 The amount received from all other sources.

Expenditures During the Year.

The amount paid for losses.
 The amount of dividends paid to policy-holders, and amount to stock-holders.
 The amount of commissions and salaries paid to agents.
 The amount paid to officers for salaries and other perquisites.
 The amount paid for taxes.
 The amount of all other payments and expenditures.

Miscellaneous.

The greatest amount insured on any one life.
 The amount deposited in other states or territories as security for policy-holders therein, stating the amount in each state and territory.
 The amount of premiums received in the state during the year.
 The amount paid for losses in this state during the year.
 The whole number of policies issued during the year, with the amount of insurance affected thereby, and total amount of risk.
 All other items of information necessary to enable the auditor to correctly estimate the cash value of policies, or to judge of the correctness of the valuation thereof.

The state auditor is authorized to amend the form of annual statement, and to propose such additional information as he may think necessary to elicit a full exhibit of the standing of companies doing business in this state.

History: En. Sec. 18, Ch. 171, L. 1907;
 Sec. 4130, Rev. C. 1907; re-en. Sec. 6273,
 R. C. M. 1921.

Collateral References

Insurance 9.
 44 C.J.S. Insurance § 73.
 29 Am. Jur. 64, Insurance, § 26.

40-1918. (6274) Renewal of certificates. The statements and evidences of investments required of foreign companies, as above, shall be renewed annually in such manner and form as required by this act, and as said auditor may direct, with any additional statement of the amount of the losses incurred and premiums received in this state, during the preceding year, so long as such agency continues; and the said auditor, on being satisfied that the capital, securities, and investments remain secure, as heretofore provided, shall furnish a renewal of his certificate.

History: En. Sec. 19, Ch. 171, L. 1907;
Sec. 4131, Rev. C. 1907; re-en. Sec. 6274,
R. C. M. 1921.

40-1919. (6275) Insurance commissioner may require changes in annual report forms so as to elicit a true exhibit of company's condition. The state insurance commissioner may, from time to time, require insurance companies and companies operating under the provisions of this act to make such changes in their annual report forms, required to be filed with the state insurance department, as are best adapted to elicit from such corporations or companies a true exhibit of their condition in respect to the several matters hereinbefore enumerated.

History: En. Sec. 20, Ch. 171, L. 1907;
Sec. 4132, Rev. C. 1907; re-en. Sec. 6275,
R. C. M. 1921; amd. Sec. 2, Ch. 145, L.
1953.

Compiler's Note

Sections 1 and 3 of Ch. 145, Laws 1953
are compiled as secs. 40-1430 and 40-2007
respectively.

40-1920. (6276) Certificate of authority on compliance with law. Upon compliance with the provisions of this act and the payment of the fees and taxes as provided by law, the state auditor shall issue a certificate to any company organized or admitted under the provisions of this act, which certificate shall be its authority to commence business and issue policies in this state, and which certificate shall be renewed annually as provided for in the preceding sections of this act. Such certificate shall expire annually on the thirty-first day of March.

History: En. Sec. 21, Ch. 171, L. 1907;
Sec. 4133, Rev. C. 1907; re-en. Sec. 6276,
R. C. M. 1921.

Collateral References

Insurance 5, 9, 20.
44 C.J.S. Insurance §§ 69, 79, 80; 46
C.J.S. Insurance § 1413.

NOTE.—This section changed in the
code of 1921 to conform to section 40-1304.

References

Occidental Life Ins. Co. v. Holmes, 107
M 48, 51, 80 P 2d 383.

40-1921. (6277) To what companies this act applicable. The provisions of the act of the seventh legislative assembly, approved March 9, 1901, and relating to the conditions upon which foreign corporations may do business in this state, known as senate bill No. 46 (section 15-1701), shall not apply to foreign insurance companies that comply with the provisions of this act.

History: En. Sec. 22, Ch. 171, L. 1907;
Sec. 4134, Rev. C. 1907; re-en. Sec. 6277,
R. C. M. 1921.

Collateral References

Insurance 4.
44 C.J.S. Insurance § 59.

40-1922. (6279) Mutual life insurance companies must make annual accounting of surplus. Every life insurance company doing business in

this state conducted on the mutual plan, or in which policy-holders are entitled to share in the profits or surplus, shall make an annual apportionment and accounting of divisible surplus to each policy-holder, beginning not later than the end of the third policy year, on all participating policies hereafter issued; and each such policy-holder shall be entitled to and be credited with or paid, in the manner hereinafter provided, such a portion of the entire divisible surplus as has been contributed thereto by his policy.

History: En. Sec. 1, Ch. 79, L. 1907;
Sec. 4136, Rev. C. 1907; re-en. Sec. 6279,
R. C. M. 1921.

Collateral References
Insurance 59.
44 C.J.S. Insurance § 114.

40-1923. (6280) Contingency reserve. Any life insurance company doing business in this state may accumulate and maintain, in addition to the capital and surplus contributed by its stockholders, and in addition to an amount equal to the net values of its policies, computed according to the laws of the jurisdiction under which it is organized, a contingency reserve not exceeding the following respective percentages of said net values, to-wit: When said net values are less than one hundred thousand dollars, twenty per centum thereof, or the sum of ten thousand dollars, whichever is the greater, when said net values are greater than one hundred thousand dollars, the percentage thereof, measuring the contingency reserve, shall decrease one-half of one per centum for each one hundred thousand dollars of said net values up to one million dollars; one-half of one per centum for each additional one million dollars up to ten million dollars; one-half of one per centum for each additional two million five hundred thousand dollars up to fifteen million dollars; and if said net values equal or exceed the last mentioned amount, the contingency reserve shall not exceed ten per centum thereof; provided, that as the net values of said policies increase and the maximum percentage measuring the contingency reserve decreases, such corporation may maintain the contingency reserve already accumulated hereunder, although for the time being it may exceed the maximum percentage herein prescribed, but may not add to the contingency reserve, when the addition will bring it beyond the maximum percentage; provided, however, that nothing herein contained shall be construed to affect any existing surplus or contingency reserves held by any such corporation, save that whenever the existing surplus and contingency reserves, exclusive of said net values and capital and surplus reserve contributed by its stockholders and of all accumulations held on account of existing deferred dividend policies or groups of such policies, shall exceed the limit above mentioned, it shall not be entitled to maintain any additional contingency reserves; provided further, that for cause shown, the state auditor may, at any time and from time to time permit any corporation to accumulate and maintain a contingency reserve in excess of the limit above mentioned for a prescribed period, not exceeding one year, under any one permission, by filing in his office a decision stating his reasons therefor, and causing the same to be published in his next annual report. This section shall not apply to any corporation doing exclusively a non-participating business.

History: En. Sec. 2, Ch. 79, L. 1907;
Sec. 4137, Rev. C. 1907; re-en. Sec. 6280,
R. C. M. 1921; amd. Sec. 1, Ch. 67, L. 1925.

Collateral References
Insurance 58.

44 C.J.S. Insurance §§ 72, 96.

29 Am. Jur. 66, Insurance, §§ 30 et seq.

state official as security for its obligation.
101 ALR 496.

Remedy of creditor of corporation to reach funds or securities deposited with

40-1924. (6281) Manner of apportionment to be selected by policy-holder. Every policy-holder shall on all participating policies hereafter issued be permitted annually to select the manner and method of the application of the surplus to be annually apportioned to his policy from among those set forth in the policy. All apportioned surplus not actually paid over to the insured, or applied in the reduction of current or future premiums, or in the purchase of paid-up insurance or pure endowment additions, shall be credited to the insured and carried as an actual liability, and be paid at the maturity of the policy.

History: En. Sec. 3, Ch. 79, L. 1907;
Sec. 4138, Rev. C. 1907; re-en. Sec. 6281,
R. C. M. 1921.

40-1925. (6282) Effect of default in payment of premium. This section shall apply only to policies of life insurance issued prior to the operative date of section 40-1926 (the standard nonforfeiture law).

In event of default in payment of any premium due on any policy, provided not less than three full years' premiums shall have been paid, there shall be secured to the insured, without action on his part, either paid-up or extended insurance as specified in the policy, the net value of which shall be at least equal to the entire net reserve held by the company of such policy, less two and one-half per centum of the amount insured by the policy and dividend additions, if any, and less any outstanding indebtedness to the company on the policy at time of default. There shall be secured to the insured the right to surrender the policy to the company at its home office within one month after date of default for cash value otherwise available for the purchase of the paid-up or extended insurance as aforesaid.

History: En. Sec. 4, Ch. 79, L. 1907; R. C. M. 1921; amd. Sec. 2, Ch. 105, L. Sec. 4139, Rev. C. 1907; re-en. Sec. 6282, 1945.

40-1926. (6282.1) Terms of standard nonforfeiture law. (1) This section shall be known as the standard nonforfeiture law.

(2) In the case of policies issued on or after the operative date of this section, as defined in subsection (8), no policy of life insurance, except as stated in subsection (7), shall be issued or delivered in this state unless it shall contain in substance the following provisions, or corresponding provisions which in the opinion of the state auditor are at least as favorable to the defaulting or surrendering policy-holder:

(a) That, in the event of default in any premium payment, after premiums have been paid for at least one full year, the company will grant, upon proper request not later than sixty days after the due date of the premium in default, a paid-up nonforfeiture benefit on a plan stipulated in the policy, effective as of such due date, of such value as may be hereinafter specified.

(b) That, upon surrender of the policy within sixty days after the due date of any premium payment in default after premiums have been

paid for at least three full years in the case of ordinary insurance or five full years in the case of industrial insurance, the company will pay, in lieu of any paid-up nonforfeiture benefit, a cash surrender value of such amount as may be hereinafter specified.

(c) That a specified paid-up nonforfeiture benefit shall become effective as specified in the policy unless the person entitled to make such election elects another available option not later than sixty days after the due date of the premium in default.

(d) That, if the policy shall have become paid up by completion of all premium payments or if it is continued under any paid-up nonforfeiture benefit which became effective on or after the third policy anniversary in the case of ordinary insurance or the fifth policy anniversary in the case of industrial insurance, the company will pay, upon surrender of the policy within thirty days after any policy anniversary, a cash surrender value of such amount as may be hereinafter specified.

(e) A statement of the mortality table and interest rate used in calculating the cash surrender values and the paid-up nonforfeiture benefits available under the policy, together with a table showing the cash surrender value, if any, and paid-up nonforfeiture benefit, if any, available under the policy on each policy anniversary either during the first twenty policy years or during the term of the policy, whichever is shorter, such values and benefits to be calculated upon the assumption that there are no dividends or paid-up additions credited to the policy and that there is no indebtedness to the company on the policy.

(f) A brief and general statement of the method to be used in calculating the cash surrender value and the paid-up nonforfeiture benefit available under the policy on any policy anniversary beyond those shown in the table together with an explanation of the manner in which the cash surrender values and the paid-up nonforfeiture benefits are altered by the existence of any paid-up additions credited to the policy or any indebtedness to the company on the policy.

Any of the foregoing provisions or portions thereof not applicable by reason of the plan of insurance may, to the extent inapplicable, be omitted from the policy.

The company shall reserve the right to defer the payment of any cash surrender value for a period of six months after demand therefor with surrender of the policy.

(3) Any cash surrender value available under the policy in the event of default in a premium payment due on any policy anniversary, whether or not required by subsection (2), shall be an amount not less than the excess, if any, of the present value, on such anniversary, of the future guaranteed benefits which would have been provided for by the policy, including any existing paid-up additions, if there had been no default, over the sum of (a) the then present value of the adjusted premiums as defined in subsection (5), corresponding to premiums which would have fallen due on and after such anniversary, and (b) the amount of any indebtedness to the company on the policy. Any cash surrender value available within thirty days after any policy anniversary under any policy paid up by completion of all premium payments or any policy continued

under any paid-up nonforfeiture benefit, whether or not required by subsection (2), shall be an amount not less than the present value, on such anniversary, of the future guaranteed benefits provided for by the policy, including any existing paid-up additions, decreased by any indebtedness to the company on the policy.

(4) Any paid-up nonforfeiture benefit available under the policy in the event of default in a premium payment due on any policy anniversary shall be such that its present value as of such anniversary shall be at least equal to the cash surrender value then provided for by the policy, or, if none is provided for, that cash surrender value which would have been required by this section in the absence of the condition that premiums shall have been paid for at least a specified period.

(5) The adjusted premiums for any policy shall be calculated on an annual basis and shall be such uniform percentage of the respective premiums specified in the policy for each policy year that the present value, at the date of issue of the policy, of all such adjusted premiums shall be equal to the sum of (i) the then present value of the future guaranteed benefits provided for by the policy; (ii) two per cent of the amount of insurance, if the insurance be uniform in amount, or of the equivalent uniform amount, as hereinafter defined, if the amount of insurance varies with duration of the policy; (iii) forty per cent of the adjusted premium for the first policy year; (iv) twenty-five per cent of either the adjusted premium for the first policy year or the adjusted premium for a whole life policy of the same uniform or equivalent uniform amount with uniform premiums for the whole of life issued at the same age for the same amount of insurance, whichever is less. Provided, however, that in applying the percentages specified in (iii) and (iv) above, no adjusted premium shall be deemed to exceed four per cent (4%) of the amount of insurance or level amount equivalent thereto. The date of issue of a policy for the purpose of this subsection shall be the date as of which the rated age of the insured is determined.

In the case of a policy providing an amount of insurance varying with duration of the policy, the equivalent level amount thereof for the purpose of this subsection shall be deemed to be the level amount of insurance provided by an otherwise similar policy, containing the same endowment benefit or benefits, if any, issued at the same age and for the same term, the amount of which does not vary with duration and the benefits under which have the same present value at the inception of the insurance as the benefits under the policy.

All adjusted premiums and present values referred to in this section shall be calculated on the basis of the commissioners 1941 standard ordinary mortality table for ordinary insurance and the 1941 standard industrial mortality table for industrial insurance and the rate of interest, not exceeding three and one-half per cent ($3\frac{1}{2}\%$) per annum, specified in the policy for calculating cash surrender values and paid-up nonforfeiture benefits. Provided, however, that in calculating the present value of any paid-up term insurance with accompanying pure endowment, if any, offered as a nonforfeiture benefit, the rates of mortality assumed may be not more than one hundred and thirty per cent (130%) of the rates of mortality

according to such applicable table. Provided, further, that for insurance issued on a substandard basis, the calculation of any such adjusted premiums and present values may be based on such other table of mortality as may be specified by the company and approved by the state auditor.

(6) Any cash surrender value and any paid-up nonforfeiture benefit, available under the policy in the event of default in a premium payment due at any time other than on the policy anniversary, shall be calculated with allowance for the lapse of time and the payment of fractional premiums beyond the last preceding policy anniversary. All values referred to in subsections (3), (4) and (5) may be calculated upon the assumption that any death benefit is payable at the end of the policy year of death. The net value of any paid-up additions, other than paid-up term additions, shall be not less than the dividends used to provide such additions. Notwithstanding the provisions of subsection (3), additional benefits payable (a) in the event of death or dismemberment by accident or accidental means, (b) in the event of total and permanent disability, (c) as reversionary annuity or deferred reversionary annuity benefits, (d) as decreasing term insurance benefits provided by a rider or supplemental policy provision to which, if issued as a separate policy, this section would not apply, and (e) as other policy benefits additional to life insurance and endowment benefits, and premiums for all such additional benefits, shall be disregarded in ascertaining cash surrender values and nonforfeiture benefits required by this section, and no such additional benefits shall be required to be included in any paid-up nonforfeiture benefits.

(7) This section shall not apply to any reinsurance, group insurance, pure endowment, annuity or reversionary annuity contract, nor to any term policy of uniform amount, or renewal thereof, of fifteen years or less expiring before age sixty-six, for which uniform premiums are payable during the entire term of the policy, nor to any term policy of decreasing amount on which each adjusted premium, calculated as specified in subsection (5), is less than the adjusted premium so calculated, on such fifteen year term policy issued at the same age and for the same initial amount of insurance, nor to any policy which shall be delivered outside this state through an agent or other representative of the company issuing the policy.

(8) After the effective date of this act, any company may file with the state auditor a written notice of its election to comply with the provisions of this section after a specified date before January first, nineteen hundred and forty-eight, with respect to the policies specified in the notice. After the filing of such notice, then upon such specified date (which shall be the operative date for such company with respect to such policies), this section shall become operative with respect to the policies specified in such notice thereafter issued by such company. As to all of its policies and contracts with respect to which a company makes no such election, the operative date of this section with respect to such policies and contracts for such company shall be January first, nineteen hundred and forty-eight.

History: En. Sec. 3, Ch. 105, L. 1945.

40-1927 to 40-1929. Repealed—Chapter 241, Laws of 1947.

40-1930. (6283) Provisions of law not waived by agreement. No agreement between the company and the policy-holder or applicant for insurance shall be held to waive any of the provisions of this act.

History: En. Sec. 5, Ch. 79, L. 1907;
Sec. 4140, Rev. C. 1907; re-en. Sec. 6283,
R. C. M. 1921.

Collateral References

Insurance—59, 363-370.
44 C.J.S. Insurance § 114; 45 C.J.S. In-
surance §§ 483, 575, 633, 667.

40-1931. (6284) Fraternal or secret societies not affected by this act. Nothing in this act shall be construed as affecting fraternal associations or secret societies, which may insure the lives of their members only.

History: En. Sec. 4, Ch. 73, L. 1907;
Sec. 4144, Rev. C. 1907; re-en. Sec. 6284,
R. C. M. 1921.

Collateral References

Insurance—750.
46 C.J.S. Insurance § 1510.

40-1932. (6285) Life insurance companies prohibited from contributing funds for political purposes. No insurance company or association, including fraternal beneficiary associations, doing business in this state, shall, directly or indirectly, pay or use or offer, consent, or agree to pay, or use any money or property for or in aid of any political party, committee, or organization, or for or in aid of any corporation, joint-stock, or other association organized or maintained for political purposes, or for or in aid of any candidate for political office, or for nomination for such office, or for any political purpose whatsoever, or for the reimbursement or indemnification of any person for money or property so used. Any officer, director, stock-holder, attorney, or agent of any corporation or association which violates any of the provisions of this act, who participates in, aids, abets, or advises, or consents to any such violation, and any person who solicits or knowingly receives any money or property in violation of this act, shall be guilty of a misdemeanor, and be punished by imprisonment for not more than one year and a fine of not more than one thousand dollars, and any officer aiding or abetting in any contribution made in violation of this act shall be liable to the company or association for the amount so contributed. No person shall be excused from attending and testifying, or producing any books, papers, or other documents before any court or magistrate, upon any investigation, proceeding, or trial, for a violation of any of the provisions of this act, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate or degrade him; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may so testify, or produce evidence, documentary or otherwise, and no testimony so given or produced shall be used against him upon any criminal investigation or proceeding.

History: En. Sec. 1, Ch. 74, L. 1907;
Sec. 4145, Rev. C. 1907; re-en. Sec. 6285,
R. C. M. 1921.

Collateral References

Elections—317; Insurance—36, 57(1).
29 C.J.S. Elections § 329; 44 C.J.S. In-
surance §§ 65, 100, 110.

40-1933. (6286) Rebating by life insurance companies—penalties. No life insurance company doing business in this state shall make or permit any distinction or discrimination in favor of individuals between insureds (the insured) of the same class and equal expectation of life in the amount

of payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes. Nor shall any such company or agent thereof make any contract of insurance or agreement as to such contract other than as plainly expressed in the policy issued thereon; nor shall any such company or any officer, agent, solicitor, or representative thereof pay, allow, or give, or offer to pay, allow, or give, directly or indirectly, as inducement to insurance, any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any paid employment or contract for services of any kind, or any valuable consideration or inducement whatever not specified in the policy contract of insurance; nor give, sell, or purchase, or offer to give, sell, or purchase, as inducement to insurance or in connection therewith, any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits to accrue thereon, or anything of value whatever, not specified in the policy.

Every officer or agent of an insurance company doing business in this state, who shall violate any of the provisions of this section, shall be deemed guilty of a misdemeanor.

It shall be the duty of the commissioner of insurance, upon being satisfied that any such insurance company, or any agent thereof, has violated any of the provisions of this section, to revoke the certificate of authority of the company or agent so offending.

History: En. Sec. 1, Ch. 15, L. 1909; re-en. Sec. 6286, R. C. M. 1921.

Collateral References

29 Am. Jur., Insurance, p. 66, § 29; p. 329, §§ 381 et seq.

Flat life insurance premium rate regardless of age, or failure to apply rate applicable according to age, as discrimination. 84 ALR 525.

Right of insurer, as affected by statute against discrimination, to reformation of

policy or other relief because of its own error, not due to misrepresentation by insured, in computing premiums, indemnity, or other benefit or option under policy. 125 ALR 1058, 1066.

Dividends on policies as violation of statutory prohibition of rebate, remission, refund, or other discrimination in respect of premiums. 137 ALR 1029.

Offering rebate or other financial benefit as ground for cancellation of agent's license. 154 ALR 1154.

40-1934. (6287) Offering of inducements to insure. From and after the date this act takes effect, no life insurance company shall issue in this state, nor permit its agents, officers, or employees to issue in this state, agency company stock or other stock or securities, or any special or advisory board or other contract of any kind promising returns and profits as an inducement to insurance; and on and after July 1, 1909, no life insurance company shall be authorized to do business in this state which issues or permits its agents, officers, or employees to issue in the state of Montana, or in other state or territory, agency company stock or other stock or securities, or any special or advisory board or other contract of any kind promising returns and profits as an inducement to insurance, and no corporation or stock company, acting as agent of a life insurance company, nor any of its agents, officers, or employees, shall be permitted to agree, sell, offer to sell or give, or offer to give, directly or indirectly, in any manner whatsoever, any share of stock, securities, bonds, or agreement

of any form or nature, promising returns and profits as an inducement to insurance, or in connection therewith; provided, that nothing herein contained shall impair or affect in any manner any such contracts issued or made as an inducement to insurance prior to the enactment hereof, or prevent the payment of the dividends or returns therein stipulated to be paid. It shall be the duty of the commissioner, upon being satisfied that any such insurance company, or any agent thereof, has violated any of the provisions of this section, to revoke the certificate of authority of the company or agent so offending.

History: En. Sec. 2, Ch. 15, L. 1909;
re-en. Sec. 6287, R. C. M. 1921.

Collateral References

Insurance—27-30.

44 C.J.S. Insurance §§ 86, 88, 89.

40-1935. (6288) Duration and renewal. Corporations organized in this state for the transaction of the business of life insurance may be formed to endure fifty years; but they may be renewed from time to time for the same or shorter periods, within three months before or after the time for the termination thereof, if a majority of the votes cast at any regular election, or special election called for that purpose, be in favor of such renewal, and if those wishing such renewal shall purchase the stock of those opposed thereto at its real value.

History: En. Sec. 1, Ch. 51, L. 1909;
re-en. Sec. 6288, R. C. M. 1921.

Collateral References

Insurance—32, 52.

44 C.J.S. Insurance §§ 95, 105.

40-1936. (6289) Number of directors. The by-laws of corporations organized in this state for the transaction of the business of life insurance shall fix the number of the trustees or directors thereof, but the same shall not be less than three, and a majority thereof shall be residents of this state.

History: En. Sec. 2, Ch. 51, L. 1909;
re-en. Sec. 6289, R. C. M. 1921.

40-1937. (6289.1) By-laws may be amended to allow policy-holders to participate in electing directors. The by-laws of corporations organized in this state for the transaction of the business of life insurance upon the stock plan may provide a plan for policy-holders participating with its stockholders in the election of its directors.

History: En. Sec. 1, Ch. 8, L. 1923.

Collateral References

Insurance—35, 56.

44 C.J.S. Insurance §§ 98, 109.

40-1938. (6289.2) By-law may be extended but not revoked. Any by-law so adopted at any regular or special meeting of the stockholders may thereafter be extended in its terms, but shall not be curtailed or revoked.

History: En. Sec. 2, Ch. 8, L. 1923.

40-1939. (6290.1) Misrepresentations concerning insurance prohibited. No life insurance corporation or society doing business in this state, and no officer, director, representative or agent therefor or thereof, and no other person, co-partnership or corporation shall issue or circulate, or cause or permit to be issued or circulated, any estimates, illustrations, circulars, statements or memoranda of any sort, misrepresenting the terms, benefits or advantages of any policy issued by any such corporation, or any cer-

tificate of membership issued by any such society, or making any misleading estimate of the dividends or share of surplus to be received thereon, or using any name or title of any policy or class of policies or certificates of membership or class of such certificates, misrepresenting the true nature thereof.

History: En. Sec. 1, Ch. 38, L. 1933.

Collateral References

Insurance⊖11.

44 C.J.S. Insurance § 60.

40-1940. (6290.2) Inducing owner to forfeit, surrender policy or allow to lapse forbidden. No such insurance corporation or society, and no officer, director, representative, or agent or broker therefor or thereof, or any other person, co-partnership or corporation shall make or issue, or cause to be made or issued, any written or oral statements misrepresenting or making incomplete comparisons for the purpose of inducing or attempting to induce the owner of such policy or contract of insurance to forfeit or surrender such policy or contract or allow it to lapse, for the purpose of replacing such policy or contract of insurance with another.

History: En. Sec. 2, Ch. 38, L. 1933.

40-1941. (6290.3) Penalty for violations. Any such insurance corporation or society and any officer, director, representative, or agent therefor or thereof, and any other person, co-partnership or corporation violating any provisions of this act, shall be deemed guilty of a misdemeanor and upon conviction shall be punished accordingly. The commission of a single act prohibited by this act shall constitute a violation thereof.

History: En. Sec. 3, Ch. 38, L. 1933.

40-1942. (6290.4) Revocation of license for violations—appeal. The commissioner of insurance may, in his discretion, revoke the certificate of authority issued to any corporation, society or agent, on his being satisfied, after notice and hearing, as provided by law, that such corporation, society or agent has violated any provisions of this act. This penalty is in addition to the other penalties herein prescribed. Any corporation, society or agent whose certificate of authority has been revoked may, within fifteen days thereafter, appeal from said order to the district court.

History: En. Sec. 4, Ch. 38, L. 1933.

Collateral References

Insurance⊖5, 20.

44 C.J.S. Insurance §§ 69, 79.

40-1943. Operation of undertaking establishment prohibited. It shall be unlawful for any life insurance company, corporation or association, except fraternal benefit societies licensed to do business in this state to own, manage, supervise, or operate or maintain a mortuary or undertaking establishment, or to permit its officers, agents or employees to own, operate or maintain any such funeral or undertaking business.

History: En. Sec. 1, Ch. 197, L. 1951.

Collateral References

Insurance⊖11.

44 C.J.S. Insurance § 60.

40-1944. Agreement with funeral director for burial of insured prohibited. It shall be unlawful for any life insurance company, sick or funeral benefit company, or any company, corporation or association engaged in a

similar business to contract or agree with any funeral director, undertaker or mortuary to the effect that such funeral director, undertaker or mortuary shall conduct the funeral of any person insured by such company, corporation or association.

History: En. Sec. 2, Ch. 197, L. 1951.

40-1945. Funeral director or employee not to be licensed as life insurance agent. It shall be unlawful for any funeral director, undertaker or mortuary, or any agent, officer or employee thereof to be licensed as agent, solicitor or salesman for any life insurance company, corporation or association doing business in this state.

History: En. Sec. 3, Ch. 197, L. 1951.

40-1946. Penalty for violation of sections 40-1943 to 40-1945. Any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and each violation thereof shall be a separate offense, and upon conviction shall be punished by fine not exceeding one thousand dollars (\$1,000.00), or by imprisonment at hard labor for not exceeding six (6) months, or both such fine and imprisonment within the discretion of the courts.

History: En. Sec. 4, Ch. 197, L. 1951.

CHAPTER 20

ASSESSMENT LIFE INSURANCE COMPANIES

Section 40-2001.	Formation of assessment life insurance companies.
40-2002.	Articles of incorporation.
40-2003.	Auditor's certificate and articles to be filed and recorded.
40-2004.	Directors.
40-2005.	Assessment notice.
40-2006.	How surplus funds invested.
40-2007.	Annual statement to auditor.
40-2008.	Auditor may employ experts.
40-2009.	Auditor to examine into financial condition.
40-2010.	Procedure in event of noncompliance with law.
40-2011.	License to foreign corporations—service of process.
40-2012.	Duty of auditor in case of noncompliance with laws.

40-2001. (6293) Formation of assessment life insurance companies. Corporations for the purpose of furnishing life indemnity or pecuniary benefits to the widows, orphans, heirs, or relatives by consanguinity or affinity, devisees or legatees of deceased members, or accident or permanent disability indemnity to members thereof, where the funds for the payment of such benefits are secured in whole or in part by assessment upon the surviving members, may be organized or do business in the state of Montana, subject to the conditions hereinafter provided. Such corporation must show by a sworn statement a guarantee fund of not less than twenty thousand dollars for the benefit and security of the policy-holders, or those holding certificates of life indemnity.

History: This Act en. in substance as Secs. 1-16, pp. 41-48, L. 1885; re-en. Secs. 603-618, 5th Div. Comp. Stat. 1887; this section re-en. as Sec. 700, Civ. C. 1895; re-en. Sec. 4146, Rev. C. 1907; re-en. Sec. 6293, R. C. M. 1921.

References

McDonald v. Northern Benefit Association, 113 M 595, 598, 131 P 2d 479.

Collateral References

Insurance 52.
44 C.J.S. Insurance § 105.

40-2002. (6294) Articles of incorporation. Any three or more persons, citizens of the United States, a majority of whom are residents of this state, may associate themselves together as a body corporate, for which purpose they must make, sign, and acknowledge, before any officer authorized to take acknowledgment of deeds in this state, articles of incorporation, in which must be stated the name or title by which such corporation, association, or society shall be known in law, the location of its principal business office, which office must be located in this state, the name and residence of the incorporators, the object of the corporation, with its plan of doing business, clearly and fully defined, the number of its directors, and the names of those elected to serve until its first annual meeting, the limits as to age of applicants for membership, which must be between the ages of sixteen and sixty-five, and that strict medical examinations are required, and that bona fide applications have been secured for at least five hundred thousand dollars by not less than two hundred persons, and two per cent. on such insurance, together with said guarantee fund of twenty thousand dollars, has been paid into the treasury and deposited in trust for the benefit of the beneficiaries of such corporation, which articles of incorporation must be submitted to the state auditor, who must examine the same, and, if he finds that the objects and purposes are fully and definitely set forth within the provisions of this chapter, and that the name or title is not the same as that of some other corporation already organized under the laws of this state, or does not so closely resemble a title or name in use as to have a tendency to mislead the public, must approve the same. If, for either of the aforesaid or other good and sufficient reasons, the said auditor shall be unwilling to approve the articles of incorporation, he must immediately inform the incorporators of the fact, stating his objections fully in writing. If the articles are sufficient and satisfactory, the auditor must indicate his approval thereof under his hand and official seal.

History: This Act en. in substance as section re-en. Sec. 701, Civ. C. 1895; re-en. Secs. 1-16, pp. 41-48, L. 1885; re-en. Secs. Sec. 4147, Rev. C. 1907; re-en. Sec. 6294, 603-618, 5th Div. Comp. Stat. 1887; this R. C. M. 1921.

40-2003. (6295) Auditor's certificate and articles to be filed and recorded. When the articles of incorporation have received the approval of the state auditor, such articles, with the approval, must be filed, recorded, and certified as required by section 15-111.

History: This Act en. in substance as section re-en. Sec. 702, Civ. C. 1895; re-en. Secs. 1-16, pp. 41-48, L. 1885; re-en. Secs. Sec. 4148, Rev. C. 1907; re-en. Sec. 6295, 603-618, 5th Div. Comp. Stat. 1887; this R. C. M. 1921.

40-2004. (6296) Directors. The affairs of all corporations organized or doing business under the provisions of this chapter must be managed by not less than three directors, a majority of whom must be residents of this state, who must be elected from and by the members at such time and place, and for such period, not exceeding three years, as may be provided for in the by-laws, and may be eligible for re-election; but, as near as practicable, an equal number must be elected each year.

History: This Act en. in substance as 603-618, 5th Div. Comp. Stat. 1887; this Secs. 1-16, pp. 41-48, L. 1885; re-en. Secs. section re-en. Sec. 703, Civ. C. 1895; re-en.

Sec. 4149, Rev. C. 1907; re-en. Sec. 6296,
R. C. M. 1921.

Collateral References
Insurance⌚56.
44 C.J.S. Insurance § 109.

40-2005. (6297) Assessment notice. Assessment notices sent to members by any corporation doing business under the provisions of this chapter must state the object or objects for which the money to be collected is intended; and no part of the funds collected for the payment of death benefits must be applied for any other purpose.

History: This Act en. in substance as Secs. 1-16, pp. 41-48, L. 1885; re-en. Secs. 603-618, 5th Div. Comp. Stat. 1887; this section re-en. Sec. 704, Civ. C. 1895; re-en. Sec. 4150, Rev. C. 1907; re-en. Sec. 6297, R. C. M. 1921.

Collateral References
Insurance⌚195(2).
44 C.J.S. Insurance § 370.

40-2006. (6298) How surplus funds invested. Any corporation transacting business under the provisions of this chapter may provide in its by-laws for the accumulation of a surplus general or guarantee fund, which may be invested only in its corporate name in the United States, state, territorial, or other first-class convertible bonds or stocks, upon which interest has not been in default. Such fund, when so set apart and so invested, with the increase thereof, belongs to such corporation, and not to the directors or officers thereof; and must be used only for mortuary benefits, without assessment, or applied in payment of future assessments, or otherwise used for the promotion of the object or objects for which such fund is specially provided and set apart, and such use shall not be deemed or construed to mean a profit received by members within the meaning of the statutes of this state.

History: This Act en. in substance as Secs. 1-16, pp. 41-48, L. 1885; re-en. Secs. 603-618, 5th Div. Comp. Stat. 1887; this section re-en. Sec. 705, Civ. C. 1895; re-en. Sec. 4151, Rev. C. 1907; re-en. Sec. 6298, R. C. M. 1921.

Collateral References
Insurance⌚59.
44 C.J.S. Insurance § 114.

40-2007. (6299) Annual statement to auditor. Corporations organized under the provisions of this chapter, or that have heretofore been organized within the state or territory of Montana for the purpose of furnishing life, accident, or permanent disability indemnity or mortuary benefits on the assessment plan, in accordance with the provisions of section 40-2001, are not insurance corporations and are not subject to the laws of this state relating thereto, but must comply with and conform to all the requirements and provisions of this chapter, and must, by their president and secretary, or like officers, make to the state auditor annually, within sixty days from and after the first day of January, each year, a statement under oath for the preceding year, which statement must show their financial condition, assets, liabilities, total amount of indemnity in force, number of members, number whose membership has terminated during the year, and cause thereof, total receipts and sources thereof, total expenditures and objects thereof, and the average amount paid on each certificate, and must pay into the treasury of the state, upon filing said certificate, a fee of twenty-five dollars, and the said auditor must publish said statement in his annual report.

But nothing herein contained applies to any organization of a purely social, religious, or benevolent character, where no commissions are paid, and no salaried officers or agents are employed; or to any local association or society organized under, or subject to the control of a grand or supreme body; or to any secret organization, having subordinate lodges or councils, which have been organized under the laws of this state or any other state or territory, and which are now permitted to do business in this state.

History: This Act en. in substance as Secs. 1-16, pp. 41-48, L. 1885; re-en. Secs. 603-618, 5th Div. Comp. Stat. 1887; this section re-en. Sec. 706, Civ. C. 1895; re-en. Sec. 4152, Rev. C. 1907; amd. Sec. 1, Ch. 136, L. 1919; re-en. Sec. 6299, R. C. M. 1921; amd. Sec. 3, Ch. 145, L. 1953.

Compiler's Note

Sections 1 and 2 of Ch. 145, Laws 1953 are compiled as secs. 40-1430 and 40-1919 respectively.

Collateral References

Insurance 9.

44 C.J.S. Insurance § 73.

40-2008. (6300) Auditor may employ experts. The state auditor has authority to appoint an expert to verify the statements aforesaid by examination of the books and papers of the corporation, and make such other examination as he may deem necessary. The expense of such examination must be paid by the corporation having its books examined, and must not exceed the necessary traveling and hotel expenses of said expert, and reasonable compensation of said expert while engaged in such examination.

History: This Act en. in substance as Secs. 1-16, pp. 41-48, L. 1885; re-en. Secs. 603-618, 5th Div. Comp. Stat. 1887; this

section re-en. Sec. 707, Civ. C. 1895; re-en. Sec. 4153, Rev. C. 1907; re-en. Sec. 6300, R. C. M. 1921.

40-2009. (6301) Auditor to examine into financial condition. The state auditor must, at the request of any corporation doing business under the provisions of this chapter in this state on the assessment plan, make an examination of such corporation, and furnish a certificate of the results of such examination, showing all its assets and how invested, and such other particulars as are necessary to show the character and condition of said corporation, and the necessary expense of the said examination must be paid by the corporation requesting the same.

History: This Act en. in substance as Secs. 1-16, pp. 41-48, L. 1885; re-en. Secs. 603-618, 5th Div. Comp. Stat. 1887; this

section re-en. Sec. 708, Civ. C. 1895; re-en. Sec. 4154, Rev. C. 1907; re-en. Sec. 6301, R. C. M. 1921.

40-2010. (6302) Procedure in event of noncompliance with law. Whenever any corporation organized or having transacted business under the provisions of this chapter, neglects or refuses to make its annual statement, as required by this chapter, or whenever the state auditor finds upon examination, as provided in section 40-2008, that any wilfully false or untrue statements in any material respect have been made, or that the business of the corporation has been conducted fraudulently or in wilful violation of any of the provisions of this chapter, or that the corporation has transacted business different from that authorized by its articles of incorporation, he must communicate the facts to the attorney-general, whose duty it is to apply to the district court, where its principal office is located, for an order requiring the officers, directors, or managers of such corporation to show cause why they should not be removed from office or its business closed; and the court must thereupon hear the allegations and

proofs of the respective parties, and if it appears to the satisfaction of the court that any one or more of them have been guilty of fraud, or any material irregularity or violation of the law to the injury of the said corporation, or of noncompliance with any of the provisions of this chapter, the court must decree a removal from office of the guilty party or parties, which decree forever bars them from holding a similar office, and must substitute a suitable person or persons to serve until the regular annual meeting, or until a successor or successors are regularly chosen or elected; or, if it appears to the said court that the interests of its members or of the general public so require, the court may decree a dissolution of such corporation and a distribution of its effects.

History: This Act en. in substance as section. re-en. Sec. 709, Civ. C. 1895; re-en. Secs. 1-16, pp. 41-48, L. 1885; re-en. Secs. Sec. 4155, Rev. C. 1907; re-en. Sec. 6302, 603-618, 5th Div. Comp. Stat. 1887; this R. C. M. 1921.

40-2011. (6303) License to foreign corporations—service of process.

(1) Any corporation, association, or society organized under the laws of any other state, territory, or government, for the purpose of furnishing life, accident, or permanent disability indemnity upon the assessment plan, where benefits are paid to such as have an insurable interest only, complying with the provisions of this chapter, so far as applicable, and showing that it has deposited with the proper authorities or department of the territory, or state, or government under which it is incorporated, not less than fifty thousand dollars as a guarantee fund for the security of its members, may be licensed by the state auditor upon payment to the state treasury of a fee of three hundred dollars, to do business in this state, provided such corporation first deposits with the said auditor a certified copy of its charter or articles of incorporation, a copy of the statement of business for the preceding year, sworn to by its president and secretary, or like officers, showing a detailed account of expenses and income, the amount of life indemnity in force, its assets and liabilities in detail, number of members, and a certificate sworn to by the president and secretary, or like officers, setting forth that an ordinary assessment upon the members is sufficient to pay its maximum certificate of membership to the full limit named therein; a copy of its policy or certificate of membership, application, and by-laws, which must show that death losses are in the main provided for by assessment upon the surviving members; and it must legally designate the commissioner of insurance and his successors in office to be its true and lawful attorney, upon whom all legal process in any action or proceeding against it shall be served, and in such writing shall agree that any lawful process against it which is served upon such attorney shall be of the same legal force and validity as if served upon the corporation or company, and that the authority shall continue in force so long as any liability remains outstanding in this state.

(2) Copies of such appointment, certified by said commissioner of insurance, shall be deemed sufficient evidence thereof, and shall be admitted in evidence with the same force and effect as the original thereof might be admitted. Such service shall only be made upon such attorney, must be made in duplicate upon the commissioner of insurance, or, in his absence, upon the person in charge of his office, and shall be deemed sufficient

service upon such society, corporation, or company; provided, however, that in all cases where service is made upon the commissioner of insurance as herein provided, the defendant shall have twenty days from the date of such service in which to file its answer or other appearance in the case. When legal process against any society, corporation, or company is served upon said commissioner of insurance, he shall forthwith forward by registered mail one of the duplicate copies prepaid and directed to its secretary or corresponding officer. For each copy of process the commissioner of insurance shall collect the sum of two dollars, which shall be paid by the plaintiff at the time of such service, the same is to be recovered by him as part of the taxable costs if he prevails in suit. Legal process shall not be served upon any such corporation or company except in the manner provided herein.

History: This Act en. in substance as Secs. 1-16, pp. 41-48, L. 1885; re-en. Secs. 603-618, 5th Div. Comp. Stat. 1887; this section re-en. Sec. 710, Civ. C. 1895; re-en. Sec. 4156, Rev. C. 1907; amd. Sec. 1, Ch. 215, L. 1919; re-en. Sec. 6303, R. C. M. 1921.

Collateral References

Insurance 20, 627.

44 C.J.S. Insurance §§ 60, 79, 80; 46 C.J.S. Insurance § 1270.

23 Am. Jur. 526, Foreign Corporations, §§ 505 et seq.; 29 Am. Jur. 70, Insurance, §§ 34 et seq.

Cessation by foreign corporation of business within state as affecting designation of agent for service of process. 45 ALR 1447.

Discrimination by state against foreign insurance corporations in imposition of taxes and license fees. 49 ALR 740.

Constitutionality of statute requiring payment to state of fee on appointment of agent by foreign insurance company. 60 ALR 1172.

Subsequent compliance with conditions of doing business in state as affecting enforceability of contract of foreign corporation made before compliance with such conditions. 75 ALR 446.

Constitutionality, construction and effect of statute providing for service of process upon statutory agent in action

against foreign corporation as regards communications to corporation of fact of service. 89 ALR 658.

Service by mail or service upon, or acknowledgment of service by, deputy or other subordinate of the public officer named in statute providing for service of process in action against foreign corporation. 98 ALR 1437.

Withdrawal of foreign insurance company from state as affecting conditions under which it may be readmitted to do business in state and its rights and duties if readmitted. 110 ALR 528.

Who, other than public official, may be served with process in action against foreign corporation doing business in state. 113 ALR 9, 100.

Personal liability of public officials or their bonds, for permitting insurance company to engage or continue in business without complying with statutory requirements. 131 ALR 275.

Personal liability of agents or brokers in respect of policies of foreign insurance companies not authorized to do business in the state. 131 ALR 1079.

What constitutes doing business within state by foreign insurance corporation. 137 ALR 1128.

Insurance companies, which are members of Federal reserve banks or similar Federal agencies or national banks, as within state social security or unemployment compensation act. 145 ALR 1074.

40-2012. (6304) Duty of auditor in case of noncompliance with laws.

Every such corporation, association, or society must pay into the treasury of the state, upon filing each annual statement, a fee of twenty-five dollars, and in the event of its failure to make such statement on or before the first day of December of each year, the state auditor must revoke its license, and thereafter, or until such annual statement is made, it must not do business in this state. When the state auditor has reason to doubt the solvency of any foreign corporation, association, or society acting under the provisions of this chapter, and when he is not fully satisfied with the certificate of the insurance commissioner, or other like officer, of the state, territory,

or government, of its organization, he may make an examination, as provided in this chapter for the examination of corporations organized in this state; and if he find that it has made fraudulent or untrue statements, or that it is conducting its business in an irregular or illegal manner, or if it appears that any such corporation in this state is conducting its business fraudulently, or is not in good faith carrying out its contracts with its members in this state, he must report the same to the attorney-general, who must thereupon commence proceedings against such corporation or association, requiring it to show why its license to do business in this state should not be revoked.

History: This Act en. in substance as Secs. 1-16, pp. 41-48, L. 1885; re-en. Secs. 603-618, 5th Div. Comp. Stat. 1887; this section re-en. Sec. 711, Civ. C. 1895; re-en. Sec. 4157, Rev. C. 1907; re-en. Sec. 6304, R. C. M. 1921.

Collateral References

Insurance—18.
44 C.J.S. Insurance § 78.

CHAPTER 21

FRATERNAL BENEFIT SOCIETIES

- Section 40-2101. Fraternal benefit societies defined.
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40-2101. (6305) Fraternal benefit societies defined. Any corporation, society, order, mutual life association, or voluntary association, without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative form of government, or whose membership is limited to the members of a lodge system with ritualistic form of work and representative form of government, and which shall make provisions for the payment of benefits in accordance with section 40-2105, is hereby declared to be a fraternal benefit society.

History: En. Sec. 1, Ch. 140, L. 1911; re-en. Sec. 6305, R. C. M. 1921; amd. Sec. 1, Ch. 130, L. 1941.

References

Cited or applied as chapter 140, Laws 1911, in *Mandoli v. National Council etc.*, 58 M 671, 679, 194 P 493; *McDonald v. Northern Benefit Association*, 113 M 595, 598, 131 P 2d 479.

Collateral References

Insurance 687.
46 C.J.S. Insurance § 1435.

38 Am. Jur. 441, *Mutual Benefit Societies*, § 2.

Mutual companies and benefit or fraternal societies as insurance companies. 63 ALR 735.

Insurance companies, which are members of Federal reserve banks or similar Federal agencies or national banks, as within state social security or unemployment compensation act. 145 ALR 1074.

Fraternity benefit societies as entitled to voluntary, or subject to involuntary, bankruptcy. 148 ALR 714.

40-2102. (6306) Lodge system defined. Any society having a supreme governing or legislative body and subordinate lodges or branches by whatever name known, into which members shall be elected, initiated, and admitted in accordance with its constitution, laws, rules, regulations, and prescribed ritualistic ceremonies, which subordinate lodges or branches shall be required by the laws of such society to hold regular or stated meetings at least once in each month, shall be deemed to be operating on the lodge system.

History: En. Sec. 2, Ch. 140, L. 1911; re-en. Sec. 6306, R. C. M. 1921.

Collateral References

Expulsion or suspension of local lodge or other unit of benefit society. 94 ALR 639.

40-2103. (6307) Representative form of government defined. A society shall be deemed to have a representative form of government when: (a) It provides in its constitution or laws for a supreme legislative or governing body, composed of representatives elected either by the members or by delegates elected directly or indirectly by the members, together with such other members of such body as may be prescribed by such society's constitution and laws;

(b) The representatives elected constitute a majority in number and have not less than two-thirds of the votes, nor less than the votes required to amend its constitution and laws;

(c) The meetings of the supreme legislative or governing body, and the election of officers, representatives, or delegates are held as often as once in four calendar years;

(d) The members, officers, representatives, or delegates shall not vote by proxy;

(e) The officers may be elected by the board of directors.

History: En. Sec. 3, Ch. 140, L. 1911;
re-en. Sec. 6307, R. C. M. 1921; amd. Sec.
1, Ch. 14, L. 1953.

Collateral References

Insurance—687.
46 C.J.S. Insurance § 1435.
38 Am. Jur. 441, Mutual Benefit Soci-
eties, § 2.

40-2104. (6308) Exemptions. Except as herein provided, such societies shall be governed by this act and shall be exempt from all provisions of the insurance laws of this state, not only in governmental relations with the state, but for every other purpose, and no law hereafter enacted shall apply to them, unless they be expressly designated therein.

History: En. Sec. 4, Ch. 140, L. 1911;
re-en. Sec. 6308, R. C. M. 1921.

46 C.J.S. Insurance § 1436.
38 Am. Jur. 447, Mutual Benefit Soci-
eties, § 6.

Collateral References

Insurance—689.

40-2105. (6309) Benefits. Every society transacting business under this act shall provide for the payment of death benefits, and may provide for the payment of benefits in case of temporary or permanent physical disability, either as the result of disease, accident, or old age; provided, the period of life at which the payment of benefits for disability on account of old age shall commence shall not be under seventy years, and may provide for monuments or tombstones to the memory of its deceased members, and for the payment of funeral benefits. Such society shall have the power to give a member, when permanently disabled or on attaining the age of seventy, all of such portion of the face value of his certificate as the laws of the society may provide; provided, that nothing in this act contained shall be so construed as to prevent the issuing of benefit certificates for a term of years less than the whole of life which are payable upon the death or disability of the member occurring within the term for which the benefit certificate may be issued. Such society shall, upon written application of the member, have the power to accept a part of the periodical contributions in cash, and charge the remainder, not exceeding one-half of the periodical contribution, against the certificate, with interest payable or compounded annually at a rate not lower than four per cent per annum; provided, that this privilege shall not be granted except to societies which have readjusted or may hereafter readjust their rates of contributions, and to contracts affected by such readjustment.

History: En. Sec. 5, Ch. 140, L. 1911;
re-en. Sec. 6309, R. C. M. 1921.

46 C.J.S. Insurance § 1546.
38 Am. Jur. 525, Mutual Benefit Soci-
eties, §§ 116 et seq.

Collateral References

Insurance—791.

**40-2106. (6310) Conditions under which extended and paid-up protec-
tion, endowment and other equities may be provided.** Any society which shall show by the annual valuation hereinafter provided for that it is accumulating and maintaining the reserve necessary to enable it to do so, under a table of mortality not lower than the American experience table and four per centum (4%) interest may, in addition to the benefits provided in section 40-2105, issue endowment certificates and grant to its members extended and paid-up protection, or such withdrawal equities as its constitution and laws may provide; provided, that such grant shall in

no case exceed in value the portion of the reserve to the credit of such members to whom they are made.

History: En. Sec. 5, Ch. 140, L. 1911; re-en. Sec. 6310, R. C. M. 1921; amd. Sec. 1, Ch. 31, L. 1931.

40-2107. (6311) Beneficiaries. No beneficiaries shall have or obtain any vested interests in the proceeds of any certificate until such certificate has become due and payable in conformity with the provisions of the membership contract. The insured member shall have the right at all times to change the beneficiary or beneficiaries in accordance with the constitution, by-laws, rules or regulations of the society. Every society may, by its constitution, by-laws, rules or regulations, limit the scope of beneficiaries.

History: En. Sec. 6, Ch. 140, L. 1911; re-en. Sec. 6311, R. C. M. 1921; amd. Sec. 1, Ch. 84, L. 1929; amd. Sec. 1, Ch. 191, L. 1931; amd. Sec. 2, Ch. 14, L. 1953.

Common-Law Wife Entitled to Take as Beneficiary

Where a woman claimant under a fraternal benefit certificate had been falsely or fraudulently designated as beneficiary as the cousin of the insured, but years later became his common-law wife, she, though admittedly incapable of taking as deceased's cousin, as wife occupied a degree of relationship under this section entitling her to take as such. *Stevens v. Woodmen Of The World*, 105 M 121, 140, 71 P 2d 898.

Descriptio Personae, False Statement Not Breach

A statement made in an application for life insurance in an old line company of relationship of beneficiary is regarded as merely for identification as a description of the person; in a statement in respect of fraternal insurance societies it has been held that falsity thereof is not a breach of warranty and does not vitiate the certificate on the ground of fraud. *Stevens v. Woodmen Of The World*, 105 M 121, 138, 71 P 2d 898.

Naming Unqualified Person, Policy Not Void Ab Initio

An attempt to name a person as a beneficiary in a life insurance policy who was not qualified by law to become such does not ipso facto invalidate the entire policy or render it void ab initio. *Stevens v. Woodmen Of The World*, 105 M 121, 139, 71 P 2d 898.

Operation and Effect

Construing prior to amendment by chapter 191, Laws of 1931, under this section, payment of death benefits by fraternal life insurance societies on their certificates are confined to husband, wife, relatives by blood, etc. The constitution of such a society and the by-laws of a subordinate

lodge provided that where husband or wife is designated as beneficiary, divorce should render either ineligible as beneficiary and annul the designation. Held, in an action by a husband who had been named in such a certificate as beneficiary of his wife but divorced from her prior to her death, the beneficiary has not a vested interest in the certificate, prior to the death of the member, as he would have under a so-called "Old-line" policy; that his designation as beneficiary lapses upon the happening of the divorce, but that the insurance is not thereby invalidated as to others who may be eligible to receive payment. *Nitsche v. Security Benefit Assn. et al.*, 78 M 532, 546, 255 P 1052.

Construing prior to amendment by chapter 191, Laws of 1931, that where the laws of Colorado under which a fraternal life insurance society was organized, at the time a contract of insurance between it and a resident of this state was executed, did not exclude a sister-in-law from becoming beneficiary, the constitution of the society on the contrary providing that she could become such, and the insured after a second marriage changed his beneficiary from his wife to his sister-in-law under the former marriage, the latter was eligible to take so long as the relationship of brother-in-law and sister-in-law continued, even though now the laws of both Colorado and Montana do not include a sister-in-law in the favored class. *Styles v. Byrne*, 89 M 243, 252, 296 P 577.

Who May Not Become Beneficiary

One who does not occupy some one of the degrees of relationship with the insured enumerated in this section cannot become a beneficiary under a certificate issued by a fraternal benefit society. *Stevens v. Woodmen Of The World*, 105 M 121, 129, 71 P 2d 898.

Collateral References

Insurance—770, 773, 780.

46 C.J.S. Insurance §§ 1549, 1558, 1566.

38 Am. Jur. 546, Mutual Benefit Societies, §§ 138 et seq.

Validity, construction, and effect of by-law, statute, or other provision of life contract which prevents payment of insured or beneficiary. 92 ALR 911.

40-2108. (6312) Qualifications for membership. Any society may admit to beneficial membership any person not less than fifteen (15) years of age at nearest birthday who has been examined by a legally qualified physician, and whose examination has been supervised in accordance with the laws of the society, or who has made declaration of insurability acceptable to the society; provided, that any beneficial member of a society who shall apply for additional benefits more than six (6) months after becoming a beneficial member shall pass an additional medical examination or make an additional declaration of insurability, as required by the society. Any person so admitted prior to attaining the full age of twenty-one (21) years shall be bound by the terms of his or her application and certificate, and by all the laws, rules and regulations of the society, and shall be entitled to all the rights and privileges of membership therein, as fully and to the same extent as though he or she were not a minor at the time of applying for such beneficial membership. Nothing herein contained shall prevent such society from accepting general or social members.

History: En. Sec. 7, Ch. 140, L. 1911; re-en. Sec. 6312, R. C. M. 1921; amd. Sec. 1, Ch. 29, L. 1931; amd. Sec. 3, Ch. 14, L. 1953.

Collateral References

38 Am. Jur. 489, Mutual Benefit Societies, § 61 et seq.

Limit of liability of members of insurance associations. 10 ALR 750.

Right of member of society with benefits in nature of insurance to notice and

hearing before suspension or expulsion. 27 ALR 1512.

Power of mutual benefit society to waive restrictions upon eligibility to membership. 28 ALR 93.

Validity, construction, and effect of by-law, statute, or other provision of life insurance contract which prevents payment to creditor of insured or beneficiary. 92 ALR 911.

Expulsion or suspension of local lodge or other unit of benefit society. 94 ALR 639.

40-2109. (6313) Certificate. Every certificate issued by any such society shall specify the amount of benefit provided thereby, and shall provide that the certificate, the charter or articles of incorporation, or, if a voluntary association, the articles of association, the constitution, and laws of the society, and the application for membership and medical examination, signed by the applicant, and all amendments to each thereof, shall constitute the agreement between the society and the member, and copies of the same, certified by the secretary of the society, or corresponding officer, shall be received in evidence of the terms and conditions thereof, and any changes, additions, or amendments to said charter or articles of incorporation, or articles of association, if a voluntary association, constitution, or laws duly made or enacted subsequent to the issuance of the benefit certificate, shall bind the member and his beneficiaries, and shall govern and control the agreement in all respects the same as though such changes, additions, or amendments had been made prior to and were in force at the time of the application for membership.

History: En. Sec. 8, Ch. 140, L. 1911; re-en. Sec. 6313, R. C. M. 1921.

Operation and Effect

In an action on a certificate of life in-

surance issued by a fraternal insurance society, the certificate together with the application and the provisions of the constitution and by-laws of the society applicable constitute the contract between

the parties. *Osborne v. Supreme Lodge etc. Ins. Dept.*, 69 M 361, 366, 222 P 456.

The certificate of life insurance issued by a mutual benefit association working under a lodge system, with the original application, the report of the medical examiner and the constitution and by-laws of the society constitute the contract between it and its member, which contract can be modified only by a subsequent agreement in writing or by executed oral agreement between the original parties

thereto. *Nitsche v. Security Benefit Assn. et al.*, 78 M 532, 546, 255 P 1052.

Collateral References

Insurance ⇨ 714.

46 C.J.S. Insurance § 1459.

38 Am. Jur., Mutual Benefit Societies, p. 451, § 11; p. 525, §§ 115 et seq.

Meaning of phrase "in good standing" employed in contract of mutual benefit association with member. 23 ALR 340.

40-2110. (6314) Funds. Any society may create, maintain, invest, disburse, and apply an emergency, surplus, or other similar fund in accordance with its laws. Unless otherwise provided in the contract, such funds shall be held, invested, and disbursed for the use and benefit of the society, and no member or beneficiary shall have or acquire individual rights therein, or become entitled to any apportionment or the surrender of any part thereof, except as provided in section 40-2106 of this code. The funds from which benefits shall be paid, and the funds from which the expenses of the society shall be defrayed, shall be derived from periodical or other payments by the members of the society, and accretions of said funds; provided, that no society, domestic or foreign, shall hereafter be incorporated or admitted to transact business in this state, which does not provide for stated periodical contributions sufficient to provide for meeting the mortuary obligations contracted, when valued upon the basis of the national fraternal congress table of mortality as adopted by the national fraternal congress, August 23, 1899, or any higher standard, with interest assumption not more than four per cent. per annum, nor write or accept members for temporary or permanent disability benefits except upon tables based upon reliable experience, with an interest assumption not higher than four per cent. per annum.

Deferred payments or instalments of claims shall be considered as fixed liabilities on the happening of the contingency upon which such payments or instalments are thereafter to be paid. Such liability shall be the present value of such future payments or instalments upon the rate of interest and mortality assumed by the society for valuation, and every society shall maintain a fund sufficient to meet such liability, regardless of proposed future collections to meet any such liabilities.

History: En. Sec. 9, Ch. 140, L. 1911; re-en. Sec. 6314, R. C. M. 1921.

Legality in Transferring Part of Surplus

Contention that fraternal mutual benefit society had no right to transfer a part of its surplus accumulated under the assessment plan to a newly created reserve division, held not meritorious, inasmuch as a member does not acquire a severable or proprietary right to any portion of the property as against the society, unless it

be in liquidation. *Willson v. Woodmen Of The World*, 104 M 31, 42, 64 P 2d 1064.

Collateral References

Insurance ⇨ 698.

46 C.J.S. Insurance § 1443.

Limit of liability of member of insurance association. 10 ALR 750.

Set-off of loss under mutual insurance policy against premium or assessment. 31 ALR 1281.

40-2111. (6315) Investments. Every society shall invest its funds only in securities permitted by the laws of this state for the investment of the assets of life insurance companies; provided, that any foreign society

permitted or seeking to do business in this state, which invests its funds in accordance with the laws of the state in which it is incorporated, shall be held to meet the requirements of this act for the investment of funds.

History: En. Sec. 10, Ch. 140, L. 1911;
re-en. Sec. 6315, R. C. M. 1921.

40-2112. (6316) Distribution and use of funds. Every society whose admitted assets are less than the sum of the required reserves and accrued liabilities shall, in every provision of its laws providing for payments by its members, in whatever form made, distinctly state the purpose of the same, and the proportion thereof which may be used for expenses, and no part of the money collected for mortuary or disability purposes by any such society, or the net accretions of either or any of said funds, shall be used for expenses.

History: En. Sec. 11, Ch. 140, L. 1911;
re-en. Sec. 6316, R. C. M. 1921; amd. Sec.
4, Ch. 14, L. 1953.

40-2113. (6317) Organization. Seven or more persons, citizens of the United States, and a majority of whom are citizens of this state, who desire to form a fraternal benefit society, as defined by this act, may make and sign (giving their addresses) and acknowledge, before some officer competent to take acknowledgment of deeds, articles of incorporation, in which shall be stated:

1. The proposed corporate name of the society, which shall not so closely resemble the name of any society or insurance company already transacting business in this state as to mislead the public, or to lead to confusion.

2. The purpose for which it is formed—which shall not include more liberal powers than are granted by this act, provided that any lawful, social, intellectual, educational, charitable, benevolent, moral, or religious advantages may be set forth among the purposes of the society—and the mode in which its corporate powers are to be exercised.

3. The names, residences, and official titles of all the officers, trustees, directors, or other persons who are to have and exercise the general control and management of the affairs and funds of the society for the first year, or until the ensuing election at which all such officers shall be elected by the supreme legislative or governing body, which election shall be held not later than one year from the date of the issuance of the permanent certificate.

Such articles of incorporation and duly certified copies of the constitution and laws, rules, and regulations, and copies of all proposed forms of benefit certificates, applications therefor, and circulars to be issued by such society, and a bond in the sum of five thousand dollars, with sureties approved by the commissioner of insurance, conditioned upon the return of the advanced payments, as provided in this section, to applicants, if the organization is not completed within one year, shall be filed with the commissioner of insurance, who may require such further information as he deems necessary, and if the purposes of the society conform to the requirements of this act, and all provisions of law have been complied with, the commissioner of insurance shall so certify and retain the record

(or file) the articles of incorporation, and furnish the incorporators a preliminary certificate authorizing said society to solicit members as hereinafter provided.

Upon receipt of said certificate from the commissioner of insurance, said society may solicit members for the purpose of completing its organization, and shall collect from each applicant the amount of not less than one regular monthly payment, in accordance with its table of rates as provided by its constitution and laws, and shall issue to each such applicant a receipt for the amount so collected. But no such society shall incur any liability other than for such advanced payments, nor issue any certificate nor pay or allow, or offer or promise to pay or allow, to any person any death or disability benefit until actual bona fide applications for death benefit certificates have been secured upon at least five hundred lives for at least one thousand dollars each, and all such applicants for death benefits shall have been regularly examined by legally qualified practicing physicians, and certificates of such examinations have been duly filed and approved by the chief medical examiner of such society, nor until there shall be established ten subordinate lodges or branches into which said five hundred applicants have been initiated, nor until there has been submitted to the commissioner of insurance, under oath of the president and secretary, or corresponding officers of such society, a list of such applicants, giving their names, addresses, date examined, date approved, date initiated, name and number of the subordinate branch of which each applicant is a member, amount of benefits to be granted, rate of stated periodical contributions, which shall be sufficient to provide for meeting the mortuary obligation contracted, when valued for death benefits upon the basis of the national fraternal congress table of mortality, as adopted by the national fraternal congress August 23, 1899, or any higher standard, at the option of the society, and for disability benefits by tables based upon reliable experience and for combined death and permanent total disability benefits by tables based upon reliable experience, with an interest assumption not higher than four per cent. per annum, nor until it shall be shown to the commissioner of insurance by the sworn statement of the treasurer, or corresponding officer of such society, that at least five hundred applicants have each paid in cash at least one regular monthly payment as herein provided per one thousand dollars of indemnity to be effected, which payments in the aggregate shall amount to at least twenty-five hundred dollars, all of which shall be credited to the mortuary or disability fund on account of such applicants, and no part of which may be used for expenses.

Said advanced payments shall, during the period of organization, be held in trust, and, if the organization is not completed within one year as hereinafter provided, returned to said applicants.

The commissioner of insurance may make such examination and require such further information as he deems advisable, and upon presentation of satisfactory evidence that the society has complied with all the provisions of law, he shall issue to such society a certificate to that effect. Such certificate shall be prima facie evidence of the existence of such society at the date of such certificate. The commissioner of insurance shall cause

a record of such certificate to be made, and a certified copy of such record may be given in evidence with like effect as the original certificate.

No preliminary certificate granted under the provisions of this section shall be valid after one year from its date, or after such further period, not exceeding one year, as may be authorized by the commissioner of insurance, upon cause shown, unless the five hundred applicants herein required have been secured and the organization has been completed as herein provided, and the articles of incorporation and all proceedings thereunder shall become null and void in one year from the date of said preliminary certificate, or at the expiration of said extended period, unless such society shall have completed its organization and commenced business as herein provided. When any domestic society shall have discontinued business for the period of one year, or has less than four hundred members, its charter shall become null and void.

Every such society shall have the power to make a constitution and by-laws for the government of the society, the admission of its members, the management of its affairs, and the fixing and readjusting of the rates of contribution of its members from time to time; and it shall have the power to change, alter, add to, or amend such constitution and by-laws, and shall have such other powers as are necessary and incidental to carrying into effect the objects and purposes of the society.

History: En. Sec. 12, Ch. 140, L. 1911; re-en. Sec. 6317, R. C. M. 1921.

Refusal Upon Change of Plan to Pay Multiple Assessments

Where fraternal mutual insurance society at convention changed from assessment to reserve plan, and beneficiaries of member who refused to join the reserve division or comply with the requirement calling for multiple assessments asserted that the action of the convention was invalid because delegates didn't conform to certain requirements and hence their decedent was not in arrears and improperly suspended, held assertion not well made. *Willson v. Woodmen Of The World*, 104 M 31, 37, 64 P 2d 1064.

Where Change of Plan Justified

Where insurance commissioners in several states advised fraternal insurance society that unless it was placed in a solvent condition and provided for an increase of rates or multiple assessments

authorized under its constitution, it would be denied the right to do business, raising of rates held justified. *Willson v. Woodmen Of The World*, 104 M 31, 43, 64 P 2d 1064.

With What Knowledge Members Chargeable

Member of fraternal society is chargeable with knowledge that failure on his part to pay multiple assessment will result in suspension, under the facts presented. *Willson v. Woodman Of The World*, 104 M 31, 39, 64 P 2d 1064.

Collateral References

Insurance—692.

46 C.J.S. Insurance § 1437.

38 Am. Jur. 449, Mutual Benefit Societies, §§ 8 et seq.

Person to whom payment of insurance premium may be made or tendered so as to charge insurer. 85 ALR 749, 759.

40-2114. (6318) Powers retained—reincorporation—amendments. Any society now engaged in transacting business in this state may exercise, after the passage of this act, all of the rights conferred thereby, and all of the rights, powers, and privileges now exercised or possessed by it under its charter or articles of incorporation, not inconsistent with this act, if incorporated; or, if it be a voluntary association, it may incorporate hereunder. But no society already organized shall be required to reincorporate hereunder, and any such society may amend its articles of incorporation from time to time in the manner provided therein, or in its

constitution and laws, and all such amendments shall be filed with the commissioner of insurance and shall become operative upon such filing, unless a later time be provided in such amendments, or in its articles of incorporation, constitution, or laws.

History: En. Sec. 13, Ch. 140, L. 1911;
re-en. Sec. 6318, R. C. M. 1921.

40-2115. (6319) Mergers and transfers. No domestic society shall merge with or accept the transfer of the membership or funds of any other society, unless such merger or transfer is evidenced by a contract in writing, setting out in full the terms and conditions of such merger or transfer, and filed with the commissioner of insurance of this state, together with a sworn statement of the financial condition of each of said societies, by its president and secretary, or corresponding officers, and a certificate of such officers, duly verified under oath of said officers of each of the contracting societies, that such merger or transfer has been approved by a vote of two-thirds of the members of the supreme legislative or governing body of each of said societies.

Upon the submission of said contract, financial statements, and certificates, the commissioner of insurance shall examine the same, and, if he shall find such financial statements to be correct, and the said contract to be in conformity with the provisions of this section, and that such merger or transfer is just and equitable to the members of each of said societies, he shall approve said merger or transfer, issue his certificate to that effect, and thereupon the said contract of merger or transfer shall be of full force and effect.

In case such contract is not approved, the fact of its submission and its contents shall not be disclosed by the commissioner of insurance.

History: En. Sec. 14, Ch. 140, L. 1911;
re-en. Sec. 6319, R. C. M. 1921.

Collateral References

38 Am. Jur. 450, Mutual Benefit Societies, § 9.

40-2116. (6320) Annual license. Societies which are now authorized to transact business in this state may continue such business until the first day of April next succeeding the passage of this act, and the authority of such societies may thereafter be renewed annually, but in all cases to terminate on the first day of the succeeding April; provided, however, the license shall continue in full force and effect until the new license be issued or specifically refused. For each such license or renewal the society shall pay the commissioner of insurance ten dollars. A duly certified copy or duplicate of such license shall be prima facie evidence that the licensee is a fraternal benefit society within the meaning of this act.

History: En. Sec. 15, Ch. 140, L. 1911;
re-en. Sec. 6320, R. C. M. 1921.

40-2117. (6321) Admission of foreign society. No foreign society now transacting business, organized prior to the passage of this act, which is not now authorized to transact business in this state, shall transact any business herein without a license from the commissioner of insurance. Any such society shall be entitled to a license to transact business within this state, upon filing with the commissioner a duly certified copy of its charter or articles of association; a copy of its constitution and laws, certified by

its secretary or corresponding officer; a power of attorney to the commissioner as hereinafter provided; a statement of its business under oath of its president and secretary or corresponding officers, in the form required by the commissioner, duly verified by an examination made by the supervising insurance official of its home state, or other state satisfactory to the commissioner of insurance of this state; a certificate from the proper official in its home state, province, or country that the society is legally organized; a copy of its contract, which must show that benefits are provided for by periodical or other payments by persons holding similar contracts, and upon furnishing the commissioner such other information as he may deem necessary to a proper exhibit of its business and plan of working, and upon showing that its assets are invested in accordance with the laws of the state, territory, district, province, or country where it is organized, he shall issue a license to such society to do business in this state until the first day of the succeeding April, and such license shall, upon compliance with the provisions of this act, be renewed annually, but in all cases to terminate on the first day of the succeeding April; provided, however, that license shall continue in full force and effect until the new license be issued or specifically refused.

Any foreign society desiring admission to this state shall have the qualifications required of domestic societies organized under this act, and have its assets invested as required by the laws of this state, territory, district, country, or province where it is organized. For each such license or renewal the society shall pay the commissioner ten dollars. When the commissioner refuses to license any society, or revokes its authority to do business in this state, he shall reduce his ruling, order, or decision to writing, and file the same in his office, and shall furnish a copy thereof, together with a statement of his reasons, to the officers of the society, upon request, and the action of the commissioner shall be reviewable by proper proceedings in any court of competent jurisdiction within the state; provided, however, that nothing contained in this or the preceding section shall be taken or construed as preventing any such society from continuing in good faith all contracts made in this state during the time such society was legally authorized to transact business herein.

History: En. Sec. 16, Ch. 140, L. 1911;
re-en. Sec. 6321, R. C. M. 1921.

Decision of Court of Domicile Binding Elsewhere

The decision of the supreme court of the state of the domicile of a fraternal benefit association that the association had a right under its constitution and by-laws to increase its rates and provide for multiple assessments, is binding upon citizens of other states who were members of the association. *Willson v. Woodmen Of The World*, 104 M 31, 40, 64 P 2d 1064.

Collateral References

Insurance 690.

46 C.J.S. Insurance § 1436.

See generally, 23 Am. Jur. 1, Foreign Corporations.

Personal liability of agent in respect of policies of foreign insurance companies not authorized to do business in the state. 131 ALR 1079.

What constitutes doing business within state by foreign insurance corporation. 137 ALR 1128.

40-2118. (6322) Power of attorney and service of process. Every society, whether domestic or foreign, now transacting business in this state, shall within thirty days after the passage of this act, and every such society hereafter applying for admission, shall, before being licensed, appoint in

writing the commissioner of insurance and his successors in office to be its true and lawful attorney, upon whom all legal process in any action or proceeding against it shall be served, and in such writing shall agree that any lawful process against it which is served upon such attorney shall be of the same legal force and validity as if served upon the society, and that the authority shall continue in force so long as any liability remains outstanding in this state.

Copies of such appointment, certified by said commissioner of insurance, shall be deemed sufficient evidence thereof, and shall be admitted in evidence with the same force and effect as the original thereof might be admitted. Service shall only be made upon such attorney, must be made in duplicate upon the commissioner of insurance, or, in his absence, upon the person in charge of his office, and shall be deemed sufficient service upon such society; provided, however, that in all cases where service is made upon the commissioner of insurance, as herein provided, the defendant shall have twenty days from the date of such service in which to file its answer or other appearance in the case. When legal process against any such society is served upon said commissioner of insurance, he shall forthwith forward by registered mail one of the duplicate copies prepaid and directed to its secretary or corresponding officer. For each copy of process the commissioner of insurance shall collect the sum of two dollars, which shall be paid by the plaintiff at the time of such service, the same to be recovered by him as part of taxable costs if he prevails in the suit. Legal process shall not be served upon any such society except in the manner provided herein.

History: En. Sec. 17, Ch. 140, L. 1911; amd. Sec. 1, Ch. 214, L. 1919; re-en. Sec. 6322, R. C. M. 1921.

Operation and Effect

Under this section, foreign mutual benefit associations may be sued in the courts of Montana; the object of the section in requiring the appointment of an agent in the state upon whom service of process may be made is to provide for the collection of debts due from them to its citizens and to enforce the contracts made in the

state through their agents. *Reed v. Woodmen Of The World*, 94 M 374, 383, 22 P 2d 819.

Collateral References

Insurance—814.

46 C.J.S. Insurance § 1626.

Who, other than public official, may be served with process in action against foreign corporation doing business in state. 113 ALR 9, 100.

40-2119. (6323) Place of meeting—location of office. Any domestic society may provide that the meetings of its legislative or governing body may be held in any state, district, province, or territory wherein such society has subordinate branches, and all business transacted at such meetings shall be as valid in all respects as if such meetings were held in this state. But its principal office shall be located in this state.

History: En. Sec. 18, Ch. 140, L. 1911; re-en. Sec. 6323, R. C. M. 1921.

Collateral References

Insurance—693.

46 C.J.S. Insurance § 1438.

40-2120. (6324) No personal liability. Officers and members of the supreme, grand, or any subordinate body of any such incorporated society shall not be individually liable for the payment of any disability or death benefit provided for in the laws and agreements of such society, but the

same shall be payable only out of the funds of such society, and in the manner provided by its laws.

History: En. Sec. 19, Ch. 140, L. 1911;
re-en. Sec. 6324, R. C. M. 1921.

Collateral References

Insurance—798.
46 C.J.S. Insurance § 1600.

40-2121. (6325) Waiver of the provisions of the laws. The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members, shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society, and each and every member thereof, and on all beneficiaries of members.

History: En. Sec. 20, Ch. 140, L. 1911;
re-en. Sec. 6325, R. C. M. 1921.

Collateral References

Insurance—693.
46 C.J.S. Insurance § 1438.

40-2122. (6326) Benefits not attachable. No money or other benefit, charity, or relief or aid to be paid, provided, or rendered by any such society, shall be liable to attachment, garnishment, or other process, or be seized, taken, appropriated, or applied by any legal or equitable process or operation of law to pay any debt or liability of a member or beneficiary, or any other person who may have a right thereunder, either before or after payment.

History: En. Sec. 21, Ch. 140, L. 1911;
re-en. Sec. 6326, R. C. M. 1921.

35 C.J.S. Exemptions § 39; 46 C.J.S. Insurance § 1597.

Collateral References

Exemptions—50; Insurance—797.

Constitutionality of statute exempting proceeds of life or benefit insurance. 1 ALR 757.

40-2123. (6327) Constitution and laws—amendment. Every society transacting business under this act shall file with the commissioner of insurance a duly certified copy of all amendments of or additions to its constitution and laws, within ninety days after the enactment of the same. Printed copies of the constitution and laws as amended, changed, or added to, certified by the secretary or corresponding officer of the society, shall be prima facie evidence of the legal adoption thereof.

History: En. Sec. 22, Ch. 140, L. 1911;
re-en. Sec. 6327, R. C. M. 1921.

Collateral References

Insurance—693.
46 C.J.S. Insurance § 1438.

40-2124. (6328) Annual reports. (1) Every society transacting business in this state shall annually, on or before the first day of March, file with the commissioner of insurance, in such form as he may require, a statement under oath of its president and secretary or corresponding officers of its condition and standing on the thirty-first day of December next preceding, and of its transactions for the year ending on that date, and also shall furnish such other information as the commissioner may deem necessary to a proper exhibit of its business and plan of working. The commissioner may at other times require any further statement he may deem necessary to be made relating to such society.

(2) In addition to the annual report herein required, each society shall annually report to the commissioner a valuation of its certificates in force on December 31st, last preceding, excluding those issued within the year

for which the report is filed, in cases where the contributions for the first year in whole or in part are used for current mortality and expenses; provided the first report of valuation shall be made as of December 31, 1912. Such report of valuation shall show, as contingent liabilities, the present mid-year value of the promised benefits provided in the constitution and laws of such society under certificates then subject to valuation; and, as contingent assets, the present mid-year value of the future net contributions provided in the constitution and laws as the same are in practice actually collected. At the option of any society, in lieu of the above, the valuation may show the net value of the certificates subject to valuation hereinbefore provided, and said net value, when computed in case of monthly contributions, may be the mean of the terminal values for the end of the preceding and of the current insurance years.

(3) Such valuation shall be certified by a competent accountant or actuary, or at the request and expense of the society, verified by the actuary of the department of insurance of the home state of the society, and shall be filed with the commissioner within ninety days after the submission of the last preceding annual report. The legal minimum standard of valuation for all certificates, except for disability benefits, shall be the national fraternal congress table of mortality as adopted by the national fraternal congress August 23, 1899, or, at the option of the society, any higher table, or, at its option, it may use a table based upon the society's own experience of at least twenty years, and covering not more than four per centum per annum. Each such valuation report shall set forth clearly and fully the mortality and interest basis, and the method of valuation. Any society providing for disability benefits shall keep the net contributions for such benefits in a fund separate and apart from all other benefit and expense funds, and the valuation of all other business of the society; provided, that where a combined contribution table is used by a society for both death and permanent total disability benefits, the valuation shall be according to tables of reliable experience, and in such a case a separation of the funds shall not be required.

The valuation herein provided for shall not be considered or regarded as a test of the financial solvency of the society, but each society shall be held to be legally solvent so long as the funds in its possession are equal to or in excess of its matured liabilities.

(4) Beginning with the year 1914, a report of such valuation and an explanation of the facts concerning the condition of the society thereby disclosed shall be printed and mailed to each beneficiary member of the society not later than June 1st of each year, or in lieu thereof, such report of valuation and showing of the society's condition as thereby disclosed may be published in the society's official paper, and the issue containing the same mailed to each beneficiary member of the society. The laws of such society shall provide that if the stated periodical contributions of the members are insufficient to pay all matured death and disability claims in full and to provide for the creation and maintenance of the funds required by its laws, additional, increased, or extra rates of contribution shall be collected from the members to meet such deficiency, and such laws may provide that, upon the written application or consent of the member,

his certificate may be charged with its proportion of any deficiency disclosed by valuation, with interest not exceeding five per centum per annum.

History: En. Sec. 23, Ch. 140, L. 1911;
re-en. Sec. 6328, R. C. M. 1921.

40-2125. (6329) Provisions to insure future security. If the valuation of the certificates, as hereinbefore provided, on December 31, 1917, shall show that the present value of future net contributions, together with the admitted assets, is less than the present value of the promised benefits and accrued liabilities, such society shall thereafter maintain said financial condition at each succeeding triennial valuation in respect of the degree of deficiency as shown in the valuation as of December 31, 1917. If at any succeeding triennial valuation such society does not show at least the same condition, the commissioner of insurance shall direct that it thereafter comply with the requirements herein specified. If the next succeeding triennial valuation after the receipt of such notice shall show that the society has failed to maintain the condition required herein, the commissioner of insurance may, in the absence of good cause shown for such failure, institute proceedings for the dissolution of such society, in accordance with the provisions of section 40-2127, or in the case of a foreign society, its license may be canceled in the manner provided in this act. Any such society, shown by any triennial valuation, subsequent to December 31, 1917, not to have maintained the condition herein required, shall, within two years thereafter, make such improvements as to show a percentage of deficiency not greater than as of December 31, 1917, or thereafter, as to all new members admitted, be subject, so far as stated rates of contributions are concerned, to the provisions of section 40-2113, applicable in the organization of new societies; provided, that the net mortuary or beneficiary contributions and funds of such new members shall be kept separate and apart from the other funds of the society. If such required improvement is not shown by the succeeding triennial valuation, then the said new members may be placed in a separate class, and their certificates valued as an independent society in respect of contributions and funds.

History: En. Sec. 23A, Ch. 140, L. 1911;
amd. Sec. 1, Ch. 164, L. 1917; re-en. Sec.
6329, R. C. M. 1921.

Collateral References
Insurance 691.
46 C.J.S. Insurance § 1436.

40-2126. (6330) Basis for valuation of certificates, etc. (1) In lieu of the requirements of the two preceding sections, any society accepting in its laws the provisions of this section may value its certificates on a basis, herein designated "accumulation basis," by crediting each member with the net amount contributed for each year, and with interest at approximately the net rate earned, and by charging him with his share of the losses of each year, herein designated "cost of insurance," and carrying the balance, if any, to his credit. The charge for the cost of insurance may be according to the actual experience of the society applied to a table of mortality recognized by the law of this state, and shall take into consideration the amount at risk during each year, which shall be the amount payable at death less the credit to the member. Except as specifically provided in its articles or laws or contracts, no charge shall be carried

forward from the first valuation hereunder against any member for any past share of losses exceeding the contributions and credit.

(2) If, after the first valuation, any member's share of losses for any year exceeds his credit, including contribution for the year, the contribution shall be increased to cover his share of the losses, and if the credit at the time any benefit becomes payable during the lifetime of the member, including any available funds, does not equal such benefit, the contributions to be made by him or on his behalf shall be increased by the difference. Any such excess share of losses chargeable to any member may be paid out of a fund or contributions especially created or required for such purpose.

(3) Any member may transfer to any plan adopted by the society with net rates on which tabular reserves are maintained, and on such transfer shall be entitled to make such application of his credit as provided in the laws of the society. Certificates issued, rerated, or readjusted on a basis providing for adequate rates with adequate reserves to mature such certificates upon assumptions for mortality and interest, recognized by the law of this state, shall be valued on such basis, herein designated the "tabular basis"; provided, that if on the first valuation under this section a deficiency in reserve shall be shown for any such certificate, the same shall be valued on the accumulation basis. Whenever in any society having members upon the tabular basis and upon the accumulation basis, the total of all costs of insurance provided for any year shall be insufficient to meet the actual death and disability losses for the year, the deficiency shall be met for the year from the available funds after setting aside all credits in the reserve; or from increased contributions, or by an increase in the number of assessments applied to the society as a whole, or to classes of members as may be specified in its laws. Savings from a lower amount of death losses may be returned in like manner as may be specified in its laws. If the laws of the society so provide, the assets representing the reserves of any separate class of members may be carried separately for such class as if an independent society, and the required reserve accumulation of such class, so set apart, shall not thereafter be mingled with the assets of other classes of a society.

(4) A table showing the rates being paid by and the credits to individual members at each age and year of entry, and showing opposite each credit the tabular rates and the tabular reserve required, or, at the option of the society, the required reserve on a level rate equivalent to that being paid, according to assumptions for mortality and interest recognized by the laws of this state, and adopted by the society, and, in either case, including any benefit payable at a specified age or on account of old age disability, shall be filed by the society with each annual report, and also be furnished to each member before July 1st of each year. In lieu of the aforesaid statement there may be furnished to each member, within the same time, a statement giving the data aforesaid for such member. No table or statement need be made or furnished when the reserves are maintained on the tabular basis. For this purpose, individual bookkeeping accounts for each member shall not be required, and all calculations may be made by actuarial methods. Nothing herein contained shall prevent

the maintenance of such surplus over and above the credits on the accumulation basis and the reserves on the tabular basis, as the society may provide by or pursuant to its laws; not to be construed as giving to the individual member any right or claim to any such reserve or credit other than in manner as expressed in the contract and its laws; nor as making any such reserve or credits a liability in determining the legal solvency of the society.

History: En. Sec. 2, Ch. 164, L. 1917;
re-en. Sec. 6330, R. C. M. 1921.

Collateral References

Insurance 691.
46 C.J.S. Insurance § 1436.

40-2127. (6331) Examination of domestic societies. The commissioner of insurance, or any person he may appoint, shall have the power of visitation and examination into the affairs of any domestic society. He may employ assistants for the purpose of such examination, and he, or any person he may appoint, shall have free access to all the books, papers, and documents that relate to the business of the society, and may summon and qualify as witness under oath and examine its officers, agents, and employees or other persons in relation to the affairs, transactions, and condition of the society.

The expense of such examination shall be paid by the society examined, upon statement furnished by the commissioner of insurance, and the examination shall be made at least once in three years.

Whenever after examination the commissioner of insurance is satisfied that any domestic society has failed to comply with any provisions of this act, or is exceeding its powers, or is not carrying out its contracts in good faith, or is transacting business fraudulently, or whenever any domestic society, after the existence of any one year or more, shall have a membership of less than four hundred (or shall determine to discontinue business), the commissioner of insurance may present the facts relating thereto to the attorney-general, who shall, if he deem that circumstances warrant it, commence an action in quo warranto in a court of competent jurisdiction, and such court shall thereupon notify the officers of such society of a hearing, and if it shall then appear that such society should be closed, said society shall be enjoined from carrying on any further business, and some person shall be appointed receiver of such society, and shall proceed at once to take possession of the books, papers, moneys, and other assets of the society, and shall forthwith, under the direction of the court, proceed to close the affairs of the society and to distribute its funds to those entitled thereto.

No such proceedings shall be commenced by the attorney-general against any such society until after notice has been duly served on the chief executive officers of the society, and a reasonable opportunity given to it, on a date to be named in said notice, to show cause why such proceedings should not be commenced.

History: En. Sec. 24, Ch. 140, L. 1911;
re-en. Sec. 6331, R. C. M. 1921.

Collateral References

Insurance 691.
46 C.J.S. Insurance § 1436.

40-2128. (6332) Application for receiver, etc. No application for injunction against, or proceedings for the dissolution of, or the appoint-

ment of a receiver for any such domestic society or branch thereof, shall be entertained by any court in this state unless the same is made by the attorney-general.

History: En. Sec. 25, Ch. 140, L. 1911;
re-en. Sec. 6332, R. C. M. 1921.

Collateral References

Insurance 708.

46 C.J.S. Insurance § 1450.

40-2129. (6333) Examination of foreign societies. The commissioner of insurance, or any person whom he may appoint, may examine any foreign society transacting or applying for admission to transact business in this state. The said commissioner may employ assistants, and he, or any person he may appoint, shall have free access to all the books, papers, and documents that relate to the business of the society, and may summon and qualify as witness under oath and examine its officers, agents, and employees and other persons in relation to the affairs, transactions, and condition of the society. He may, in his discretion, accept in lieu of such examination the examination of the insurance department of the state, territory, district, province, or country where such society is organized. The actual expenses of examiners making any such examination shall be paid by the society upon statement furnished by the commissioner of insurance.

If any such society or its officers refuse to submit to such examination, or to comply with the provisions of the section relative thereto, the authority of such society to write new business in this state shall be suspended or license refused until satisfactory evidence is furnished the commissioner relating to the condition and affairs of the society, and during such suspension the society shall not write new business in this state.

History: En. Sec. 26, Ch. 140, L. 1911;
re-en. Sec. 6333, R. C. M. 1921.

40-2130. (6334) No adverse publication. Pending, during, or after an examination or investigation of any such society, either domestic or foreign, the commissioner of insurance shall make public no financial statement, report, or finding, nor shall he permit to become public any financial statement, report, or finding, affecting the status, standing, or rights of any such society, until a copy thereof shall have been served upon such society, at its home office, nor until such society shall have been afforded a reasonable opportunity to answer any such financial statement, report, or finding, and to make such showing in connection therewith as it may desire.

History: En. Sec. 27, Ch. 140, L. 1911;
re-en. Sec. 6334, R. C. M. 1921.

40-2131. (6335) Revocation of license. When the commissioner of insurance on investigation is satisfied that any foreign society transacting business under this act has exceeded its powers, or has failed to comply with any provision of this act, or is conducting business fraudulently, or is not carrying out its contracts in good faith, he shall notify the society of his findings, and state in writing the grounds of his dissatisfaction, and after reasonable notice require said society, on a date named, to show cause why its license should not be revoked. If, on the date named in said notice, such objections have not been removed to the satisfaction of the

said commissioner, or the society does not present good and sufficient reasons why its authority to transact business in this state should not at that time be revoked, he may revoke the authority of the society to continue business in this state. All decisions and findings of the commissioner made under the provisions of this section may be reviewed by proper proceedings in any court of competent jurisdiction, as provided in section 40-2117.

History: En. Sec. 28, Ch. 140, L. 1911;
re-en. Sec. 6335, R. C. M. 1921.

40-2132. (6336) Exemption of certain societies. Nothing contained in this act shall be construed to affect or apply to grand or subordinate lodges of Masons, Odd Fellows, or Knights of Pythias (exclusive of the insurance department of the supreme lodge Knights of Pythias), and the Junior Order of the United American Mechanics (exclusive of the beneficiary degree or insurance branch of the national council Junior Order of the United American Mechanics), or societies which admit to membership only persons engaged in one (1) or more hazardous occupations, in the same or similar lines of business; nor to similar societies which do not issue insurance certificates; nor to an association of local lodges of a society now doing business in this state which provided death benefits not to exceed three hundred dollars (\$300.00) to any one (1) person, or disability benefits not exceeding three hundred dollars (\$300.00) in any one (1) year to any one (1) person, or both; nor to any contracts of reinsurance business on such plan in this state; nor to domestic societies which limit their membership to the employees of a particular city or town, designated firm, business house, or corporation; nor to domestic lodges, orders, or associations of a purely religious, charitable, benevolent description, which do not provide for a death benefit of more than one hundred dollars (\$100.00) or for disability benefits of more than one hundred and fifty dollars (\$150.00) to any one (1) person in any one (1) year; provided always, that any such domestic order or society which has more than five hundred (500) members, and provides for death or disability benefits, and any such domestic lodge, order, or society which issues to any person a certificate providing for the payments of benefits, shall not be exempt by the provisions of this section, but shall comply with all the requirements of this act. The commissioner of insurance may require from any society such information as will enable him to determine whether such society is exempt from the provisions of this act.

No society, which is exempt by the provisions of this section from the requirements of this act, shall give, or allow to promise to give or allow, to any person any compensation for procuring new members.

Any fraternal benefit society heretofore organized and incorporated, and operating within the definition set forth in sections 40-2101 to 40-2103, providing for benefits in case of death or disability resulting solely from accidents, but which does not obligate itself to pay death or sick benefits, may be licensed under the provisions of this act, and shall have all the privileges and shall be subject to all the provisions and regulations of this act, except that the provisions of this act requiring medical examina-

tions, valuations of benefit certificates, and that the certificate shall specify the amount of benefits, shall not apply to such society.

History: En. Sec. 29, Ch. 140, L. 1911;
re-en. Sec. 6336, R. C. M. 1921; amd. Sec.
1, Ch. 61, L. 1931.

Collateral References

Insurance⌘688.
46 C.J.S. Insurance § 1436.

40-2133. (6337) Taxation. Every fraternal benefit society organized or licensed under this act is hereby declared to be a charitable and benevolent institution, and all of its funds shall be exempt from all and every state, county, district, municipal, and school tax, other than taxes on real estate and office equipment.

History: En. Sec. 30, Ch. 140, L. 1911;
re-en. Sec. 6337, R. C. M. 1921.

84 C.J.S. Taxation § 294.

Collateral References

Taxation⌘241(3).

Exemption from taxation of property of
fraternal or relief association. 22 ALR 907.

40-2134. (6338) Penalties. Any person, officer, member, or examining physician of any society authorized to do business under this act, who shall knowingly or wilfully make any false or fraudulent statement or representation in or with reference to any application for membership, or for the purpose of obtaining money from or benefit in any society transacting business under this act, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars, nor more than five hundred dollars, or imprisonment in the county jail for not less than thirty days, nor more than one year, or both, in the discretion of the court; and any person who shall wilfully make a false statement of any material fact or thing in a sworn statement as to the death or disability of a certificate-holder in any such society, for the purpose of procuring payment of a benefit named in the certificate of such holder, and any person who shall wilfully make any false statement in any verified report or declaration under oath required or authorized by this act, shall be guilty of perjury, and shall be proceeded against and punished as provided by the statutes of this state in relation to the crime of perjury.

Any person who shall solicit membership for, or in any manner assist in procuring membership in any fraternal benefit society not licensed to do business in this state, or who shall solicit membership for, or in any manner assist in procuring membership in any such society, not authorized, as herein provided, to do business as herein defined in this state, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than fifty nor more than two hundred dollars.

Any society, or any officer, agent, or employee thereof neglecting or refusing to comply with, or violating any of the provisions of this act, the penalty for which neglect, refusal, or violation is not specified in this section, shall be fined not exceeding two hundred dollars upon conviction thereof.

History: En. Sec. 31, Ch. 140, L. 1911;
re-en. Sec. 6338, R. C. M. 1921.

Collateral References

Insurance⌘689.
46 C.J.S. Insurance § 1436.

40-2135. Benefits on lives of children. Every fraternal benefit society authorized to do business in this state may provide in its constitution or by-laws, in addition to other benefits provided for therein, for term, life,

endowment and annuity benefits, and combinations thereof, on the lives of children under twenty-one years of age at time of application therefor, upon the application of some adult person, as the by-laws, rules, or regulations may provide. Every such society may, at its option, organize and operate branches for such children, and membership in local lodges, and initiation therein shall not be required of such children nor shall they have a voice in the management of the society.

History: En. Sec. 1, Ch. 97, L. 1945.

40-2136. Contributions based upon standard mortality tables. The contributions to be made for death benefits under all juvenile certificates or contracts issued after December thirty-first, nineteen hundred forty-five, shall be based upon the 1941 standard industrial mortality table and interest at not more than three and one-half per cent per annum, or the American experience table of mortality with Craig's or Buttolph's extension thereof, with interest assumption of not more than four per cent per annum, or the American men ultimate table of mortality with Bowerman's extension thereof, and interest at three and one-half per cent per annum, or upon any other standard approved by the commissioner of insurance.

History: En. Sec. 2, Ch. 97, L. 1945.

40-2137. Reserve required. Every society issuing such benefit certificates or contracts shall maintain on all such certificates or contracts not less than the reserve required by the standard of mortality and interest adopted by the society for computing contributions.

History: En. Sec. 3, Ch. 97, L. 1945.

40-2138. Powers of societies. Every society issuing such benefit certificates or contracts shall have the right to provide in its by-laws, rules or regulations, for payments on account of the society's expense or general fund, which payments may be mingled with the general fund of the society. Such society shall have full power to provide for means of enforcing payment of contribution, designations of beneficiaries, and changing such designations, and in all other respects for the regulation, government and control of such certificates and all rights, obligations and liabilities incident thereto and connected therewith.

History: En. Sec. 4, Ch. 97, L. 1945.

CHAPTER 22

BENEVOLENT ASSOCIATIONS—REGULATION BY INSURANCE COMMISSIONER

- Section 40-2201. Purpose.
 40-2202. Definition of terms.
 40-2203. Procedure for obtaining certificate of authority.
 40-2204. Power of commissioner in regard to certificate of authority.
 40-2205. Power of attorney to accept process.
 40-2206. Assessment notification procedure.
 40-2207. Annual statement.
 40-2208. Officers and agents.
 40-2209. Approval of contract forms.
 40-2210. Foreign corporations.
 40-2211. Judicial review.
 40-2212. Companies exempt.

40-2201. Purpose. The purposes of this act are:

(1) To establish and maintain the supervision and authority of the insurance commissioner over the business and activities of those associations hereinafter described, commonly known as "benevolent associations."

(2) To prohibit unbridled and unregulated activities of the said associations for the better protection of the members and beneficiaries of the said associations, and the public.

(3) To permit and authorize the said associations upon compliance with the provisions of this act to operate their business in the state of Montana under the jurisdiction of the insurance commissioner.

(4) To extend the jurisdiction of the insurance commissioner to the officers and agents of the said associations.

History: En. Sec. 1, Ch. 153, L. 1945.

40-2202. Definition of terms. "Benevolent associations." Any corporation, association, or society, or by whatever name called, which issues any certificate, policy, membership agreement, or makes any promise or agreement with its members, whereby, upon decease of a member, any money or other benefit, charity, aid, or relief is to be paid, provided or rendered by such corporation, association, or society to his legal representatives, or to the beneficiary designated by him, which money, benefit, charity, aid or relief is derived from voluntary donations, or from admission fees, dues, or assessments, or any of them collected or to be collected from the members thereof, or members of a class therein, or interest or accretions thereon, or accumulations thereof; and wherein the money or other benefit, charity, aid or relief, so realized, is applied to or accumulated for the uses and purposes herein specified, and/or the uses of such corporation, association or society, and/or the expenses of management and prosecution of its business, shall be deemed to be a "benevolent association" for the purposes of this act.

"Member." For the purposes of this act, a "member" or "member in good standing" shall be taken to be the person who must contribute upon notice of assessment. There shall be one contributing member for each membership contract, but a membership contract may cover more than one person.

"Commissioner" or "commissioner of insurance," for the purposes of this act, shall mean the state auditor and ex officio insurance commissioner of the state of Montana.

"Membership contract" shall mean any certificate, policy, membership agreement, or by whatever name called, or any promise of agreement of the benevolent association with any or all of its members, whereby any money or other benefit, charity, aid, or relief is to be paid, provided, or rendered by such benevolent association upon the decease of a member to his legal representatives, or to the beneficiary or beneficiaries designated by him.

"Officer" as used in this act shall be taken to mean any of those persons having supervision and control of the benevolent association, and who engage in the management and the prosecution of the business thereof,

whether they are designated as officers, trustees, comptrollers, managers, or by whatever name called.

History: En. Sec. 2, Ch. 153, L. 1945.

40-2203. Procedure for obtaining certificate of authority. (a) Each benevolent association now existing or hereafter existing shall first procure a certificate of authority to transact such business by filing a written application with the insurance commissioner on a form to be provided by the commissioner. Such application shall show that the benevolent association has two hundred (200) or more applications for membership contracts; or in the case of benevolent associations now existing, such application shall show that the benevolent association has two hundred (200) members in good standing. In each case a list of the names and addresses of the members or applicants shall accompany each application for license to do business under this act. The application shall also contain the name and business address of the benevolent association and the names and addresses of the officers of such benevolent association, not exceeding five (5) in number; the total number of applicants or members of the association, and the number and totals of the sub-groups or classes, if any, of the membership of the benevolent association. The application for license shall also be accompanied by a financial statement in the case of a benevolent association already existing. There shall also be presented at the same time as the application, forms of membership contracts now in use, or to be used, a certified copy of the articles of incorporation, if incorporated, and its by-laws, and, if not incorporated, its articles of association or articles of agreement, and its rules and agreements with members.

(b) The commissioner shall have the power to enter the office and examine the books, papers, documents, and any and all matters pertinent to the application presented by such benevolent association.

(c) Upon determination by the commissioner that the requirements of this act are complied with, certificate of authority shall be issued to the benevolent association by the commissioner, to transact such business as in this act herein provided. Each such certificate so issued shall expire on the thirty-first day of March of each year. For each such certificate so issued, and for each renewal thereof, the commissioner shall charge a fee of twenty-five dollars (\$25.00).

History: En. Sec. 3, Ch. 153, L. 1945.

40-2204. Power of commissioner in regard to certificate of authority.

(a) The commissioner shall have the power to refuse to issue a certificate of authority to a benevolent association, if such benevolent association has failed to meet the requirements herein provided.

(b) The commissioner shall have the power to suspend or revoke a certificate of authority of a benevolent association, or to refuse to renew a certificate of authority to a benevolent association. Before revoking or suspending or refusing to renew such license, he shall set a hearing at which the benevolent association may attend and show cause why such action shall not be taken. The benevolent association shall be given notice by registered mail, prepaid, thirty (30) days in advance of such hearing.

At the expiration of the thirty (30) days, if the benevolent association does not appear, or upon hearing duly had, the commissioner may enter his order suspending or revoking or refusing to renew such license.

(c) Every corporation, association, society, or by whatever name called, which shall engage in the business of a benevolent association, must operate under a certificate of authority under this act, and any person or persons, agents, trustees, managers, comptrollers, officers, or by whatever name called, shall cause to be issued or procured, received, or forwarded, any membership contract, or shall collect any dues, assessments, contributions, or by whatever name called in the name of such unlicensed benevolent association shall upon conviction be deemed guilty of felony.

History: En. Sec. 4, Ch. 153, L. 1945.

40-2205. Power of attorney to accept process. (a) At the time of making application for license under this act, each benevolent association shall appoint, in writing, the commissioner of insurance and his successors in office to be its true and lawful attorney, upon whom true and legal process may be served in any action or proceeding against it, and in such writing shall agree that any lawful process against it which is served upon such attorney shall be of the same legal force and validity as if served upon such association, and that the authority shall continue in force so long as any liability remains outstanding in the state.

Copies of such appointment, certified by said commissioner of insurance shall be deemed sufficient evidence thereof, and shall be admitted in evidence with the same force and effect as if the original thereof were admitted. Such service must be made upon the commissioner of insurance, or in his absence, upon the person in charge of his office, by delivering to him two (2) copies of the summons and complaint, or other service, and shall be deemed sufficient service upon such association; provided, that in all cases where service is made upon the commissioner of insurance, as herein provided, the defendant shall have twenty (20) days from the date of such service in which to file its answer or other appearance in the case. When legal process against any such benevolent association is served upon said commissioner, he shall forthwith forward by registered mail one (1) copy of the summons and complaint, or other service, postage prepaid, and directed to such association, at the last known address of such association. For each copy of process the commissioner shall collect one dollar (\$1.00), which shall be paid by the plaintiff at the time of service, the same to be recovered by him as part of the taxable costs, if he prevails in the suit.

(b) Nothing herein contained shall be deemed to prevent a plaintiff in any action against a benevolent association, authorized by this act to do business in this state, from proceeding in service of process in the usual manner as provided by law.

(c) The sale by any benevolent association, whether qualified to do business within the state of Montana under this act, or not, of any certificate, policy, or membership agreement, whereby said association promises upon the decease of a member to pay any money or other benefit, shall be deemed equivalent to an appointment by such association of the commissioner of insurance, or his successors in office, to be its true and lawful attorney, upon whom may be served all lawful process in any action or

proceeding against said association growing out of the sale of such certificate, policy, or membership agreement.

History: En. Sec. 5, Ch. 153, L. 1945.

40-2206. Assessment notification procedure. Death notice must be mailed to each member in good standing within thirty (30) days of receipt of completed proof of claim for death of a member, stating the expiration date of assessment payment, and giving the name, date, and place of death of deceased member. Each death claim shall be assigned a number, which numbers shall be consecutive for each calendar year, and each assessment notice shall show the death number to which it applies. Each assessment notice shall show the number of members in good standing to whom such notices are being sent, which number shall be computed from the last completed assessment. One such assessment notice shall be sent to the office of the commissioner for filing at the time of each mailing, which notice shall be duplicate in form and information to the notice being sent to the members in good standing. Payment in full on final settlement of death benefits shall be paid by the benevolent association to the legal heir or heirs, or the designated beneficiary or beneficiaries, within twenty (20) days after the expiration date stated on such assessment notice sent to the members in good standing.

History: En. Sec. 6, Ch. 153, L. 1945;
amd. Sec. 1, Ch. 156, L. 1947.

40-2207. Annual statement. (a) It shall be the duty of the officers of each benevolent association incorporated under the laws of this state, or if not incorporated, doing business in this state, and transacting business under this act, annually, on the first day of January, or within sixty (60) days thereafter, to prepare under oath and deposit in the office of the commissioner a full, true and complete statement of the condition of the company on the thirty-first day of December preceding the filing of such statement, which shall exhibit the following items and facts:

- (1) The name and business address of the benevolent association.
- (2) The names and addresses of the officers of the benevolent association.
- (3) The number of membership contracts in force at the start of the year; number of memberships in good standing at the close of the year for which the statement is made. This information must be made as to each sub-group or class, if any.
- (4) The number of death losses claimed; the number and total amount of death losses paid; the number of death claims compromised, denied or resisted, and why.
- (5) The number of assessments in the association or in each sub-group or class, if any; the amount collected in each such assessment; income to the benevolent association from all other sources, and all other fees, assessments, donations, of any kind or nature, except new membership fees from new members.
- (6) The expenses actually incurred during the year; debts unpaid at the start of the year; debts and obligations of any kind (not including death losses actually paid) paid during the year; debts unpaid at the close of the year; a breakdown of expenses to show the amount paid in salaries

or commissions, office expense, and other expenses, in those cases where members of a benevolent association are assessed for operating expenses of such association.

(b) The expenses in total amount of each benevolent association shall be limited to ten per centum (10%) of the total amount collected during the year whether assessments, dues, donations, or by whatever name called, except fees collected for new memberships, provided that a minimum amount of fifteen dollars (\$15.00) per death loss may be charged for expenses; provided, further, that all expenses of any kind or nature must be within the limits herein described.

A benevolent association may, instead of paying expenses as provided in the preceding paragraph, assess each of its members a sum not to exceed three dollars (\$3.00) per year, provided, however, that such assessment may amount to not more than four dollars (\$4.00) per year where a membership certificate includes within its protection a family group consisting of two or more persons, the receipts of which shall be placed in an expense fund, out of which all expenses of the association of any kind or nature shall be paid. The condition of this fund, if this method is chosen, shall be shown in the annual statement.

The initial membership fee for new members shall in no event exceed five dollars (\$5.00).

The benevolent association must state in its annual statement whether the expenses for the coming year will be charged on a percentage basis of income as herein provided, or whether the members of the association will be assessed for the same. No association shall use both methods, nor a combination of either.

(c) Each benevolent association shall comply with all the provisions of section 40-2206, and the officers making up the annual statement shall state therein whether this has been done. The benevolent association shall issue a receipt or other evidence of payment to the person making a payment of any kind to the benevolent association.

(d) Two (2) officers of the benevolent association shall attest under oath to the truth of the facts contained in the annual statement. At least one (1) of such officers must have charge of making up the statement.

(e) The annual statement must be filed in the office of the commissioner as hereinbefore provided; a copy thereof certified by the commissioner must be filed by the benevolent association in the office of the county clerk in which the business office of the association is located before the first day of April of each year.

(f) The commissioner shall have the power to enter and make an examination of the benevolent association to determine the truth of the facts exhibited in the statement, and he shall have the power to require such other information as he may require in the performance of his duties under this act, and to make such rulings as he shall deem necessary.

History: En. Sec. 7, Ch. 153, L. 1945;
amd. Sec. 2, Ch. 156, L. 1947.

40-2208. Officers and agents. (a) Each benevolent association operating under this act shall be in the charge of its officers. The treasurer and any other officer having charge of any funds of the benevolent association

shall each be bonded in the amount of one thousand dollars (\$1,000.00) executed to the state of Montana, joint and several, for the use and benefit of the members or beneficiaries of the benevolent association. There shall be no more than five (5) officers in each benevolent association.

Each such bond must be on file at the business address of the benevolent association, and a certified copy thereof must be filed with the commissioner.

(b) Agents for the benevolent association may be appointed in accordance with section 40-1308, who shall be subject to all the laws enacted in regard to agents so appointed; provided that no such agent may be appointed unless there are at least three officers as provided in the preceding paragraph, and provided further that the officers of the benevolent association, not exceeding five (5), shall act for the benevolent association without obtaining a license as an agent. Such officers shall be subject to the jurisdiction of the commissioner in the same manner as though they were licensed under section 40-1308.

(c) Before a certificate of authority may be issued to any benevolent association, the officers thereof must file with the commissioner, and each agent upon application for license must also file, the following affidavit to wit: "To the commissioner of insurance of the State of Montana: I, being first duly sworn, do depose and say: '(1) That I will not violate any of the insurance laws of the State of Montana, or the provisions of this act. (2) That I will not misrepresent any of the terms or conditions of any policy of life insurance or annuity, or of any benevolent association membership contract, or the financial responsibility or business practices of any life insurance company or benevolent association authorized to transact business in this state. (3) I will not, upon the basis of any incomplete comparison or misrepresentation, advise or persuade, or attempt to persuade any person to drop or discontinue any insurance that he may have with any company or association during the term of such insurance or otherwise.'" This form shall be furnished by the commissioner, and such statement shall be sworn to and subscribed before a person authorized to administer such oath.

History: En. Sec. 8, Ch. 153, L. 1945.

40-2209. Approval of contract forms. All forms of membership contracts, policies, agreements or by whatever name called, shall be submitted to the commissioner for approval, and such forms shall not be used, sold, or in any manner promulgated by the benevolent association, its officers, or agents, unless such approval shall first be obtained, provided that this section shall not apply to any membership contracts in full force and effect prior to the effective date of this act.

History: En. Sec. 9, Ch. 153, L. 1945.

40-2210. Foreign corporations. No such corporation, association, or society organized under the laws of any other state or territory of the United States or the District of Columbia, shall transact business herein until it has received a certificate of authority from the commissioner. Before said certificate is issued, such corporation, association or society shall first designate a person who is a resident of Montana to represent it

in this state. Such person shall be bonded as provided for officers of domestic benevolent associations under this act. Such foreign benevolent associations shall also designate a county in this state, wherein its business office shall be located. The commissioner shall annually issue to such benevolent association renewal certificates of authority to continue its business, if its annual report is satisfactory to him, and its certificate shall be filed in the office of the county clerk of the county in which its business office is designated within sixty (60) days after filing its annual report as in this act provided, and no such benevolent association shall be authorized to continue its business in this state, unless such certificate shall be so received and filed. The commissioner shall refuse a certificate or renewal whenever in his judgment such refusal will best promote the public interest, or when, by the laws of the state or territory under which the same is organized, a benevolent association organized under the laws of the state of Montana, including this act, is prohibited. Such benevolent association receiving a certificate of authority under this act shall be bound by all the applicable provisions of this act.

History: En. Sec. 10, Ch. 153, L. 1945.

40-2211. Judicial review. Any benevolent association, or any officer or agent of any such benevolent association who shall be aggrieved by any act, ruling, or order of the commissioner under the provisions of this act may apply to any court of competent jurisdiction for a judicial review or suitable action in regard to the said act, ruling, or order, provided that such action is commenced within thirty (30) days after the rendition of the act, ruling or order. Said court may in all cases fix the conditions under which a stay of order or action will be granted.

History: En. Sec. 11, Ch. 153, L. 1945.

40-2212. Companies exempt. This act does not include any fraternal benefit society, assessment life insurance company, or association, or any other insurance corporation, association, or society, which receives or is eligible to receive a certificate of authority in this state, and is within the jurisdiction of the commissioner under any other provisions of the laws of this state. The provisions of this act further shall not apply to burial or death benefits, annuities, endowments or any other benefit payments of labor unions, railroad brotherhoods and lodges, which groups have as a primary business the improvement of working conditions or of the ladies auxiliaries to any of these; nor shall this act apply to the benevolent plans within fraternal orders, where the plan is limited to members, and where the benevolent plan is not the principal object for the formation or continuance of the fraternal order.

History: En. Sec. 12, Ch. 153, L. 1945.

CHAPTER 23

TITLE INSURANCE COMPANIES

- Section 40-2301. Title insurance company, who may incorporate.
40-2302. Insurance statutes and rules applicable.
40-2303. Capital stock—amount and investment.
40-2304. Exchange and sale of securities—interest and dividends.

- 40-2305. Expenditures for commencement of business.
- 40-2306. Surplus fund—creation and impairment.
- 40-2307. Powers of company.
- 40-2308. Trust company business.
- 40-2309. Certificate from insurance commissioner.
- 40-2310. Loans to officers or employees forbidden.

40-2301. (6345) Title insurance company, who may incorporate. Any number of persons, not less than three, may associate themselves together under the provisions of this act, and become incorporated as a title insurance company, who shall, with their successors, constitute a body politic and corporate, under the name adopted by them in their articles of incorporation, provided no such corporation shall adopt a name previously adopted by any other corporation in this state.

History: En. Sec. 1, Ch. 118, L. 1915;
re-en. Sec. 6345, R. C. M. 1921.

44 C.J.S. Insurance §§ 94, 95.
29 Am. Jur. 822, Insurance, § 1098.

Collateral References
Insurance⌚32.

Guaranty of title as insurance. 63 ALR
771.

40-2302. (6346) Insurance statutes and rules applicable. Every title insurance company shall be subject to and shall comply with all the requirements of the insurance laws and the rules and regulations of the insurance department of this state, and the insurance commissioner shall have the same power and authority regarding any such corporation that he may exercise in relation to other insurance corporations organized under the laws of this state, including the right to examine and inspect the financial condition and affairs of such company relating to the insurance business of such company, and to compel compliance with the provisions of law governing any such corporation.

History: En. Sec. 2, Ch. 118, L. 1915;
re-en. Sec. 6346, R. C. M. 1921.

Collateral References
Insurance⌚3, 4.
44 C.J.S. Insurance §§ 57, 67.

40-2303. (6347) Capital stock—amount and investment. Every corporation organized under the provisions of this act shall have not less than one hundred thousand dollars of capital subscribed, at least fifty per cent. of which shall be paid up and invested in bonds of the United States or this state, bonds issued by the authority of the legislative assembly of this state secured by land grants, bonds, or warrants of any school district, county, or city in this state, or in bonds or mortgages upon unencumbered real estate in this state worth, exclusive of improvements, at least double the sum loaned thereon, which securities shall be deposited with the insurance commissioner, who shall give his receipt therefor, and the state shall be responsible for their custody and safe return. Upon such deposit and evidence by affidavit or otherwise, satisfactory to the insurance commissioner, that the capital is all subscribed in good faith, and that the company is the actual and unqualified owner of the securities representing the paid-up capital, he shall issue to such company a certificate which shall be its authority to commence business and issue policies in this state.

History: En. Sec. 3, Ch. 118, L. 1915;
re-en. Sec. 6347, R. C. M. 1921.

Collateral References
Insurance⌚8, 33.
44 C.J.S. Insurance §§ 72, 96.

40-2304. (6348) Exchange and sale of securities—interest and dividends. The securities above referred to in this act and so deposited may

be exchanged from time to time, with the approval of the insurance commissioner, for other securities receivable as aforesaid, and so long as the company so depositing said securities shall continue solvent, said company shall have the right and shall be permitted by the insurance commissioner to receive the interest and dividends on the securities so deposited. Said securities shall be subject to sale and transfer and to the disposal of the proceeds by said insurance commissioner, only on the order of a court of competent jurisdiction, and for the benefit of the holders of guaranties and policies of insurance issued by the company depositing such securities.

History: En. Sec. 4, Ch. 118, L. 1915;
re-en. Sec. 6348, R. C. M. 1921.

Collateral References

Insurance⊕8.
44 C.J.S. Insurance § 72.

40-2305. (6349) Expenditures for commencement of business. Any such corporation organized under the laws of this state and having a capital stock paid in, in cash, of more than one hundred thousand dollars, after depositing said guaranty fund as above provided, may invest an amount not to exceed fifty per cent. of its subscribed capital stock in the preparation and purchase of materials or plant necessary to enable it to engage in such title insurance business; and such materials or plant shall be deemed an asset valued at the actual cost thereof, in all statements and proceedings required by law for the ascertainment and determination of the condition of such corporation, or at such lesser value as may be estimated by such corporation in any such statement or proceeding, or omitted entirely therefrom.

History: En. Sec. 5, Ch. 118, L. 1915;
re-en. Sec. 6349, R. C. M. 1921.

Collateral References

Insurance⊕36.
44 C.J.S. Insurance § 67.

40-2306. (6350) Surplus fund—creation and impairment. Every title insurance company shall annually set apart a sum equal to ten per cent. of its premiums during the year, which sums shall be allowed to accumulate until a fund shall have been created equal in amount to twenty-five per cent. of the subscribed capital stock of such corporation. Such fund shall be maintained as a further security to holders of the guaranties and policies of insurance issued by such corporation, and shall be known as the "title insurance surplus fund"; and if at any time such fund shall be impaired by reason of a loss, the amount by which it may be impaired shall be restored in the manner hereinabove provided for its accumulation. The reporting of a loss shall be deemed an impairment of such fund for the purposes of this section. Such corporation must not make any dividends except from profits remaining on hand after retaining unimpaired:

1. The entire subscribed capital stock;
2. The amount set apart as a surplus fund under the provisions of this section;
3. A sum sufficient to pay all liabilities for expenses and taxes, and all losses reported or in course of settlement, without impairment of the title insurance surplus fund required to be set apart as hereinabove provided.

Any written contract or instrument purporting to show the title to real property, or furnish information relative thereto, which shall in express

terms purport to insure or guarantee such title, or the correctness of such information, shall be deemed a policy of title insurance.

History: En. Sec. 6, Ch. 118, L. 1915;
re-en. Sec. 6350, R. C. M. 1921.

Collateral References
Insurance 38.

44 C.J.S. Insurance § 102.

40-2307. (6351) Powers of company. Every title insurance company organized under this act shall also have power to guarantee or insure the identity, due execution, and validity of any note or bond secured by mortgage or trust deed, and the identity, due execution, and validity and recording of any such mortgage or trust deed, and the identity, due execution, and validity of bonds, notes, or other evidence of indebtedness issued by this state, or by any county, city, school district, irrigation district, or other municipality or district herein, or by any private or public corporation, and to act as registrar or transfer agent of this state, or of any municipality or district therein, or of any private or public corporation, and to transfer or countersign any such bonds, notes, or other evidence of indebtedness, and to transfer or countersign certificates of stock of any private or public corporation.

History: En. Sec. 7, Ch. 118, L. 1915;
re-en. Sec. 6351, R. C. M. 1921.

40-2308. (6352) Trust company business. Any title insurance corporation incorporated under this act, authorized by its articles of incorporation to act as executor, administrator, guardian, assignee, receiver, depository, agent, or trustee, or to do a general trust business, and having a capital of not less than three hundred thousand dollars actually paid in, in cash, may also do a business as a trust company, and maintain a trust department as well as a title insurance department, on compliance with the following conditions:

1. When such title insurance company desires to do such a departmental business, it shall first obtain the consent of both the state examiner and of the insurance commissioner, and in its application for such consent, must file a statement making a segregation of its capital and surplus for each such department. At least two hundred thousand dollars of its capital must be apportioned by such statement to its trust department. The respective portion of such capital and surplus, when such apportionment has been approved by the state examiner and by the insurance commissioner, shall be considered and treated as the separate capital and surplus of each such department respectively, as if each such department were a separate business.

2. Such company, as to its title insurance department, shall be subject to and shall comply with all the requirements of the insurance laws and the rules and regulations of the insurance department of this state, and may invest its capital apportioned to its title insurance department, and the accumulations thereon, in the securities in which the capital and accumulations of insurance companies are allowed by the laws of this state to be invested, including the materials and plant necessary to enable it to engage in the title insurance business as provided in this chapter.

3. Such company, as to its trust department, shall be subject to and shall comply with all the requirements of the banking laws of this state

and the rules and regulations of the state examiner, and may invest its capital apportioned to its trust department, and the accumulations thereon, and trust funds received by it, in accordance with the laws of this state relative to the investment of funds of trust companies.

History: En. Sec. 8, Ch. 118, L. 1915; 9 C.J.S. Banks and Banking § 1046; 44 re-en. Sec. 6352, R. C. M. 1921. C.J.S. Insurance § 100.

Collateral References

Banks and Banking 312; Insurance 36.

40-2309. (6353) Certificate from insurance commissioner. No corporation shall make any contract or issue any policy of guaranty or insurance affecting titles to real estate, or engage in the business of a title insurance company, until it has obtained from the insurance commissioner his certificate that such company has complied with the provisions of this chapter, and is duly authorized to do business as such title insurance company.

History: En. Sec. 9, Ch. 118, L. 1915; **Collateral References**
re-en. Sec. 6353, R. C. M. 1921. Insurance 5.

44 C.J.S. Insurance § 69.

40-2310. (6354) Loans to officers or employees forbidden. No loan shall be made by any title insurance company, directly or indirectly, to any of its officers, or directors or employees, or to any member of the family of any officer or director. Any officer, director, agent, or employee of any such company who knowingly consents to any violation of the terms or provisions of this section shall be guilty of a misdemeanor.

History: En. Sec. 10, Ch. 118, L. 1915; **Collateral References**
re-en. Sec. 6354, R. C. M. 1921. Insurance 36.

44 C.J.S. Insurance § 67.

CHAPTER 24

INSURANCE RATE REGULATION—RATING BUREAUS

- Section 40-2401. Purpose of act.
40-2402. Scope of act.
40-2403. Rating bureau and organization.
40-2404. Rating organization regulations.
40-2405. Rating bureau rates and surveys.
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40-2407. Power of commissioner of insurance.
40-2408. Group of insurers.
40-2409. Hearing procedure.
40-2410. Appeal and judicial review.
40-2411. Rate filings and disapproval of filings.
40-2412. Examination of rating bureau.
40-2413. Prohibiting regulation of dividends—regulating deviations.
40-2414. Advisory organization—joint underwriting or joint reinsurance.
40-2415. Penalties.
40-2416. Constitutionality.

40-2401. Purpose of act. The purpose of this act is to promote the public welfare by regulating insurance rates to the end that they shall not be excessive, inadequate or unfairly discriminatory, and that the solvency of insurers will not be endangered, and to authorize and regulate cooperative action among insurers in rate making and other matters within the

scope of this act. Nothing in this act is intended (1) to prohibit or discourage reasonable competition, or (2) to prohibit, or encourage except to the extent necessary to accomplish the aforementioned purpose, uniformity in insurance rates, rating systems, rating plans or practices.

History: En. Sec. 1, Ch. 255, L. 1947.

40-2402. Scope of act. This act shall apply to all insurers licensed in this state to effect insurance on risks enumerated in paragraphs 1, 3, 4 and 5 of section 40-1409 (excepting title insurance), and to workmen's compensation insurance. This act shall not apply to reinsurance, other than joint reinsurance to the extent stated in section 40-2414.

History: En. Sec. 2, Ch. 255, L. 1947;
amd. Sec. 1, Ch. 200, L. 1951.

40-2403. Rating bureau and organization. (a) Subject to the provisions of this act, two or more admitted insurers, not members of a "group" as hereinafter set forth, may act in concert with each other and with others with respect to all matters pertaining to the making of rates, rating plans or rating systems or the preparation of making insurance policy or bond forms, underwriting rules, surveys, inspections and investigations or the furnishing of loss or expense statistics or other information and data, or carrying on of research and shall be known as a rating bureau. No insurer or "group" shall be deemed to be a rating organization.

(b) Any corporation, unincorporated association, partnership, or individual, whether located within or outside this state, may make application for and obtain a license as a rating organization. To obtain a license as a rating organization, every such corporation, unincorporated association, partnership or individual shall file with the insurance commissioner of the state of Montana, hereinafter referred to as commissioner, (1) a copy of its constitution, its articles of agreement or association or its certificate of incorporation, and of its by-laws, rules and regulations governing the conduct of its business, (2) a list of its members and subscribers, (3) the name and address of a resident of this state upon whom notices or orders of the commissioner or process affecting such rating organization may be served and (4) a statement of its qualifications as a rating organization. If the commissioner finds that the applicant meets the licensing requirements of this act applicable to it and is trustworthy and competent to act as a rating organization he shall issue a license. Licenses issued pursuant to this section shall remain in effect for three (3) years unless sooner suspended or revoked by the commissioner. The fee for said license shall be twenty-five (\$25.00) dollars. Said license fee shall be in lieu of all other fees, licenses or taxes to which said rating organization might otherwise be subject.

History: En. Sec. 3, Ch. 255, L. 1947.

40-2404. Rating organization regulations. A rating organization shall: (1) permit any admitted insurer or "group" to obtain and use at its option such rating organizations' rates and rating manuals at a reasonable cost without discrimination and without any requirement to become a member or subscriber; (2) permit any admitted insurer or "group" to become a member of or a subscriber to such rating organization or withdraw therefrom; (3) neither have nor adopt any rule or exact any agreement, the

effect of which would be to require as a condition to membership or subscription any member or subscriber to adhere to its rates, rating plans or rating systems; (4) neither adopt any rule or exact any agreement the effect of which would be to prohibit or regulate the payment of dividends, savings or unabsorbed premium deposits allowed or returned by insurers to their policy-holders, members or subscribers. A plan for the payment of dividends, savings or unabsorbed premium deposits allowed or returned by insurers to their policy-holders, members or subscribers shall not be deemed to be a rating plan or system.

History: En. Sec. 4, Ch. 255, L. 1947.

40-2405. Rating bureau rates and surveys. Every rating bureau engaged in making rates or estimates for rates on property in this state shall inspect every risk specially rated by it on schedule and make a written survey of the risk, which shall be filed as a permanent record in the office of the bureau. A copy of this survey shall be furnished to the owner upon request.

History: En. Sec. 5, Ch. 255, L. 1947.

40-2406. Rating standards. No insurance company or other insurer making its own rates subject to the provisions of this act, nor any rating bureau shall fix or charge any rate for insurance upon property in this state which discriminates unfairly between risks in the application of like charges and credits or which discriminates unfairly between risks of essentially the same hazard and having substantially the same degree of protection, nor shall any rate be such as to endanger the solvency of such insurer. Nor shall any insurance company or other insurer or rating bureau engage in any unfair method of competition in commerce, or engage in any unfair or deceptive acts or practices in commerce.

All rates shall be made in accordance with the following provisions:

(a) Due consideration shall be given to past and prospective loss experience within and outside this state, to catastrophe hazards, if any, to a reasonable margin for underwriting profit and contingencies, to dividends, savings or unabsorbed premium deposits allowed or returned by insurers to their policy-holders, members or subscribers, to past and prospective expenses both countrywide and those specially applicable to this state, and to all other relevant factors within and outside this state.

(b) Rates shall not be excessive, inadequate or unfairly discriminatory.

(c) Rates for casualty insurance to which this act applies shall be subject to the following provisions:

1. The systems of expense provisions included in the rates for use by any insurer or group of insurers may differ from those of other insurers or groups of insurers to reflect the requirements of the operating methods of any such insurer or group with respect to any kind of insurance, or with respect to any subdivision or combination thereof for which subdivision or combination separate expense provisions are applicable.

2. Risks may be grouped by classifications for the establishment of rates and minimum premiums. Classification rates may be modified to produce rates for individual risks in accordance with rating plans which establish standards for measuring variations in hazards or expense provisions, or

both. Such standards may measure any differences among risks that can be demonstrated to have a probable effect upon losses or expenses.

(d) Rates for fire, marine and inland marine insurance to which this act applies shall also be subject to the following provisions:

1. Manual, minimum class rates, rating schedules or rating plans, shall be made and adopted, except in the case of specific inland marine rates on risks specially rated.

2. Due consideration shall be given to the conflagration hazards, and in the case of fire insurance rates consideration shall be given to the experience of the fire insurance business during a period of not less than the most recent five-year period for which such experience is available.

(e) Except to the extent necessary to meet the provisions of subsection (b) of this section, uniformity among insurers in any matters within the scope of this section is neither required nor prohibited.

(f) Rates made in accordance with this section may be made subject to the provisions of this act.

History: En. Sec. 6, Ch. 255, L. 1947.

40-2407. Power of commissioner of insurance. The commissioner of insurance shall have the power at any time on written petition or upon his own motion to review any rate fixed by any insurer making its own rates or by any rating bureau for insurance upon property within this state, for the purpose of determining whether the same is excessive, inadequate or unfairly discriminatory. He shall have the power and authority to order the excessive, inadequate or discriminatory rate removed and fix and order a rate in lieu of the rate made by any such insurer or the bureau rate found to be excessive, inadequate or unfairly discriminatory, and the rate so ordered and fixed shall become the established rate. No rate shall be held to be excessive, inadequate or unfairly discriminatory if the commissioner finds that free competition exists in the area and classification covered by such rate. No rate shall be held to be inadequate unless the commissioner finds that the continued use of such rate shall endanger the solvency of the insurer charging such rate.

History: En. Sec. 7, Ch. 255, L. 1947.

40-2408. Group of insurers. Two or more insurers who are not members of or subscribers to a rating organization and who by virtue of their business association in the United States represent themselves to be or are customarily known as a "group," or similar insurance trade designation, shall have the right to use the same rates for each such insurer subject to the provisions of this act; and nothing contained in this act shall be construed to prohibit an agreement to make or use the same rates and concerted action in connection with such rates by such insurers.

History: En. Sec. 8, Ch. 255, L. 1947.

40-2409. Hearing procedure. If at any time the commissioner finds that a rate to which this act applies does not meet the requirements of this act he may, after a hearing held upon not less than twenty (20) days' written notice, specifying the matters to be considered at such hearing, to every insurer which makes its own rates or rating organization which made such rate, issue an order specifying in what respects he finds that such rate fails

to meet the requirements of this act, and stating when, within a reasonable period thereafter, such rate shall be deemed no longer in effect. Said order shall not affect any contract or policy made or issued prior to the expiration of the period set forth in said order. Copies of any such order shall be sent to every such insurer and rating organization.

History: En. Sec. 9, Ch. 255, L. 1947.

40-2410. Appeal and judicial review. Any person, insurer or rating organization aggrieved by any order or decision made by the commissioner of insurance may appeal therefrom to the district court of the county where the aggrieved party may reside, or to the district court of Lewis and Clark County, Montana, within thirty (30) days from the making and filing of the order or decision, by filing in the office of the commissioner of insurance a notice of the appeal in writing and in this case the commissioner of insurance shall within twenty (20) days after filing of the notice, make and return to the district court a full and complete certified transcript of the finding and order appealed from and of all parts relative thereto on file in his office, including the notice of appeal, and upon the filing of the certified transcript all matters involved therein shall be brought on for trial upon the merits at the next term of the court after the filing of the transcript, unless otherwise ordered by the court; and upon the trial the findings of fact on which the order is based shall be prima facie evidence of the matters therein stated. During the pendency of the proceedings upon review the order of the commissioner of insurance shall be suspended, but in the event of a final determination against any insurer, any overcharge by the insurer during review shall be refunded to the persons entitled thereto.

History: En. Sec. 10, Ch. 255, L. 1947.

40-2411. Rate filings and disapproval of filings. The commissioner of insurance may in his discretion address inquiries to any individual, association or bureau which is or has been engaged in making rates or estimates for rates as provided for in this act in relation to its organization, maintenance, or operation, or any other matter connected with its transactions and shall require the filing of schedules, rates, forms, rules, regulations, and other information; and it shall be the duty of every such individual, association or bureau, or some officer thereof, to promptly make such filing and reply to such inquiries in writing.

(a) 1. Under this section every rating bureau shall file with the commissioner every manual of classifications, rules and rates, every rating plan and every modification of any of the foregoing which it proposes to use for casualty insurance to which this act applies.

2. Every insurer shall file with the commissioner, except as to inland marine risks which by general custom of the business are not written according to manual rates or rating plans, every manual, minimum, class rate, rating schedule or rating plan and every other rating rule, and every modification of any of the foregoing which it proposes to use for fire, (except fire on motor vehicles written by casualty insurers) marine and inland marine insurance to which this act applies. Specific inland marine rates on risks specially rated, made by a rating organization, shall be filed with the commissioner.

(b) Every such filing shall state the proposed effective date thereof, and shall indicate the character and extent of the coverage contemplated. When a filing is not accompanied by the information upon which the insurer supports such filing, and the commissioner does not have sufficient information to determine whether such filing meets the requirements of the act, he shall require such insurer to furnish the information upon which it supports such filing, and in such event the waiting period shall commence as of the date such information is furnished. The information furnished in support of a filing may include: (1) the experience or judgment of the insurer or rating organization making the filing, (2) its interpretation of any statistical data it relies upon, (3) the experience of other insurers or rating organizations, or (4) any other relevant factors. A filing and any supporting information shall be open to public inspection after the filing becomes effective.

(c) An insurer may satisfy its obligation to make such filings by becoming a member of, or a subscriber to, a licensed rating organization which makes such filings, and by authorizing the commissioner to accept such filings on its behalf; provided, that nothing contained in this act shall be construed as requiring any insurer to become a member of or a subscriber to any rating organization.

(d) The commissioner shall review filings as soon as reasonably possible after they have been made in order to determine whether they meet the requirements of this act.

(e) Subject to the exception specified in subsection (f) and (g) of this section, each filing shall be on file for a waiting period of fifteen (15) days before it becomes effective, which period may be extended by the commissioner for an additional period not to exceed fifteen (15) days if he gives written notice within such waiting period to the insurer or rating organization which made the filing that he needs such additional time for the consideration of such filing. Upon written application by such insurer or rating organization, the commissioner may authorize a filing which he has reviewed to become effective before the expiration of the waiting period or any extension thereof. A filing shall be deemed to meet the requirements of this act unless disapproved by the commissioner within the waiting period or any extension thereof.

(f) Any special filing with respect to a surety or guaranty bond required by law or by court or executive order or by order, rule or regulation of a public body, not covered by a previous filing, shall become effective when filed and shall be deemed to meet the requirements of this act until such time as the commissioner reviews the filing and so long thereafter as the filing remains in effect.

(g) Specific inland marine rates on risks specially rated by a rating organization shall become effective when filed and shall be deemed to meet the requirements of this act until such time as the commissioner reviews the filing and so long thereafter as the filing remains in effect.

(h) Under such rules and regulations as he shall adopt the commissioner may, by written order, suspend or modify the requirements of filings as to any kind of insurance, subdivision or combination thereof, or as to classes of risks, the rates for which cannot practicably be filed before they

are used. Such orders, rules and regulations shall be made known to insurers and rating organizations affected thereby. The commissioner may make such examination as he may deem advisable to ascertain whether any rates affected by such order meet the standards set forth in subsection (b) of section 40-2406.

(i) Upon the written application of the insured, stating his reasons therefor, filed with and approved by the commissioner, a rate in excess of that provided by a filing otherwise applicable may be used on any specific risk.

(j) If within the waiting period or any extension thereof as provided in subsection (e), the commissioner finds that a filing does not meet the requirements of this act, he shall send to the insurer or rating organization which made such filing, written notice of disapproval of such filing specifying therein in what respects he finds such filing fails to meet the requirements of this act and stating that such filing shall not become effective.

(k) If within thirty (30) days after a special surety or guaranty filing subject to subsection (f) has become effective, or if within thirty (30) days after a specific inland marine rate on a risk specially rated by a rating organization subject to subsection (g) has become effective, the commissioner finds that such filing does not meet the requirements of this act, he shall send to the insurer or rating organization which made such filing written notice of disapproval of such filing specifying therein in what respects he finds that such filing fails to meet the requirements of this act and stating when, within a reasonable period thereafter, such filing shall be deemed no longer effective. Said disapproval shall not affect any contract made or issued prior to the expiration of the period set forth in said notice.

(l) If at any time subsequent to the applicable review period provided for in subsection (j) or (k) of this section, the commissioner finds that a filing does not meet the requirements of this act, he shall, after a hearing held upon not less than ten (10) days' written notice, specifying the matters to be considered at such hearing, to every insurer and rating organization which made such filing, issue an order specifying in what respects he finds that such filing fails to meet the requirements of this act, and stating when, within a reasonable period thereafter, such filing shall be deemed no longer effective. Copies of said order shall be sent to every such insurer and rating organization. Said order shall not affect any contract or policy made or issued prior to the expiration of the period set forth in said order.

(m) Any person or organization aggrieved with respect to any filing which is in effect may make written application to the commissioner for a hearing thereon, provided, however, that the insurer or rating organization that made the filing shall not be authorized to proceed under this subsection. Such application shall specify the grounds to be relied upon by the applicant. If the commissioner shall find that the application is made in good faith, that the applicant would be so aggrieved if his grounds are established, and that such grounds otherwise justify holding such a hearing, he shall, within thirty (30) days after receipt of such application, hold a hearing upon not less than ten (10) days' written notice to the applicant

and to every insurer and rating organization which made such filing. If, after such hearing, the commissioner finds that the filing does not meet the requirements of this act, he shall issue an order specifying in what respects he finds that such filing fails to meet the requirements of this act, and stating when, within a reasonable period thereafter, such filing shall be deemed no longer effective. Copies of said order shall be sent to the applicant and to every such insurer and rating organization. Said order shall not affect any contract or policy made or issued prior to the expiration of the period set forth in said order.

(n) No manual of classifications, rules, rating plans, or any modification of any of the foregoing which establishes standards for measuring variations in hazards or expense provisions, or both, in the case of casualty insurance to which this act applies, and no manual, minimum, class rate, rating schedule, rating plan or rating rule, or any modification of the foregoing, in the case of fire insurance to which this act applies, and which has been filed pursuant to the requirements of this section shall be disapproved if the rates produced meet the requirements of this act.

History: En. Sec. 11, Ch. 255, L. 1947.

40-2412. Examination of rating bureau. The commissioner of insurance shall have the power to examine any such rating bureau as often as he deems it expedient to do so and shall do so not less than once every three (3) years. A report thereof shall be filed in his office. The commissioner of insurance may waive such examination upon the filing with him of a report of an examination made by some other insurance department or proper supervising officer within the three (3) years. The cost of such examination shall be borne by the bureau so examined. A statement in regard to such examination shall be made in the annual report of the commissioner of insurance.

History: En. Sec. 12, Ch. 255, L. 1947.

40-2413. Prohibiting regulation of dividends—regulating deviations. Nothing in this act shall be construed to prohibit or regulate the payment of dividends, savings, or unabsorbed premium deposits allowed or returned by insurers to their policy-holders, members or subscribers.

(a) In connection with regulating deviations, every member of or subscriber to a rating organization shall adhere to the filings made on its behalf of such organization except that:

1. In the case of casualty insurance to which this act applies any such insurer may make written application to the commissioner for permission to file a uniform percentage decrease or increase to be applied to the premiums produced by the rating system so filed for a kind of insurance, or for a class of insurance which is found by the commissioner to be a proper rating unit for the application of such uniform percentage decrease or increase, or for a subdivision of a kind of insurance (1) comprised of a group of manual classifications which is treated as a separate unit for rate making purposes, or (2) for which separate expense provisions are included in the filings of the rating organization. Such application shall specify the basis for the modification and shall be accompanied by the data upon which the applicant relies. A copy of the application and data shall be sent simultaneously to such rating organization; and

2. In the case of fire, marine, and inland marine insurance to which this act applies any insurer may deviate from the bureau rate by notifying the commissioner in writing ten (10) days before the deviation is to become effective. Should the commissioner find such rate unfair, discriminatory, or of such a nature as to affect the solvency of the insurer, he shall order a hearing. The commissioner shall set a time and place for a hearing at which all interested parties may be heard and shall give the insurer not less than ten (10) days' written notice thereof. The commissioner after the hearing shall make an order either approving or disapproving the rate and any interested party may appeal from the ruling of the commissioner to the court as in this act provided and during the pendency of the appeal the commissioner's order shall be held in abeyance. If any insurer grants a lower rate on any class of property than that fixed by the bureau of which it is a member or subscriber, this rate shall not be increased by the insurer until one (1) year has elapsed without first securing the approval of the commissioner. A declaration filed with the commissioner of insurance by any insurer of its intention to write insurance at a uniform variation of a certain per cent from the bureau rate shall be sufficient compliance with this act.

(b) The commissioner shall set a time and place for a hearing at which the insurer and such rating organization may be heard and shall give them not less than ten (10) days' written notice thereof. In the event the commissioner is advised by the rating organization that it does not desire a hearing he may, upon the consent of the applicant, waive such hearing. The commissioner shall issue an order permitting the modification for such insurer to be filed if he finds it to be justified and it shall thereupon become effective. He shall issue an order denying such application if he finds that the modification is not justified or that the resulting premiums would be excessive, inadequate or unfairly discriminatory.

History: En. Sec. 13, Ch. 255, L. 1947.

40-2414. Advisory organization—joint underwriting or joint reinsurance. (a) Every group, association or other organization of insurers, whether located within or outside this state, which assists insurers which make their own filings or rating organizations in rate making, by the collection and furnishing of loss or expense statistics, or by the submission of recommendations, but which does not make filings under this act, shall be known as an advisory organization.

(b) Every advisory organization shall file with the commissioner (1) a copy of its constitution, its articles of agreement or association of its certificate of incorporation and of its by-laws, rules and regulations governing its activities, (2) a list of its members, (3) the name and address of a resident of this state upon whom notices or orders of the commissioner or process issued at his direction may be served, and (4) an agreement that the commissioner may examine such advisory organization in accordance with the provisions of section 40-2412.

(c) If, after a hearing, the commissioner finds that the furnishing of such information or assistance involves any act or practice which is unfair or unreasonable or otherwise inconsistent with the provisions of this act he may issue a written order specifying in what respects such act or practice

is unfair or unreasonable or otherwise inconsistent with the provisions of this act, and requiring the discontinuance of such act or practice.

(d) No insurer which makes its own filings nor any rating organization shall support its filings by statistics or adopt rate making recommendations, furnished to it by an advisory organization which has not complied with this section or with an order of the commissioner involving such statistics or recommendations issued under subsection (c) of this section. If the commissioner finds such insurer or rating organization to be in violation of this subsection he may issue an order requiring the discontinuance of such violation.

(e) Every group, association or other organization of insurers which engages in joint underwriting or joint reinsurance, shall be subject to regulation with respect thereto as herein provided, subject, however, with respect to joint underwriting, to all other provisions of this act, and, with respect to joint reinsurance, to section 40-2412.

(f) If, after a hearing, the commissioner finds that any activity or practice of any such group, association or other organization is unfair or unreasonable or otherwise inconsistent with the provisions of this act, he may issue a written order specifying in what respects such activity or practice is unfair or unreasonable or otherwise inconsistent with the provisions of this act and requiring the discontinuance of such activity or practice.

History: En. Sec. 14, Ch. 255, L. 1947.

40-2415. Penalties. Any person or insurance company or other insurer or rating bureau found guilty of violating any of the provisions of this act shall be subject to a fine of one hundred (\$100.00) dollars for each such violation, which fine shall be paid into the state public school general fund.

History: En. Sec. 15, Ch. 255, L. 1947.

40-2416. Constitutionality. If any section, provision, clause or phrase of this act be adjudged unconstitutional or invalid by any court for any reason, such adjudication shall not affect the validity of this act as a whole, or any section or provision thereof which is not specifically so adjudged unconstitutional or invalid.

History: En. Sec. 16, Ch. 255, L. 1947.

CHAPTER 25

SURPLUS LINE INSURANCE

- Section 40-2501. Definition of terms.
40-2502. Issuance of license—fee—authority conferred by license.
40-2503. Execution and delivery of bond—rights conferred by license.
40-2504. Affidavit as prerequisite to procurement of insurance—contents.
40-2505. Indorsement on policy.
40-2506. Service of process.
40-2507. Record of business—filing of statement—content.
40-2508. Surplus line insurance valid.
40-2509. Actions against companies issuing insurance—venue—service of process.

- 40-2510. Penalty for failure to file statement and pay tax—action for recovery—revocation of license—conditions prerequisite to reissuance—hearing procedure and judicial review.
 40-2511. Surplus lines in solvent insurers.
 40-2512. Agent's authority.
 40-2513. Commissioner to make rules.

40-2501. Definition of terms. The words, "commissioner" or "insurance commissioner," as used in this act, refer to the commissioner of insurance of the state of Montana. A "surplus line" agent is one to whom a "surplus line" license has been issued by the commissioner under the provisions of this act.

History: En. Sec. 1, Ch. 90, L. 1949.

40-2502. Issuance of license—fee—authority conferred by license. Upon receipt of an application in proper form, on blanks furnished by the commissioner, and on payment of a license fee of twenty-five dollars (\$25.00), the insurance commissioner may issue a "surplus line" license to any duly qualified and licensed insurance agent of this state. Such license shall permit the agent named therein to act as agent in this state for any foreign company or insurer not authorized to transact business in this state in securing, issuing or placing policies of insurance, contracts of indemnity and/or surety bonds on property located in, or undertakings to be carried out in, this state for such companies.

History: En. Sec. 2, Ch. 90, L. 1949.

Collateral References

Insurance—22.

44 C.J.S. Insurance § 85.

40-2503. Execution and delivery of bond—rights conferred by license. Before receiving such license, such "surplus line" agent shall execute and deliver to the commissioner a bond in the penal sum of two thousand dollars (\$2,000.00) in such form and with such sureties as the commissioner shall approve, conditioned that he will fully comply with all requirements of this act. Such license shall entitle such agent to transact business for any or all unauthorized insurance companies or insurers as provided in this act, and shall expire on March 31st next following the date of issue.

History: En. Sec. 3, Ch. 90, L. 1949.

40-2504. Affidavit as prerequisite to procurement of insurance—contents. Before the person named in such license shall procure, effect or issue any such insurance policy or indemnity contract or surety bond, he shall in every case execute and file with the commissioner his affidavit in acceptable form that the insured is unable to procure in a majority of the companies or insurers admitted to do business in this state writing the class of insurance involved, the amount or kind of insurance necessary to protect the property or undertakings of the insured described in such affidavit; and that the procuring of insurance in an unauthorized insurer is not for the purpose of securing a lower premium rate than would be charged by any authorized insurer.

History: En. Sec. 4, Ch. 90, L. 1949.

Collateral References

Insurance—22.

44 C.J.S. Insurance § 85.

40-2505. Indorsement on policy. Every policy issued under this section shall be indorsed "issued in an unauthorized company, under agent's

license No. _____," which indorsement shall be properly filled in and signed by the agent.

History: En. Sec. 5, Ch. 90, L. 1949.

40-2506. Service of process. Any company desiring to transact any business under the terms of this act, by any agent or agents in this state, shall appoint in writing the commissioner of insurance to be its true and lawful attorney, upon whom legal process in any action or proceeding against it shall be served and, in such writing, shall agree that any legal process against it, which is served upon such attorney, shall be of the same legal force and validity as if served upon such company, and that said authority shall continue in force so long as any liability remains outstanding in this state. Copies of such appointment certified by the commissioner of insurance shall be deemed sufficient evidence thereof and shall be admitted in evidence with the same force and effect as the original thereof might be admitted. Such service must be made in duplicate upon the commissioner of insurance or, in his absence, upon the person in charge of his office, and shall be deemed sufficient service upon such company; provided, however, that in all cases where service is made upon the commissioner of insurance, as herein provided, the defendant shall have twenty days from the date of such service in which to file its answer, or other appearance in the case. When legal process against such company is served upon the commissioner of insurance, he shall forthwith forward by registered mail one of the duplicate copies, prepaid, and directed to its secretary or corresponding officer. For each copy of process the commissioner of insurance shall collect two dollars (\$2.00), which shall be paid by the plaintiff at the time of such service, the same to be recovered by him as part of the taxable costs if he prevails in the suit. Legal process shall not be served upon any such company except in the manner provided herein. In any suit on a policy on behalf of the owner or holder thereof, the service of process shall be made as in this section provided, but the action must be prosecuted in the county of the policy-holder's residence.

History: En. Sec. 6, Ch. 90, L. 1949.

Collateral References

Insurance 627(1).

46 C.J.S. Insurance § 1270.

40-2507. Record of business—filing of statement—content. Every such agent shall keep a separate account of the business done under his "surplus line" license and on or before the first day of April in each year shall file with the commissioner a statement for the calendar year preceding, giving the name of the insured to whom such policy or indemnity contract granting such unauthorized insurance has been issued, the name and home office of each company issuing any such policy or contract, the amount of such insurance, the rates charged therefor, the gross premiums charged therein or therefor, the date and term of the policy and the amount of premium returned on each policy cancelled or not taken, with such other information and upon such form as required by the commissioner, and pay the commissioner an amount equal to the taxes imposed by law on the premiums of like authorized insurance companies. If a "surplus line" policy covers risk or exposures only partially in this state, the tax so payable shall be com-

puted upon the proportion of the premium which is properly allocable to the risks or exposures located in this state.

History: En. Sec. 7, Ch. 90, L. 1949.

Collateral References

Insurance \Rightarrow 23.

44 C.J.S. Insurance § 78.

40-2508. Surplus line insurance valid. Insurance contracts procured as "surplus line" coverage from unauthorized insurers in accordance with this act shall be fully valid and enforceable as to all parties, and shall be given recognition in all matters and respects to the same effect as like contracts issued by authorized insurers.

History: En. Sec. 8, Ch. 90, L. 1949.

40-2509. Actions against companies issuing insurance—venue—service of process. Every company, insurer or insurers making insurance under the provisions of this section shall be deemed and held to be doing business in this state as an unlicensed concern and may be sued upon any cause of action arising under any policy of insurance so issued and delivered by it. Such suit shall be brought in the district court of the county wherein the plaintiff resides. Service of summons and complaint in such a suit shall be made upon the commissioner of insurance in the manner provided by section 40-2506.

History: En. Sec. 9, Ch. 90, L. 1949.

Collateral References

Insurance \Rightarrow 608, 618.

46 C.J.S. Insurance §§ 1243, 1252.

40-2510. Penalty for failure to file statement and pay tax—action for recovery—revocation of license—conditions prerequisite to reissuance—hearing procedure and judicial review. Every such agent who fails or refuses to make and file said annual statement, and to pay the taxes required to be paid thereon prior to the first day of April after such tax is due, shall be liable for a fine of twenty-five dollars (\$25.00) for each day of said delinquency. Such tax and fine may be recovered in an action to be instituted by the commissioner in the name of the state, the attorney general representing him, in any court of competent jurisdiction, and the fine, when so collected, shall be paid to the state treasurer and placed to the credit of the general fund. If any such agent shall fail to make and file said annual statement and pay the said taxes, or shall refuse to allow the commissioner to inspect and examine his records of the business transacted by him pursuant to this section, or shall fail to keep such records in manner as required by the commissioner, or shall falsify the affidavit referred to in section 40-2504, all insurance licenses, including surplus line agent's license of such agent shall be immediately revoked by the commissioner.

Before the commissioner of insurance shall revoke or suspend any such license he shall give to the agent written notice of the charges and of the hearing, not less than twenty (20) days prior to the time set for such hearing. Such notice shall be forwarded by registered mail addressed to the agent at his last known address. Full opportunity shall be given at such hearing to the agent to appear with counsel and be heard upon such charges. Any agent or other person aggrieved by any order or decision made by the commissioner of insurance may appeal therefrom to the district court of the county where the aggrieved party may reside, or to the dis-

trict court of Lewis and Clark county, Montana, within thirty (30) days from the making and filing of the order or decision, by filing in the office of the commissioner of insurance a notice of the appeal in writing and in this case the commissioner of insurance shall within twenty (20) days after filing of the notice, make and return to the district court a full and complete certified transcript of the finding and order appealed from and of all parts relative thereto on file in his office, including the notice of appeal, and upon the filing of the certified transcript all matters involved therein shall be brought on for trial upon the merits at the next term of the court after the filing of the transcript, unless otherwise ordered by the court; and upon the trial the findings of fact on which the order is based shall be prima facie evidence of the matters therein stated. During the pendency of the proceedings upon review the order of the commissioner of insurance shall be suspended, but in the event of a final determination against such agent, the license of such agent shall be immediately revoked. In the event of the revocation of a license of an agent whether by the action of the commissioner or by judicial proceedings, another license shall not be issued to that agent until one (1) year shall elapse from the effective date of such revocation, nor until all taxes and fines are paid, nor until the commissioner shall be satisfied that full compliance with this section will be had.

History: En. Sec. 10, Ch. 90, L. 1949.

Collateral References

Insurance⊕24.

44 C.J.S. Insurance § 83.

40-2511. Surplus lines in solvent insurers. A "surplus line" agent shall not knowingly place "surplus line" insurance with insurers unsound financially. The agent shall ascertain the financial condition of the unauthorized insurer before placing insurance therewith. The agent shall not so insure with any stock insurer having capital and surplus amounting to less than two hundred thousand dollars (\$200,000.00), or with any other type of insurer having assets of less than two hundred thousand dollars (\$200,000.-00) of which not less than fifty thousand dollars (\$50,000.00) is surplus.

History: En. Sec. 11, Ch. 90, L. 1949.

Collateral References

Insurance⊕22.

44 C.J.S. Insurance § 85.

40-2512. Agent's authority. An agent duly licensed as provided in this act may accept business from any duly licensed agent for an admitted company and may compensate him therefor, provided such insurance is written in conformity with the provisions of the insurance code.

History: En. Sec. 12, Ch. 90, L. 1949.

40-2513. Commissioner to make rules. The commissioner may make and publish reasonable rules and regulations, consistent with this act, in respect to transactions governed thereby and the basis or bases for his determination hereunder.

History: En. Sec. 13, Ch. 90, L. 1949.

Collateral References

Insurance⊕18.

44 C.J.S. Insurance § 78.

TITLE 41

LABOR

- Chapter
1. Obligations of employers, 41-101 to 41-116.
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 14. Employment agencies, regulation, 41-1401 to 41-1416.
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CHAPTER 1

OBLIGATIONS OF EMPLOYERS

- Section
- 41-101. Employment defined.
 - 41-102. When employer must indemnify employee.
 - 41-103. When not.
 - 41-104. Employer to indemnify for his own negligence.
 - 41-105. Railway corporation—vice-principals.
 - 41-106. Mines, mills and smelters—vice-principals.
 - 41-107. Contract of insurance not to relieve employer.
 - 41-108. Mining companies liable for negligence of certain employees.
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 - 41-111. Railway corporations liable for negligence of fellow-servant.
 - 41-112. Survival of action.
 - 41-113. Medical examination as condition of employment—costs to be paid by employer.
 - 41-114. Employer defined.
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 - 41-116. Penalty.

41-101. (7756) Employment defined. The contract of employment is a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer, or of a third person.

History: En. Sec. 2650, Civ. C. 1895; re-en. Sec. 5241, Rev. C. 1907; re-en. Sec. 7756, R. C. M. 1921. Cal. Civ. C. Sec. 1965. Field Civ. C. Sec. 1004.

Cross-References

Advertisements for workmen to state existence of labor trouble, secs. 94-3556, 94-35-256, 94-35-257.

Children, employment, secs. 10-201 to 10-204, 10-208.

Compelling employee to live at boarding house, penalty, secs. 94-3536, 94-3537.

Contracts releasing liability for negligence void, secs. 13-803, 94-1614.

Elections, unlawful act of employers, sec. 94-1424.

Foreman soliciting gifts, penalty, sec. 94-1616.

Labor disputes, injunctions not allowed, sec. 93-4203.

Retiring rooms required for employees, sec. 69-2501.

Returned servicemen, employment rights, secs. 77-601 to 77-708.

School children, employment, secs. 75-2902, 75-2903, 75-2906.

Workmen's compensation, secs. 92-101 to 92-1222.

Collateral References

Master and Servant^①.

56 C.J.S. Master and Servant § 2.

35 Am. Jur. 450, Master and Servant, §§ 8 et seq.

41-102. (7757) When employer must indemnify employee. An employer must indemnify his employee, except as prescribed in the next section, for all that he necessarily expends or loses in direct consequence of the discharge of his duties as such, or of his obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying such directions believed them to be unlawful.

History: En. Sec. 2660, Civ. C. 1895; re-en. Sec. 5242, Rev. C. 1907; re-en. Sec. 7757, R. C. M. 1921. Cal. Civ. C. Sec. 1969. Field Civ. C. Sec. 1005.

Operation and Effect

This section and the two following sections are directly applicable to cases arising between master and servant on account of personal injuries sustained by the latter in the course of his employment. *Hardesty v. Largey Lumber Co.*, 34 M 151, 164, 86 P 29; *John v. Northern Pacific Ry. Co.*, 42 M 18, 34, 111 P 632.

References

Cited or applied as section 2660, Civil

Code, in *Coulter v. Union Laundry Co.*, 34 M 590, 605, 87 P 973; as section 5242, Revised Codes, in *Michalsky v. Centennial Brewing Co.*, 48 M 1, 13, 134 P 307.

Collateral References

Master and Servant^② 72, 72½.

56 C.J.S. Master and Servant § 117.

35 Am. Jur. 541, Master and Servant, § 114.

Liability of master under apparent authority doctrine where servant engages assistant. 2 ALR 2d 406.

Contributory negligence as defense to cause of action based on violation of statute. 10 ALR 2d 853.

41-103. (7758) When not. An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed.

History: En. Sec. 2661, Civ. C. 1895; re-en. Sec. 5243, Rev. C. 1907; re-en. Sec. 7758, R. C. M. 1921. Cal. Civ. C. Sec. 1970. Based on Field Civ. C. Sec. 1006.

Operation and Effect

A servant is conclusively presumed to have assumed the ordinary risks of the employment. This is a part of his contract of service. Beyond this he does not assume any risk, except by express agreement, or where the circumstances are such that he must be presumed to have done so from the fact that he continued in the employment, though the extraordinary danger was known to him, or was so obvious that he must be presumed to have had knowledge of it. *Schroder v. Montana Iron Works*, 38 M 474, 478, 100 P 619.

The servant assumes the ordinary risks of his employment, but such assumption of risk implies knowledge by the servant, or his having the means of knowledge, and his appreciation of the danger. *Morelli v. Twohy Bros. Co.*, 54 M 366, 375, 170 P 757.

By his act of entering into the service of his master the servant assumes all the usual and ordinary risks attendant upon his employment, not including risks arising from the negligence of the master, and he assumes these also if he knows of the defects from which they arise and appreciates the dangers which flow from them. *Grant v. Nihill*, 64 M 420, 437, 210 P 914.

Id. An employee who, with knowledge of the defective machinery with which he is required to work, continues in the employment upon assurance by the employer that the defect would be repaired, may do so for a reasonable length of time without assuming the added risk, unless the danger is so great that a reasonably prudent man would not have continued to work.

Where an experienced miner was employed to dig a well and was killed by a bucket used for hoisting the dirt falling upon him, its fall being caused by the hook attached to the bucket bail becoming detached in hoisting because improv-

erly adjusted to the bail by him, the court's holding that he assumed the risk from the use of the hook, which was so simple in construction that it did not require a mechanic to understand it or the exercise of science or skill to adjust it, was correct. *Miller v. Granite County Power Co. et al.*, 66 M 368, 213 P 604.

41-104. (7759) Employer to indemnify for his own negligence. An employer must in all cases indemnify his employee for losses caused by the former's want of ordinary care.

History: En. Sec. 2662, Civ. C. 1895; re-en. Sec. 5244, Rev. C. 1907; re-en. Sec. 7759, R. C. M. 1921. Cal. Civ. C. Sec. 1971. Field Civ. C. Sec. 1007.

Operation and Effect

This section is directly applicable to cases arising between master and servant on account of personal injuries sustained by the latter in the course of his employment, and an instruction embodying it is properly submitted to the jury. *Hardesty v. Largey Lumber Co.*, 34 M 151, 164, 86 P 29; *John v. Northern Pacific Ry. Co.*, 42 M 18, 34, 111 P 632; *Wallace v. Chicago, Milwaukee & Puget Sound Ry. Co.*, 52 M 345, 352, 157 P 955.

In an action for personal injuries alleged to have been sustained by plaintiff, a laundry employee, while working on a patently defective mangle, the evidence, in view of this section, held not to preclude defendant from offering any defense, though he did not use ordinary care in furnishing ordinarily safe machinery. *Coulter v. Union Laundry Co.*, 34 M 590, 600, 87 P 973. See *Leary v. Anaconda*

References

Cited or applied as section 2661, Civil Code, in *Hardesty v. Largey Lumber Co.*, 34 M 151, 161, 86 P 29; *Coulter v. Union Laundry Co.*, 34 M 590, 604, 87 P 973; as section 5243, Revised Codes, in *Michalsky v. Centennial Brewing Co.*, 48 M 1, 13, 134 P 307.

Copper Min. Co., 36 M 157, 165, 92 P 477; *Osterholm v. Boston & Montana Con. C. & S. Min. Co.*, 40 M 508, 524, 107 P 499; *Fotheringill v. Washoe Copper Co.*, 43 M 485, 499, 117 P 86.

Degrees of negligence are recognized in this state. *John v. Northern Pac. Ry. Co.*, 42 M 18, 29, 111 P 632.

Id. A master owes the same duty to his servant that a carrier owes to an unpaid passenger; that is, to exercise ordinary care for his safety.

Id. Where the doctrine of the maxim "res ipsa loquitur" may be invoked to raise a presumption of want of care, it is want of ordinary care to which reference is made.

References

Cited or applied as section 5244, Revised Codes, in *Cummings v. Reins Copper Co.*, 40 M 599, 617, 107 P 904.

Collateral References

Master and Servant—85, 87.

56 C.J.S. Master and Servant §§ 171, 173.

41-105. (7760) Railway corporation—vice-principals. Every railway corporation, including electric railway corporations, doing business in this state, shall be liable for all damages sustained by an employee thereof, within this state, without contributing negligence on his part, when such damages are caused by the negligence of any train dispatcher, telegraph operator, superintendent, master mechanic, yardmaster, conductor, engineer, motorman, or of any other employee who has superintendence of any stationary or hand signal.

History: En. Sec. 1, Ch. 83, L. 1903; re-en. Sec. 5245, Rev. C. 1907; re-en. Sec. 7760, R. C. M. 1921.

Operation and Effect

Under either of the fellow-servant acts, a complaint, in an action by a switchman against a railway company for personal injuries, alleging that "the defendant company so carelessly and negligently managed, operated, and ran" a train of cars as to seriously injure him, was insufficient, in the absence of an allegation that recovery was sought on account of the negligence of one for whose fault

the statute imposes a liability on the master, to admit proof showing that plaintiff's injuries were brought about by the careless and negligent acts of the engineer in charge of the train in question. *Kelly v. Northern Pacific Ry. Co.*, 35 M 243, 250, 88 P 1009.

Where a servant relies for recovery of damages for personal injuries upon the provisions of either of the fellow-servant acts, creating a liability on the part of the master where none existed before their enactment, he must set forth in ordinary and concise language a statement of facts showing his right to recover

under such special statute. *Kelly v. Northern Pacific Ry. Co.*, 35 M 243, 255, 88 P 1009; *Miley v. Northern Pacific Ry. Co.*, 41 M 51, 54, 108 P 5; *Thurman v. Pittsburg & Montana Copper Co.*, 41 M 141, 150, 108 P 588. See *Beeler v. Butte & London C. D. Co.*, 41 M 465, 472, 110 P 528; *Kinsel v. North Butte Min. Co.*, 44 M 445, 466, 120 P 797; *Melzner v. Raven Copper Co.*, 47 M 351, 357, 132 P 552; *Kirk v. Smith*, 48 M 489, 492, 138 P 1088.

This statute constitutes a valid exercise of legislative power. *Lewis v. Northern Pacific Ry. Co.*, 36 M 207, 212, 92 P 469.

Id. The general purpose of this act being to protect railroad employees in their particularly hazardous employment, it cannot be held to violate the equal protection of the law clause of the United States constitution, under the rule of statutory construction that, where the general purpose of a statute has been ascertained, general words may be restricted to a particular meaning, or those of a restricted meaning expanded so as to embrace the general purpose and effectuate it, by holding that the expression "railway corporation," found in the above section, includes all persons, both individual and corporate, engaged in operating railroads.

41-106. (7761) Mines, mills and smelters—vice-principals. Every company, corporation, or individual, operating any mine, smelter, or mill for the refining of ores, shall be liable for all damages sustained by an employee thereof within this state, without contributing negligence on his part, when such damage is caused by the negligence of any superintendent, foreman, shift-boss, hoisting or other engineer, or craneman.

History: En. Sec. 2, Ch. 83, L. 1903; re-en. Sec. 5246, Rev. C. 1907; re-en. Sec. 7761, R. C. M. 1921.

41-107. (7762) Contract of insurance not to relieve employer. No contract of insurance, relief, benefit, or indemnity in case of injury or death, nor any other contract entered into, either before or after the injury, between the person injured and any of the employers named in this act, shall constitute any bar or defense to any cause of action brought under the provisions of this act.

History: En. Sec. 3, Ch. 83, L. 1903; re-en. Sec. 5247, Rev. C. 1907; re-en. Sec. 7762, R. C. M. 1921.

41-108. (7763) Mining companies liable for negligence of certain employees. Every company, corporation, or individual, operating any mine, smelter, or mill for the refining of ores, shall be liable for any damages sustained by any employees thereof within this state, without contributing negligence on his part, when such damage is caused by the negligence of any superintendent, foreman, shift-boss, hoisting or other engineer, or craneman.

References

Cited or applied as Laws of 1903, p. 156, in *Cunningham v. Northwestern Improvement Co.*, 44 M 180, 216, 119 P 554; *Jones et al. v. Great Northern Ry. Co.*, 68 M 231, 217 P 673.

Collateral References

Master and Servant—180-184.

56 C.J.S. Master and Servant §§ 346, 350.

35 Am. Jur. 715, Master and Servant, §§ 293 et seq.; 38 Am. Jur. 848, Negligence, §§ 174 et seq.

Contributory negligence or assumption of risk in disobeying rules or directions of master under counter direction by superior. 23 ALR 315.

Right to recover for death of, or injury to, servant due to his conscious exposure in attempt to save property. 61 ALR 579.

Assumption of risk of overstrain consequent upon failure of other employee to lift his share. 74 ALR 157.

Statute denying to employer defense of assumption of risk as affecting simple tool rule. 91 ALR 786.

Assumption of risk and contributory negligence in connection with injury arising from improper manner of loading or fastening load on freight car. 106 ALR 1140.

Collateral References

Master and Servant—100.

56 C.J.S. Master and Servant § 197.

History: En. Sec. 1, Ch. 23, L. 1905; re-en. Sec. 5248, Rev. C. 1907; re-en. Sec. 7763, R. C. M. 1921.

Contributory Negligence

The phrase, "without contributing negligence on his part," as used in this section, is a mere proviso or qualifying clause, inserted to forestall any possible interpretation of the statute as also abolishing the defense of contributory negligence. *Melzner v. Raven Copper Co.*, 47 M 351, 358, 132 P 552.

Operation in General

The fact that the negligent act of a shift-boss, which caused the injury, was not connected with the work of directing the men under him, but was committed while doing the work of one of his subordinates, does not relieve the operator from liability; so long as the act is done in the due course of his employment, the master is responsible, whether done in the discharge of delegable or non-delegable duties. *Johnson v. Butte & Superior Copper Co.*, 41 M 158, 171, 108 P 1057.

An action under this section is not a "purely statutory action." *Melzner v. Raven Copper Co.*, 47 M 351, 357, 132 P 552.

Id. Where the verdict in an action for wrongful death brought jointly against a mine operator and a hoisting engineer under this section, by which the former is made responsible for injuries to his employees under the maxim respondeat superior, was silent as to the engineer, the failure of the jury to find as to him was not a finding of non-negligence on his part, but should be regarded as no finding as to him.

Pleading

Where a servant relies for recovery for personal injuries on a special statute creating a liability on the part of the master where none existed before, he must set forth, in ordinary and concise language, a statement of facts showing his right to recover under that statute. *Thurman v. Pittsburg & Montana Copper Co.*, 41 M 141, 150, 108 P 588.

Id. A complaint which charged defendant company and its foreman with primary negligence in failing to use ordinary care to furnish plaintiff a safe place to work, and did not allege any specific acts of negligence on the part of the foreman imputable to the master, failed to state a cause of action falling within this section.

In an action to recover damages for personal injuries, brought under this section, plaintiff held to have made out a prima facie case upon which to go to the jury, upon the question whether a timber which, in falling, produced the injury, was caused to fall by a shift-boss of defendant company, and whether such person occupied the position of shift-boss. *Johnson v. Butte & Superior Copper Co.*, 41 M 158, 167, 108 P 1057.

Where the negligence of a fellow-servant is relied upon, the injured servant must declare upon the statute, and cannot recover in a common-law action. *Kinsel v. North Butte Mining Co.*, 44 M 445, 466, 120 P 797.

The plaintiff, in an action under this section, need not allege in his complaint that the injury sustained was caused "without contributing negligence on his part," such negligence being matter of defense to be asserted and shown by defendant employer unless made apparent by plaintiff's own pleading or proof. *Melzner v. Raven Copper Co.*, 47 M 351, 357, 132 P 552.

Purpose

The purpose and effect of this section declared in *Thurman v. Pittsburg & Montana Copper Co.*, 41 M 141, 150, 108 P 588; *Beeler v. Butte & London C. D. Co.*, 41 M 465, 472, 110 P 528; *Melzner v. Raven Copper Co.*, 47 M 351, 357, 132 P 552.

"Shift-Boss"

The term "shift-boss," as used in this section, means a master workman who directs the operations of a set of men who work in turn with other sets. *Johnson v. Butte & Superior Copper Co.*, 41 M 158, 170, 108 P 1057.

Statute of Limitations

An action brought under this section and the two following sections, to recover damages for injuries to a mine employee, does not fall within the category of those founded "upon a liability created by statute," mentioned in the statute of limitations as being barred unless brought within two years. *Beeler v. Butte & London C. D. Co.*, 41 M 465, 472, 110 P 528.

Sufficiency of Evidence

Evidence, circumstantial in character, held sufficient under the provisions of this and the next two succeeding sections in *Beeler v. Butte & London C. D. Co.*, 41 M 465, 473, 110 P 528.

41-109. (7764) Contract of insurance no bar to recovery. No contract of insurance, relief, benefit, or indemnity in case of injury or death, nor any other contract entered into before the injury, between the person injured

and any of the employers named in this act, shall constitute any bar or defense to any cause of action brought under the provisions of this act.

History: En. Sec. 2, Ch. 23, L. 1905; re-en. Sec. 5249, Rev. C. 1907; re-en. Sec. 7764, R. C. M. 1921.

Codes, in *Da Rin v. Casualty Company of America*, 41 M 175, 186, 108 P 649; *Beeler v. Butte & London C. D. Co.*, 41 M 465, 472, 110 P 528.

References

Cited or applied as section 5249, Revised

41-110. (7765) Survival of action. In case of the death of any such employees in consequence of any injury or damages so sustained, the right of action shall survive and may be prosecuted and maintained by their heirs or personal representatives.

History: En. Sec. 3, Ch. 23, L. 1905; re-en. Sec. 5250, Rev. C. 1907; re-en. Sec. 7765, R. C. M. 1921.

Effect of death of a beneficiary upon right of action under death statute. 13 ALR 225.

Operation and Effect

Under the express provision of this section, the right of action to recover damages for injuries to a mine employee, alleged to have been caused by the negligence of a fellow-servant, survives to, and may be prosecuted and maintained by, the heirs or personal representatives of the deceased. *Beeler v. Butte & London C. D. Co.*, 41 M 465, 472, 110 P 528.

"Sentimental" losses, including mental anguish, loss of society, and loss of marital, filial, or parental care and guidance, as elements of damages in action for wrongful death. 74 ALR 11.

Amendment of pleadings in death action after limitation has run by change in capacity in which suit is prosecuted. 74 ALR 1269.

Collateral References

Death—10.

25 C.J.S. Death § 16.

16 Am. Jur. 35, Death, §§ 44 et seq.

Nature of difference between *lex loci* and *lex fori* which will sustain or defeat jurisdiction of a cause of action for death arising under the law of another state or country. 77 ALR 1311.

41-111. (7766) Railway corporations liable for negligence of fellow-servant. Every person or corporation operating a railway or railroad in this state shall be liable for all damages sustained by any employee of such person or corporation in consequence of the neglect of any other employee or employees thereof, or by the mismanagement of any other employee or employees thereof, and in consequence of the wilful wrongs, whether of commission or omission, of any other employee or employees thereof, when such neglect, mismanagement, or wrongs are in any manner connected with the use and operation of any railway or railroad on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding.

History: En. Sec. 1, Ch. 1, L. 1905; re-en. Sec. 5251, Rev. C. 1907; re-en. Sec. 7766, R. C. M. 1921.

960; *Melzner v. Northern Pacific Ry. Co.*, 46 M 277, 286, 127 P 1002.

Cross-Reference

Railroads, employers' liability act, secs. 72-648 to 72-651.

If a person is injured while employed by a railroad company engaged in interstate commerce, and subsequently dies of his injuries, a right of action survives to his personal representative, for the benefit of certain named beneficiaries, and the proper party plaintiff is the personal representative of the decedent; the right of recovery, however, is determinable by the provisions of the federal employers' liability act, which impliedly supersedes all state statutes on the subject. *Melzner v. Northern Pac. Ry. Co.*, 46 M 277, 288, 127 P 1002.

Action Survives

Under this section and sections 41-112 and 93-2824 the right of action accruing to an injured employee survives in case of his death, and may be prosecuted to judgment by his representative, whether such employee has commenced action in his life-time or not. *Dillon v. Great Northern Ry. Co.*, 38 M 485, 496, 100 P

Fellow-Servant Doctrine Abolished

This section abolishes the fellow-servant rule. *Moyse v. Northern Pacific Ry. Co.*, 41 M 272, 282, 108 P 1062.

This section enlarges the common-law liability of persons or corporations operating railroads. *Cunningham v. Northwestern Impr. Co.*, 44 M 180, 216, 119 P 554.

Who Are Employees

In an action brought under this section by a freight conductor against his employer, where it appeared that plaintiff, who, during the entire time when away from his home terminal, was subject to be called on duty and required to be within call, and who, though not required to do so under his contract of employment, was nevertheless expected to occupy the caboose of his train at night, was, when injured in a collision while asleep in the caboose standing on a side-track, in the discharge of his duties, he did not occupy the position of a mere licensee, even though his pay had, for the time being, ceased, and would not begin again until called on duty. *Moyse v. Northern Pacific Ry. Co.*, 41 M 272, 282, 108 P 1062. See *Hollenback v. Stone & Webster Eng.*

41-112. (7767) Survival of action. In case of the death of any such employee in consequence of any injury or damage so sustained, the right of action shall survive and may be prosecuted and maintained by his heirs or personal representatives.

History: En. Sec. 2, Ch. 1, L. 1905; re-en. Sec. 5252, Rev. C. 1907; re-en. Sec. 7767, R. C. M. 1921.

Operation and Effect

The provisions of this section and of the next preceding section constitute a survival statute, and do not create a new cause of action in favor of the heirs for damages sustained by them by reason of the death of the deceased. *Dillon v. Great Northern Ry. Co.*, 38 M 485, 494, 100 P 960.

Id. Where, in an action brought by the heirs of a railroad employee, under the provisions of this section and the next pre-

ceding one, to recover damages for the alleged killing of deceased, the agreed statement of facts showed that his death in a collision was instantaneous, there could not be any survival of an action in the heirs, since the wrong and the death of decedent, having been coincident in point of time, no cause of action ever accrued in his favor, and therefore none could survive in the heirs.

ceding one, to recover damages for the alleged killing of deceased, the agreed statement of facts showed that his death in a collision was instantaneous, there could not be any survival of an action in the heirs, since the wrong and the death of decedent, having been coincident in point of time, no cause of action ever accrued in his favor, and therefore none could survive in the heirs.

References

Cited or applied as Session Laws of 1905, p. 1, in *Kelly v. Northern Pacific Ry. Co.*, 35 M 243, 250, 88 P 1009; as section 5251, Revised Codes, in *Thurman v. Pittsburg & Montana Copper Co.*, 41 M 141, 150, 108 P 588.

Collateral References

35 Am. Jur. 814, Master and Servant, §§ 392-394.

Contributory negligence as a defense to a cause of action based upon violation of statute imposing duty on railroad. 10 ALR 2d 853.

References

Cited or applied as section 5252, Revised Codes, in *Melzner v. Northern Pacific Ry. Co.*, 46 M 277, 286, 127 P 1002.

41-113. Medical examination as condition of employment—costs to be paid by employer. It shall be unlawful for any employer to require any employee or applicant for employment to pay the cost of a medical examination or the cost of furnishing any records of such examination as a condition of employment.

History: En. Sec. 1, Ch. 47, L. 1953.

41-114. Employer defined. The term "employer" as used in this act shall mean and include an individual, a partnership, an association, a corporation, a legal representative, trustee, receiver, trustee in bankruptcy,

and any common carrier by rail, motor, water, air or express company doing business in or operating within the state.

History: En. Sec. 2, Ch. 47, L. 1953.

41-115. Employee defined. The term "employee" as used in this act shall mean and include any person who may be permitted, required or directed by any employer, as defined in section 41-114 in consideration of direct or indirect gain or profit to engage in any employment.

History: En. Sec. 3, Ch. 47, L. 1953.

41-116. Penalty. Any employer violating the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine in any sum not exceeding one hundred dollars (\$100.00) for each such offense.

History: En. Sec. 4, Ch. 47, L. 1953.

CHAPTER 2

OBLIGATIONS OF EMPLOYEES

- Section 41-201. Duties of gratuitous employee.
 41-202. Same—by special request.
 41-203. Same—under written power of attorney.
 41-204. Duties of employee for reward.
 41-205. Duties of employee for his own benefit.
 41-206. Contracts for service limited to two years.
 41-207. Employee must obey employer.
 41-208. Employee to conform to usage.
 41-209. Degree of skill required.
 41-210. Must use what skill he has.
 41-211. What belongs to employer.
 41-212. Duty to account.
 41-213. Employee not bound to deliver without demand.
 41-214. Preference to be given to employer's business.
 41-215. Responsibility of employee for substitute.
 41-216. Responsibility for negligence.
 41-217. Surviving employee.
 41-218. Confidential employment.

41-201. (7768) Duties of gratuitous employee. One who, without consideration, undertakes to do a service for another is not bound to perform the same, but if he actually enters upon its performance, he must use at least slight care and diligence therein.

History: En. Sec. 2670, Civ. C. 1895; re-en. Sec. 5253, Rev. C. 1907; re-en. Sec. 7768, R. C. M. 1921. Cal. Civ. C. Sec. 1975. Field Civ. C. Sec. 1008.

Operation and Effect

Under the law of this state a difference in degree of negligence is recognized. *Liston v. Reynolds*, 69 M 480, 497, 223 P 507.

References

Cited or applied as section 5253, Revised Codes, in *Neary v. Northern Pacific Ry. Co.*, 41 M 480, 491, 110 P 226; *John v. Northern Pacific Ry. Co.*, 42 M 18, 29, 111 P 632.

Collateral References

Master and Servant § 50.
 56 C.J.S. Master and Servant § 63.

41-202. (7769) Same—by special request. One who, by his own special request, induces another to entrust him with the performance of a service, must perform the same fully. In other cases, one who undertakes a gratuitous service may relinquish it at any time.

History: En. Sec. 2671, Civ. C. 1895; 7769, R. C. M. 1921. Cal. Civ. C. Sec. 1976.
re-en. Sec. 5254, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1009.

41-203. (7770) Same—under written power of attorney. A gratuitous employee, who accepts a written power of attorney, must act under it so long as it remains in force, or until he gives notice to his employer that he will not do so.

History: En. Sec. 2672, Civ. C. 1895;
re-en. Sec. 5255, Rev. C. 1907; re-en. Sec.
7770, R. C. M. 1921. Cal. Civ. C. Sec. 1977.
Field Civ. C. Sec. 1010.

Collateral References
Principal and Agent ⇨ 48.
2 C.J.S. Agency § 91.

41-204. (7771) Duties of employee for reward. One who, for a good consideration, agrees to serve another, must perform the service, and must use ordinary care and diligence therein, so long as he is thus employed.

History: En. Sec. 2673, Civ. C. 1895;
re-en. Sec. 5256, Rev. C. 1907; re-en. Sec.
7771, R. C. M. 1921. Cal. Civ. C. Sec. 1978.
Field Civ. C. Sec. 1011.

Collateral References
Master and Servant ⇨ 50, 53.
56 C.J.S. Master and Servant §§ 63, 69.
35 Am. Jur. 514, Master and Servant,
§§ 82 et seq.

41-205. (7772) Duties of employee for his own benefit. One who is employed at his own request to do that which is more for his own advantage than for that of his employer, must use great care and diligence therein to protect the interest of the latter.

History: En. Sec. 2674, Civ. C. 1895; 7772, R. C. M. 1921. Cal. Civ. C. Sec. 1979.
re-en. Sec. 5257, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1012.

41-206. (7773) Contracts for service limited to two years. A contract to render personal service, other than a contract of apprenticeship, as provided in the chapter on apprentices, cannot be enforced against the employee beyond the term of two years from the commencement of service under it; but if the employee voluntarily continues his service under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation.

History: En. Sec. 2675, Civ. C. 1895;
re-en. Sec. 5258, Rev. C. 1907; re-en. Sec.
7773, R. C. M. 1921. Cal. Civ. C. Sec. 1980.
Field Civ. C. Sec. 1013.

Collateral References
Master and Servant ⇨ 8, 70(4).
56 C.J.S. Master and Servant §§ 8, 118.

41-207. (7774) Employee must obey employer. An employee must substantially comply with all the directions of his employer concerning the service on which he is engaged, except where such obedience is impossible or unlawful, or would impose new and unreasonable burdens upon the employee.

History: En. Sec. 2676, Civ. C. 1895;
re-en. Sec. 5259, Rev. C. 1907; re-en. Sec.
7774, R. C. M. 1921. Cal. Civ. C. Sec. 1981.
Based on Field Civ. C. Sec. 1014.

35 Am. Jur. 514, Master and Servant,
§ 83.

Disobedience of order reducing employee in rank or authority for changing his duties, as ground for discharge. 4 ALR 2d 76.

Collateral References

Master and Servant ⇨ 54.
56 C.J.S. Master and Servant § 75.

41-208. (7775) Employee to conform to usage. An employee must perform his service in conformity to the usage of the place of performance, unless otherwise directed by his employer, or unless it is impracticable, or manifestly injurious to his employer to do so.

History: En. Sec. 2677, Civ. C. 1895; re-en. Sec. 5260, Rev. C. 1907; re-en. Sec. 7775, R. C. M. 1921. Cal. Civ. C. Sec. 1982. Field Civ. C. Sec. 1015.

Operation and Effect

A vital part of every contract of employment is the law of the state requiring one employed to perform services under contract, to perform those services in accordance with the usage in the community in which they are to be performed, to perform them with a reasonable degree

of skill and with an ordinary degree of diligence and faithfulness. Schwab v. Peterson, 80 M 214, 227, 260 P 711.

A contract of employment carries with it the obligation to do the work in a reasonably skillful manner. Garden City Floral Co. v. Hunt, 126 M 537, 255 P 2d 352, 354.

Collateral References

Master and Servant⁵³.

56 C.J.S. Master and Servant § 69.

41-209. (7776) Degree of skill required. An employee is bound to exercise a reasonable degree of skill, unless his employer has notice, before employing him, of his want of skill.

History: En. Sec. 2678, Civ. C. 1895; re-en. Sec. 5261, Rev. C. 1907; re-en. Sec. 7776, R. C. M. 1921. Cal. Civ. C. Sec. 1983. Field Civ. C. Sec. 1016.

Operation and Effect

A vital part of every contract of employment is the law of the state requiring one employed to perform services under contract, to perform those services in accordance with the usage in the community in which they are to be performed, to perform them with a reasonable degree of skill and with an ordinary degree of diligence and faithfulness. Schwab v. Peterson, 80 M 214, 227, 260 P 711.

A contract of employment carries with it the obligation to do the work in a reasonably skillful manner. Garden City Floral Co. v. Hunt, 126 M 537, 255 P 2d 352, 354.

Id. Accompanying every contract is a common-law duty to perform with care, skill, reasonable expediency, and faithfulness, and a negligent failure to observe any of these conditions is a tort, as well as a breach of contract.

Collateral References

35 Am. Jur. 530, Master and Servant, §§ 101-103.

41-210. (7777) Must use what skill he has. An employee is always bound to use such skill as he possesses, so far as the same is required, for the service specified.

History: En. Sec. 2679, Civ. C. 1895; re-en. Sec. 5262, Rev. C. 1907; re-en. Sec. 7777, R. C. M. 1921. Cal. Civ. C. Sec. 1984. Based on Field Civ. C. Sec. 1017.

41-211. (7778) What belongs to employer. Everything which an employee acquires by virtue of his employment, except the compensation, if any, which is due to him from his employer, belongs to the latter, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment.

History: En. Sec. 2680, Civ. C. 1895; re-en. Sec. 5263, Rev. C. 1907; re-en. Sec. 7778, R. C. M. 1921. Cal. Civ. C. Sec. 1985. Field Civ. C. Sec. 1018.

Operation and Effect

Where the bank's president performed services in negotiating a loan in the course of his employment, the bank was

entitled to receive the commission earned in negotiating the loan. Sullivan v. Mountain, 117 M 224, 227, 160 P 2d 477.

Collateral References

Master and Servant⁶¹.

56 C.J.S. Master and Servant § 71.

35 Am. Jur. 516, Master and Servant, §§ 87 et seq.

41-212. (7779) Duty to account. An employee must, on demand, render to his employer just accounts of all his transactions in the course of his service, as often as may be reasonable, and must, without demand, give prompt notice to his employer of everything which he receives for his account.

History: En. Sec. 2681, Civ. C. 1895; re-en. Sec. 5264, Rev. C. 1907; re-en. Sec. 7779, R. C. M. 1921. Cal. Civ. C. Sec. 1986. Field Civ. C. Sec. 1019.

Collateral References

Master and Servant 50, 52.
56 C.J.S. Master and Servant § 67.

41-213. (7780) Employee not bound to deliver without demand. An employee who receives anything on account of his employer, in any capacity other than that of a mere servant, is not bound to deliver it to him until demanded, and is not at liberty to send it to him from a distance, without demand, in any mode involving greater risk than its retention by the employee himself.

History: En. Sec. 2682, Civ. C. 1895; re-en. Sec. 5265, Rev. C. 1907; re-en. Sec. 7780, R. C. M. 1921. Cal. Civ. C. Sec. 1987. Field Civ. C. Sec. 1020.

Collateral References

Master and Servant 61.
56 C.J.S. Master and Servant § 71.

41-214. (7781) Preference to be given to employer's business. An employee who has any business to transact on his own account, similar to that entrusted to him by his employer, must always give the latter the preference.

History: En. Sec. 2683, Civ. C. 1895; re-en. Sec. 5266, Rev. C. 1907; re-en. Sec.

7781, R. C. M. 1921. Cal. Civ. C. Sec. 1988. Based on Field Civ. C. Sec. 1021.

41-215. (7782) Responsibility of employee for substitute. An employee who is expressly authorized to employ a substitute is liable to his principal only for want of ordinary care in his selection. The substitute is directly responsible to the principal.

History: En. Sec. 2684, Civ. C. 1895; re-en. Sec. 5267, Rev. C. 1907; re-en. Sec. 7782, R. C. M. 1921. Cal. Civ. C. Sec. 1989. Field Civ. C. Sec. 1022.

Collateral References

35 Am. Jur. 532, Master and Servant, § 103.

41-216. (7783) Responsibility for negligence. An employee who is guilty of a culpable degree of negligence is liable to his employer for the damage thereby caused to the latter; and the employer is liable to him, if the service is not gratuitous, for the value of such services only as are properly rendered.

History: En. Sec. 2685, Civ. C. 1895; re-en. Sec. 5268, Rev. C. 1907; re-en. Sec. 7783, R. C. M. 1921. Cal. Civ. C. Sec. 1990. Field Civ. C. Sec. 1023.

Collateral References

Master and Servant 66, 73.
56 C.J.S. Master and Servant §§ 79, 102.
35 Am. Jur. 530, Master and Servant, §§ 101-103.

41-217. (7784) Surviving employee. Where service is to be rendered by two or more persons jointly, and one of them dies, the survivor must act alone, if the service to be rendered is such as he can rightly perform without the aid of the deceased person, but not otherwise.

History: En. Sec. 2686, Civ. C. 1895; re-en. Sec. 5269, Rev. C. 1907; re-en. Sec. 7784, R. C. M. 1921. Cal. Civ. C. Sec. 1991. Field Civ. C. Sec. 1024.

Collateral References

Master and Servant 59.
56 C.J.S. Master and Servant § 62.

41-218. (7785) Confidential employment. The obligations peculiar to confidential employments are defined in the chapter on trusts.

History: En. Sec. 2687, Civ. C. 1895; re-en. Sec. 5270, Rev. C. 1907; re-en. Sec. 7785, R. C. M. 1921. Cal. Civ. C. Sec. 1992. Field Civ. C. Sec. 1025.

Collateral References

Trusts 179.
65 C.J. Trusts § 519.

CHAPTER 3

TERMINATION OF EMPLOYMENT

- Section 41-301. Termination by death, etc., of employer.
 41-302. Employment—how terminated.
 41-303. Continuance of service in certain cases.
 41-304. Termination at will.
 41-305. Termination by employer for fault.
 41-306. Termination by employee for fault.
 41-307. Compensation of employee dismissed for cause.
 41-308. Compensation of employee leaving for cause.

41-301. (7786) Termination by death, etc., of employer. Every employment in which the power of the employee is not coupled with an interest in its subject is terminated by notice to him of:

1. The death of the employer; or,
2. His legal incapacity to contract.

History: En. Sec. 2700, Civ. C. 1895;
 re-en. Sec. 5271, Rev. C. 1907; re-en. Sec.
 7786, R. C. M. 1921. Cal. Civ. C. Sec. 1996.
 Field Civ. C. Sec. 1026.

Collateral References

Master and Servant § 8.
 56 C.J.S. Master and Servant § 8.
 35 Am. Jur. 465, Master and Servant,
 § 29.

41-302. (7787) Employment—how terminated. Every employment is terminated:

1. By the expiration of its appointed term;
2. By the extinction of its subject;
3. By the death of the employee; or,
4. By his legal incapacity to act as such.

History: En. Sec. 2701, Civ. C. 1895;
 re-en. Sec. 5272, Rev. C. 1907; re-en. Sec.
 7787, R. C. M. 1921. Cal. Civ. C. Sec. 1997.
 Field Civ. C. Sec. 1027.

Collateral References

35 Am. Jur. 456, Master and Servant,
 §§ 19 et seq.

41-303. (7788) Continuance of service in certain cases. An employee, unless the term of his service has expired, or unless he has a right to discontinue it at any time without notice, must continue his service after notice of the death or incapacity of his employer, so far as is necessary to protect from serious injury the interests of the employer's successor in interest, until a reasonable time after notice of the facts has been communicated to such successor. The successor must compensate the employee for such service according to the terms of the contract of employment.

History: En. Sec. 2702, Civ. C. 1895; 7788, R. C. M. 1921. Cal. Civ. C. Sec. 1998.
 re-en. Sec. 5273, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1028.

41-304. (7789) Termination at will. An employment having no specified term may be terminated at the will of either party, on notice to the other, except where otherwise provided by sections 41-101 to 41-407 and 2-109 to 2-112 and 2-401 to 2-405.

History: En. Sec. 2703, Civ. C. 1895;
 re-en. Sec. 5274, Rev. C. 1907; re-en. Sec.
 7789, R. C. M. 1921. Cal. Civ. C. Sec. 1999.
 Field Civ. C. Sec. 1029.

References

Wirta v. North Butte Mining Co. et
 al., 64 M 279, 290, 210 P 332.

41-305. (7790) Termination by employer for fault. An employment, even for a specified term, may be terminated at any time by the employer in case of any wilful breach of duty by the employee in the course of his

employment, or in case of his habitual neglect of his duty or continued incapacity to perform it.

History: En. Sec. 2704, Civ. C. 1895; re-en. Sec. 5275, Rev. C. 1907; re-en. Sec. 7790, R. C. M. 1921. Cal. Civ. C. Sec. 2000. Field Civ. C. Sec. 1030.

Collateral References

35 Am. Jur. 469, Master and Servant, §§ 34 et seq.

41-306. (7791) Termination by employee for fault. An employment, even for a specified term, may be terminated by the employee at any time in case of any wilful or permanent breach of the obligations of his employer to him as an employee.

History: En. Sec. 2705, Civ. C. 1895; re-en. Sec. 5276, Rev. C. 1907; re-en. Sec. 7791, R. C. M. 1921. Cal. Civ. C. Sec. 2001. Based on Field Civ. C. Sec. 1031.

Collateral References

Disobedience of order reducing employee in rank or authority for changing his duties as ground for discharge. 4 ALR 2d 276.

References

Wirta v. North Butte Mining Co. et al., 64 M 279, 290, 210 P 332.

41-307. (7792) Compensation of employee dismissed for cause. An employee, dismissed by his employer for good cause, is not entitled to any compensation for services rendered since the last day upon which a payment became due to him under the contract.

History: En. Sec. 2706, Civ. C. 1895; re-en. Sec. 5277, Rev. C. 1907; re-en. Sec. 7792, R. C. M. 1921. Cal. Civ. C. Sec. 2002. Field Civ. C. Sec. 1032.

Collateral References

Master and Servant ⇐ 74.
56 C.J.S. Master and Servant § 119.
35 Am. Jur. 510, Master and Servant, § 79.

41-308. (7793) Compensation of employee leaving for cause. An employee who quits the service of his employer for good cause is entitled to such proportion of the compensation which would become due in case of full performance as the services which he has already rendered bear to the services which he was to render as full performance.

History: En. Sec. 2707, Civ. C. 1895; re-en. Sec. 5278, Rev. C. 1907; re-en. Sec. 7793, R. C. M. 1921. Cal. Civ. C. Sec. 2003. Field Civ. C. Sec. 1033.

Collateral References

Master and Servant ⇐ 73(7), 75.
56 C.J.S. Master and Servant §§ 88, 113.

CHAPTER 4

MASTER AND SERVANT

- Section 41-401. Servant defined.
41-402. Term of hiring.
41-403. Same—presumed to be monthly, when.
41-404. Renewal of hiring.
41-405. Time of service.
41-406. Servant to pay over without demand.
41-407. When servant may be discharged.

41-401. (7794) Servant defined. A servant is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master.

History: En. Sec. 2720, Civ. C. 1895; re-en. Sec. 5279, Rev. C. 1907; re-en. Sec. 7794, R. C. M. 1921. Cal. Civ. C. Sec. 2009. Field Civ. C. Sec. 1034.

When Employee a Servant and Not an Independent Contractor

An operator of a wrecker service taking direction from employee of highway construction company in righting a trailer was for the time an employee of the company and not an independent contractor, and his widow entitled to compensation under the workmen's compensation act. Under the facts stated, he submitted himself to the direction of the employer as to details and means, and

the rule that an advance agreement as to price for service to obtain a certain result without regard to length of time indicating relationship of independent contractor, inapplicable. *Grief v. Industrial Accident Fund*, 108 M 519, 522, 93 P 2d 961.

Collateral References

Master and Servant^①1.
56 C.J.S. Master and Servant § 2.

41-402. (7795) Term of hiring. A servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to be for one year; a hiring at a daily rate for one day; a hiring by piece-work for no specified term.

History: En. Sec. 2721, Civ. C. 1895; re-en. Sec. 5280, Rev. C. 1907; re-en. Sec. 7795, R. C. M. 1921. Cal. Civ. C. Sec. 2010. Field Civ. C. Sec. 1035.

Operation and Effect

Where the salary of an extra deputy in the county clerk's office had been fixed at a monthly rate, her employment is presumed to have been from month to month,

under this section terminable at the end of each monthly period and such employment was therefore of a temporary and not of a permanent character. *Farrell v. Yellowstone County*, 68 M 313, 315, 218 P 559.

Collateral References

Master and Servant^②8.
56 C.J.S. Master and Servant § 8.

41-403. (7796) Same—presumed to be monthly, when. In the absence of any agreement or custom as to the term of service, the time of payment, or rate or value of wages, a servant is presumed to be hired by the month, at a monthly rate of reasonable wages, to be paid when the service is performed.

History: En. Sec. 2722, Civ. C. 1895; re-en. Sec. 5281, Rev. C. 1907; re-en. Sec. 7796, R. C. M. 1921. Cal. Civ. C. Sec. 2011. Based on Field Civ. C. Sec. 1036.

Collateral References

Master and Servant^③8(3).
56 C.J.S. Master and Servant § 8.

41-404. (7797) Renewal of hiring. Where, after the expiration of an agreement respecting the wages and the term of service, the parties continue the relation of master and servant, they are presumed to have renewed the agreement for the same wages and term of service.

History: En. Sec. 2723, Civ. C. 1895; re-en. Sec. 5282, Rev. C. 1907; re-en. Sec. 7797, R. C. M. 1921. Cal. Civ. C. Sec. 2012. Field Civ. C. Sec. 1037.

Collateral References

Master and Servant^④9.
56 C.J.S. Master and Servant § 10.

41-405. (7798) Time of service. The entire time of a domestic servant belongs to the master, and the time of other servants to such extent as is usual in the business in which they serve, not exceeding in any case ten hours in the day.

History: En. Sec. 2724, Civ. C. 1895; re-en. Sec. 5283, Rev. C. 1907; re-en. Sec. 7798, R. C. M. 1921. Cal. Civ. C. Sec. 2013. Field Civ. C. Sec. 1038.

Collateral References

Master and Servant^⑤50.
56 C.J.S. Master and Servant § 60.

41-406. (7799) Servant to pay over without demand. A servant must deliver to his master, as soon as with reasonable diligence he can find him, everything that he receives for his account, without demand; but he is not

bound, without orders from his master, to send anything to him through another person.

History: En. Sec. 2725, Civ. C. 1895; re-en. Sec. 5284, Rev. C. 1907; re-en. Sec. 7799, R. C. M. 1921. Cal. Civ. C. Sec. 2014. Field Civ. C. Sec. 1039.

Collateral References

Master and Servant 50.
56 C.J.S. Master and Servant § 63.

41-407. (7800) When servant may be discharged. A master may discharge any servant, other than an apprentice, whether engaged for a fixed term or not:

1. If he is guilty of misconduct in the course of his service, or of gross immorality, though unconnected with the same; or,

2. If, being employed about the person of his master, or in a confidential position, the master discovers that he has been guilty of misconduct, before or after the commencement of his service, of such a nature that, if the master had known or contemplated it, he would not have so employed him.

History: En. Sec. 2726, Civ. C. 1895; re-en. Sec. 5285, Rev. C. 1907; re-en. Sec. 7800, R. C. M. 1921. Cal. Civ. C. Sec. 2015. Field Civ. C. Sec. 1040.

Collateral References

35 Am. Jur. 469, Master and Servant, §§ 34 et seq.

CHAPTER 5

SERVICE WITHOUT EMPLOYMENT

Section 41-501. Service without employment—voluntary interference with property.

41-501. (7810) Service without employment—voluntary interference with property. One who officiously, and without the consent of the real or apparent owner of a thing, takes it into his possession for the purpose of rendering service about it, must complete such service, and use ordinary care, diligence, and reasonable skill about the same. He is not entitled to any compensation for his service or expenses, except that he may deduct actual and necessary expenses, incurred by him about such service, from any profits which his service has caused the thing to acquire for its owner, and must account to the owner for the residue.

History: En. Sec. 2760, Civ. C. 1895; re-en. Sec. 5295, Rev. C. 1907; re-en. Sec. 7810, R. C. M. 1921. Cal. Civ. C. Sec. 2078. Field Civ. C. Sec. 1083.

References

Cited or applied as section 5295, Revised Codes, in *Neary v. Northern Pacific Ry. Co.*, 41 M 480, 491, 110 P 226; *John v. Northern Pacific Ry. Co.*, 42 M 18, 29, 111 P 632.

Different Degrees of Negligence

Under the law of this state a difference in degrees of negligence is recognized. *Liston v. Reynolds*, 69 M 480, 497, 223 P 507.

Collateral References

Bailment 15.
8 C.J.S. Bailments § 30.

CHAPTER 6

REPORT OF ALIEN EMPLOYEES TO INDUSTRIAL ACCIDENT BOARD

Section 41-601. Reports of aliens employed to be made quarterly to industrial accident board.

41-602. Blank forms for reports to be furnished.

41-603. Duty of employees to furnish information.

41-604. Rules and regulations—failure to comply with law a misdemeanor.

41-601. (3040) Reports of aliens employed to be made quarterly to industrial accident board. It shall hereafter be the duty of every person, association, or corporation employing more than fifty persons at one time, within the state of Montana, to make out and file with the industrial accident board a regular quarterly report showing the names, ages, and residence of all their employees who are not citizens of the United States, and also of all employees who do not read and speak the English language. All such reports shall be made upon printed blank forms to be furnished by the industrial accident board, and shall in addition to the foregoing facts disclose the following, to-wit:

1. The country of which said employee is a citizen;
2. The period of time which said employee has resided in the United States;
3. The period of time which said employee has been in the service of said employer;
4. Whether said employee be married or single, and if married, the residence of employee's wife and family;
5. What steps, if any, employee has taken to become a citizen of the United States;
6. What steps, if any, employee has taken to familiarize himself with the English language;
7. Such further and additional facts and information as shall be prescribed and required by said board.

History: En. Sec. 1, Ch. 134, L. 1919;
re-en. Sec. 3040, R. C. M. 1921.

41-602. (3041) Blank forms for reports to be furnished. It shall be the duty of the industrial accident board to prepare, or cause to be prepared, all blank printed forms that shall be necessary to comply with the provisions hereof, which said blanks shall be furnished to all said employers, upon application therefor to said industrial accident board.

History: En. Sec. 2, Ch. 134, L. 1919;
re-en. Sec. 3041, R. C. M. 1921.

41-603. (3042) Duty of employees to furnish information. For the purpose of carrying out the provisions of this act, all employers of labor are hereby designated, for the purpose of receiving the information provided for in this act, agents and representatives of the industrial accident board, and it shall be the duty of all employees of such employers to furnish to the employers, upon their request, for and on behalf of said industrial accident board, all information necessary to enable the employers to make out and furnish the report or reports required by this act. In case of the failure or refusal of any employee to furnish to his employer the information provided for in this act, such fact shall be reported by the employer to the industrial accident board, and the industrial accident board is hereby authorized and empowered to cause such employee to appear before the industrial accident board, at such time and place as they may determine, and furnish the information required under the provisions of this act.

History: En. Sec. 3, Ch. 134, L. 1919;
re-en. Sec. 3042, R. C. M. 1921.

41-604. (3043) Rules and regulations—failure to comply with law a misdemeanor. The industrial accident board shall have full power and authority to make and prescribe all reasonable rules and regulations, and to prescribe all necessary penalties to secure a strict compliance with the provisions of this act, and every employer or employee or other person, who shall fail or refuse to comply with the provisions of this act, or with any rule or regulation of the industrial accident board, shall be deemed guilty of a misdemeanor.

History: En. Sec. 4, Ch. 134, L. 1919;
re-en. Sec. 3043, R. C. M. 1921.

CHAPTER 7

PREFERENCE OF MONTANA LABOR IN PUBLIC WORKS CONTRACTS

Section 41-701. Preference of Montana labor in public works—wage scale—not to conflict with federal statutes.

41-702. Labor and bona fide resident defined.

41-703. Penalty for violation of act.

41-701. (3043.1) Preference of Montana labor in public works—wage scale—not to conflict with federal statutes. In all contracts hereafter let for state, county, municipal and school construction, repair and maintenance work under any of the laws of this state there shall be inserted in each of said contracts a provision by which the contractor must give preference to the employment of bona fide Montana residents in the performance of said work, and that the said contractor must further pay the standard prevailing rate of wages in effect as paid in the county seat of the county in which the work is being performed and no contract shall be let to any person, firm, association or corporation refusing to execute an agreement with the above-mentioned provisions in it; provided that, in contracts involving the expenditure of federal aid funds this act shall not be enforced in such a manner as to conflict with or be contrary to the federal statutes prescribing a labor preference to honorably discharged soldiers, sailors and marines, and prohibiting as unlawful any other preference or discrimination among citizens of the United States.

History: En. Sec. 1, Ch. 102, L. 1931.

Collateral References

Counties—122 et seq.; Municipal Corporations—339 et seq.; Schools and School Districts—80 et seq.; States—100 et seq.

20 C.J.S. Counties § 191; 63 C.J.S. Municipal Corporations § 1162; 78 C.J.S. Schools and School Districts § 270; 81 C.J.S. States § 115.

41-702. (3043.2) Labor and bona fide resident defined. Labor is hereby defined to be all services performed in the construction, repair or maintenance of all state, county, municipal and school work and does not include engineering, superintendence, management, or office or clerical work.

A bona fide resident of Montana is hereby declared to be a person, who at the time of his said employment and immediately prior thereto, has lived in this state in such a manner and for such time as is sufficient to clearly justify the conclusion that his past habitation in this state has been coupled with intention to make it his home. Sojourners, or persons who come to Montana solely in pursuance of any contract or agreement to per-

form such labor, shall under no circumstance be deemed to be bona fide residents of Montana within the meaning and for the purpose of this act.

History: En. Sec. 2, Ch. 102, L. 1931.

41-703. (3043.3) Penalty for violation of act. If any person, firm or corporation shall fail to comply with the provisions of this act the state, county, municipal or school officers who have executed the contract shall retain five hundred dollars (\$500.00) of the contract price as liquidated damages for the violation of the terms of the contract and said money shall be credited to the proper funds of the state, county, municipal or school districts. In all contracts entered into under the provisions of this act at least five hundred dollars (\$500.00) of the contract price shall be withheld at all times until the termination of the contract.

History: En. Sec. 3, Ch. 102, L. 1931.

CHAPTER 8

VOCATIONAL REHABILITATION AND EDUCATION

Section	41-801.	Definitions.
	41-802.	Establishment of bureau of vocational rehabilitation.
	41-803.	Director of bureau of vocational rehabilitation.
	41-804.	Administration.
	41-805.	Cooperation with federal government.
	41-806.	Receipt and disbursement of vocational rehabilitation funds.
	41-807.	Gifts.
	41-808.	Eligibility for vocational rehabilitation.
	41-809.	Maintenance not assignable.
	41-810.	Hearings.
	41-811.	Misuse of vocational rehabilitation lists and records.
	41-812.	Limitation of political activity.
	41-813.	Separability.
	41-814.	Saving clause.
	41-815.	Short title.

41-801. Definitions. As used in this act:

- (a) "State board" means the state board of education;
- (b) "Bureau" means the bureau of vocational rehabilitation established by this act;
- (c) "Director" means the director of the bureau of vocational rehabilitation;
- (d) "Employment handicap" means a physical or mental condition which constitutes, contributes to or if not corrected, will probably result in an obstruction to occupational performance;
- (e) "Disabled individual" means any person who has a substantial employment handicap;
- (f) "Vocational rehabilitation" and "vocational rehabilitation services" mean any services, provided directly or through public or private instrumentalities, found by the director to be necessary to compensate a disabled individual for his employment handicap, and to enable him to engage in a remunerative occupation including, but not limited to, medical and vocational diagnosis, vocational guidance, counseling and placement, rehabilitation training, physical restoration, transportation, occupational licenses, customary occupational tools and equipment, maintenance, and training books and materials;

(g) "Rehabilitation training" means all necessary training provided to a disabled individual to compensate for his employment handicap including, but not limited to, manual, pre-conditioning, pre-vocational, vocational, and supplementary training and training provided for the purpose of achieving broader or more remunerative skills and capacities;

(h) "Physical restoration" means any medical, surgical or therapeutic treatment necessary to correct or substantially reduce a disabled individual's employment handicap within a reasonable length of time including, but not limited to, medical, psychiatric, dental and surgical treatment, nursing services, hospital care not to exceed ninety (90) days, convalescent home care, drugs, medical and surgical supplies, and prosthetic appliances, but excluding curative treatment for acute or transitory conditions;

(i) "Prosthetic appliance" means any artificial device necessary to support or take the place of a part of the body or to increase the acuity of a sense organ;

(j) "Occupational licenses" means any license, permit or other written authority required by any governmental unit to be obtained in order to engage in an occupation;

(k) "Maintenance" means money payments not exceeding the estimated cost of subsistence during vocational rehabilitation;

(l) "Regulations" means regulations made by the director with the approval of the state board.

History: En. Sec. 1, Ch. 74, L. 1947.

41-802. Establishment of bureau of vocational rehabilitation. There is hereby established, in the state board, a division to be known as the bureau of vocational rehabilitation.

History: En. Sec. 2, Ch. 74, L. 1947.

41-803. Director of bureau of vocational rehabilitation. The bureau shall be administered, under the general supervision and direction of the state board, by a director appointed by such board in accordance with established personnel standards and on the basis of his education, training, experience, and demonstrated ability. In carrying out his duties under this act, the director

(a) shall make regulations governing personnel standards, the protection of records and confidential information, the manner and form of filing applications, eligibility, and investigation and determination thereof, for vocational rehabilitation services, procedures for fair hearings and such other regulations as he finds necessary to carry out the purposes of this act;

(b) shall, with the approval of the state board, establish appropriate subordinate administrative units within the bureau;

(c) shall, with the approval of the state board, appoint such personnel as he deems necessary for the efficient performance of the functions of the bureau;

(d) shall prepare and submit to the state board annual reports of activities and expenditures, and, prior to each regular session of the legislature, estimates of sums required for carrying out this act and estimates of the amounts to be made available for this purpose from all sources;

(e) shall make certification for disbursement, in accordance with regulations, of funds available for vocational rehabilitation purposes;

(f) shall, with the approval of the state board, take such other action as he deems necessary or appropriate to carry out the purposes of this act;

(g) may, with the approval of the state board, delegate to any officer or employee of the bureau such of his powers and duties, except the making of regulations and the appointment of personnel, as he finds necessary to carry out the purposes of this act.

History: En. Sec. 3, Ch. 74, L. 1947.

41-804. Administration. Except as otherwise provided by law, the state board, through the bureau, shall provide vocational rehabilitation services to disabled individuals determined by the director to be eligible therefor, and, in carrying out the purposes of this act, the bureau is authorized, among other things,

(a) to cooperate with other departments, agencies and institutions, both public and private, in providing for the vocational rehabilitation of disabled individuals, in studying the problems involved therein, and in establishing, developing and providing, in conformity with the purposes of this act, such programs, facilities and services as may be necessary or desirable;

(b) to enter into reciprocal agreements with other states to provide for the vocational rehabilitation of residents of the states concerned;

(c) to conduct research and compile statistics relating to the vocational rehabilitation of disabled individuals.

History: En. Sec. 4, Ch. 74, L. 1947.

41-805. Cooperation with federal government. The state board, through the bureau, shall cooperate, pursuant to agreements, with the federal government in carrying out the purposes of any federal statutes pertaining to vocational rehabilitation and is authorized to adopt such methods of administration as are found by the federal government to be necessary for the proper and efficient operation of such agreements or plans for vocational rehabilitation and to comply with such conditions as may be necessary to secure the full benefits of such federal statutes.

History: En. Sec. 5, Ch. 74, L. 1947.

41-806. Receipt and disbursement of vocational rehabilitation funds. The state treasurer is hereby designated as the custodian of all funds received from the federal government for the purpose of carrying out any federal statutes pertaining to vocational rehabilitation. The state treasurer shall make disbursements from such funds and from all state funds available for vocational rehabilitation purposes upon certification in the manner provided in section 41-803(e).

History: En. Sec. 6, Ch. 74, L. 1947.

41-807. Gifts. The director is hereby authorized and empowered, with the approval of the state board, to accept and use gifts made unconditionally by will or otherwise for carrying out the purposes of this act. Gifts made under such conditions as in the judgment of the state board are proper and consistent with the provisions of this act may be so accepted

and shall be held, invested, reinvested, and used in accordance with the conditions of the gift.

History: En. Sec. 7, Ch. 74, L. 1947.

41-808. Eligibility for vocational rehabilitation. Vocational rehabilitation services shall be provided to any disabled individual (1) who is a resident of the state at the time of filing his application therefor and whose vocational rehabilitation, the director determines after full investigation, can be satisfactorily achieved, or (2) who is eligible therefor under the terms of an agreement with another state or with the federal government: Provided, that, except as otherwise provided by law or as specified in any agreement with the federal government with respect to classes of individuals certified to the state board thereunder, the following rehabilitation services shall be provided at public cost only to disabled individuals found to require financial assistance with respect thereto:

- (a) Physical restoration;
- (b) Transportation not provided to determine the eligibility of the individual for vocational rehabilitation services and the nature and extent of the services necessary;
- (c) Occupational licenses;
- (d) Customary occupational tools and equipment;
- (e) Maintenance;
- (f) Training books and materials.

History: En. Sec. 8, Ch. 74, L. 1947.

41-809. Maintenance not assignable. The right of a disabled individual to maintenance under this act shall not be transferable or assignable at law or in equity.

History: En. Sec. 9, Ch. 74, L. 1947.

41-810. Hearings. Any individual applying for or receiving vocational rehabilitation who is aggrieved by any action or inaction of the bureau shall be entitled, in accordance with regulations, to a fair hearing by the state board.

History: En. Sec. 10, Ch. 74, L. 1947.

41-811. Misuse of vocational rehabilitation lists and records. It shall be unlawful, except for purposes directly connected with the administration of the vocational rehabilitation program, and in accordance with regulations, for any person or persons to solicit, disclose, receive, or make use of, or authorize, knowingly permit, participate in, or acquiesce in the use of any list of, or names of, or any information concerning, persons applying for or receiving vocational rehabilitation, directly or indirectly derived from the records, papers, files, or communications of the state or subdivisions or agencies thereof, or acquired in the course of the performance of official duties.

History: En. Sec. 11, Ch. 74, L. 1947.

41-812. Limitation of political activity. No officer or employee engaged in the administration of the vocational rehabilitation program shall use his official authority or influence or permit the use of the vocational rehabilitation program for the purpose of interfering with an election or

affecting the result thereof or for any partisan political purpose. No such officer or employee shall take any active part in the management of political campaigns or participate in any political activity, except that he shall retain the right to vote as he may please and to express his opinions as a citizen on all subjects. No such officer or employee shall solicit or receive, nor shall any such officer or employee be obliged to contribute or render, any service, assistance, subscription, assessment, or contribution for any political purpose. Any officer or employee violating this provision shall be subject to discharge or suspension.

History: En. Sec. 12, Ch. 74, L. 1947.

41-813. Separability. If any provision of this act, or the application thereof to any person or circumstance, is held invalid, the remainder of the act, and the application of such provision to other persons or circumstances shall not be affected thereby.

History: En. Sec. 14, Ch. 74, L. 1947.

41-814. Saving clause. The legislature reserves the right to amend or repeal all or any part of this act at any time; and there shall be no vested private right of any kind against such amendment or repeal. All the rights, privileges, or immunities conferred by this act or by acts done pursuant thereto shall exist subject to the power of the legislature to amend or repeal this act at any time.

History: En. Sec. 15, Ch. 74, L. 1947.

41-815. Short title. This act may be cited as the "Vocational Rehabilitation Act of Montana."

History: En. Sec. 16, Ch. 74, L. 1947.

CHAPTER 9

STATE BOARD OF ARBITRATION AND CONCILIATION

- Section 41-901. State board of arbitration and conciliation.
 41-902. Who may be appointed.
 41-903. Oath of members and organization of board.
 41-904. Settlement of controversies.
 41-905. Application, how made—proceedings by board—expert assistants.
 41-906. Decisions of board—report to governor.
 41-907. The decision—when binding.
 41-908. Parties may agree to special board of arbitration.
 41-909. Compensation.

41-901. (3052) State board of arbitration and conciliation. There is a state board of arbitration and conciliation consisting of three members, whose term of office is two years and until their successors are appointed and qualified. The board must be appointed by the governor, with the advice and consent of the senate. If a vacancy occurs at any time the governor shall appoint some one to serve out the unexpired term, and he may in like manner remove any member of said board.

History: A territorial board of arbitration and conciliation, created by act of February 23, 1887, 5th Division Compiled Statutes 1887, sections 82 to 88, was superseded by what are now sections 41-901 to 41-909.

This section en. Sec. 3330, Pol. C. 1895; re-en. Sec. 1670, Rev. C. 1907; re-en. Sec. 3052, R. C. M. 1921.

Collateral References

Labor Relations—451.

56 C.J.S. Master and Servant § 27.

See generally, 3 Am. Jur. 825, Arbitration and Award.

41-902. (3053) Who may be appointed. One of the board must be an employer, or selected from some association representing employers of labor, and one of them must be a laborer, or selected from some labor organization, and not an employer of labor, and the other must be a disinterested citizen.

History: En. Sec. 3331, Pol. C. 1895;
re-en. Sec. 1671, Rev. C. 1907; re-en. Sec.
3053, R. C. M. 1921.

41-903. (3054) Oath of members and organization of board. The members of the board must, before entering upon the duties of their office, take the oath required by the constitution. They shall at once organize by the choice of one of their number as chairman. Said board may appoint and remove a clerk of the board, who shall receive such compensation as may be allowed by the board, but not exceeding five dollars per day for the time employed. The board shall, as soon as possible after its organization, establish such rules or modes of procedure as are necessary, subject to the approval of the governor.

History: En. Sec. 3332, Pol. C. 1895;
re-en. Sec. 1672, Rev. C. 1907; re-en. Sec.
3054, R. C. M. 1921.

41-904. (3055) Settlement of controversies. Whenever any controversy or dispute, not involving questions which may be the subject of a civil action, exists between an employer (if he employs twenty or more in the same general line of business in the state) and his employees, the board must, on application as is hereinafter provided, visit the locality of the dispute and make inquiry into the cause thereof, hear all persons interested therein, who may come before them, advise the respective parties what, if anything, ought to be done, by either or both, to adjust said dispute, and the board must make a written decision thereon. The decision must at once be made public, and must be recorded in a book kept by the clerk of the board, and a statement thereof published in the annual report, and the board must cause a copy thereof to be filed with the clerk of the county where the dispute arose.

History: En. Sec. 3333, Pol. C. 1895;
re-en. Sec. 1673, Rev. C. 1907; re-en. Sec.
3055, R. C. M. 1921.

41-905. (3056) Application, how made—proceedings by board—expert assistants. (1) The application to the board of arbitration and conciliation must be signed by the employer, or by a majority of his employees in the department of the business in which the controversy or difference exists, or their duly authorized agent, or by both parties, and shall contain a concise statement of the grievances complained of, and a promise to continue on in business or at work without any lockout or strike until the decision of said board, if it shall be made within four weeks of the date of filing said application. When an application is signed by an agent claiming to represent a majority of such employees, the board shall satisfy itself that such agent is duly authorized in writing to represent such employees,

but the names of the employees giving such authority shall be kept secret by said board.

(2) As soon as may be after the receipt of said application, the secretary of said board shall cause public notice to be given for the time and place for the hearing thereon; but public notice need not be given when both parties to the controversy join in the application and present therewith a written request that no public notice be given. When such request is made, notice shall be given to the parties interested in such manner as the board may order; and the board may, at any stage of the proceedings, cause public notice to be given, notwithstanding such request. When notice has been given as aforesaid, each of the parties to the controversy, the employer on one side, and the employees interested on the other side, may in writing nominate, and the board may appoint, one person to act in the case as expert assistant to the board. The two persons so appointed shall be skilled in and conversant with the business or trade concerning which the dispute has arisen. It shall be their duty, under the direction of the board, to obtain and report to the board information concerning the wages paid, the hours of labor, and the methods and grades of work prevailing in manufacturing establishments, or other industries or occupations, within the state, of a character similar to that in which the matters in dispute have arisen. Said expert assistants shall be sworn to the faithful discharge of their duty; such oath to be administered by any member of the board, and a record thereof shall be preserved with the record of the proceedings in the case. They shall be entitled to receive from the treasury of the state such compensation as shall be allowed and certified by the board not exceeding.....dollars per day, together with all necessary traveling expenses.

(3) Nothing in this act shall be construed to prevent the board from appointing such other additional expert assistant or assistants as it may deem necessary, who shall be paid in like manner. Should the petitioner or petitioners fail to perform the promise made in said application, the board shall proceed no further thereupon without the consent of the adverse party. The board shall have power to summon as witness any operative or employee in the department of business affected, and any person who keeps the records of wages earned in those departments, and to examine them under oath, and to require the production of books containing the record of wages paid. Summons may be signed and oaths administered by any member of the board.

History: En. Sec. 3334, Pol. C. 1895;
re-en. Sec. 1674, Rev. C. 1907; re-en. Sec.
3056, R. C. M. 1921.

41-906. (3057) Decisions of board—report to governor. Upon the receipt of said application and after such notice, the board shall proceed as before provided, and render a written decision, which shall be open to the public inspection, shall be recorded upon the records of the board, and published at the discretion of the same in an annual report to be made to the governor on or before the first day of December in each year.

History: En. Sec. 3335, Pol. C. 1895;
re-en. Sec. 1675, Rev. C. 1907; re-en. Sec.
3057, R. C. M. 1921.

41-907. (3058) The decision—when binding. Any decision made by the board is binding upon the parties who join in the application for six months, or until either party has given the other notice in writing of his intention not to be bound by the same at the expiration of sixty days therefrom. The notice must be given to employees by posting the same in three conspicuous places in the shop, office, factory, store, mill, or mine where the employees work.

History: En. Sec. 3336, Pol. C. 1895; re-en. Sec. 1676, Rev. C. 1907; re-en. Sec. 3058, R. C. M. 1921.

41-908. (3059) Parties may agree to special board of arbitration. (1) The parties to any controversy or difference as described in section 41-904 of this code may submit the matters in dispute, in writing, to a local board of arbitration and conciliation; such board may be either mutually agreed upon, or the employer may designate one of the arbitrators, the employees, or their duly authorized agent, another, and the two arbitrators so designated may choose a third, who shall be chairman of the board. Such board shall, in respect to the matters referred to it, have and exercise all the powers which the state board might have and exercise, and its decision shall have whatever binding effect may be agreed upon by the parties to the controversy in written submission. The jurisdiction of such board shall be exclusive in respect to the matters submitted to it, but it may ask and receive the advice and assistance of the state board. The decision of such board shall be rendered within ten days of the close of any hearing held by it; such decision shall at once be filed with the clerk of the county in which the controversy or difference arose, and a copy thereof shall be forwarded to the state board and entered on its records. Each of such arbitrators shall be entitled to receive from the treasury of the county in which the controversy or difference that is the subject of the arbitration exists, if such payment shall be approved by the commissioners of said county, the sum of three dollars for each day of actual service, not exceeding ten days for any one arbitration.

(2) Whenever it is made to appear to the mayor of any city or two commissioners of any county, that a strike or lockout such as described hereafter in this section is seriously threatened or actually occurs, the mayor of such city, or said commissioners of such county, shall at once notify the state board of the fact. Whenever it shall come to the knowledge of the state board, either by notice from the mayor of a city, or two or more commissioners of a county, as provided in this section, or otherwise, that a strike or lockout is seriously threatened or has actually occurred in any city or county of this state, involving an employer and his present or past employees, if at the time he is employing or up to the occurrence of the strike or lockout was employing not less than twenty persons in the same general line of business in any city, town, or county in this state, it shall be the duty of the state board to put itself in communication as soon as may be with such employer and employees, and endeavor by mediation to effect an amicable settlement between them, or to endeavor to persuade them, providing that a strike or lockout has not actually occurred or is not then continuing, to submit the matters in dispute to a

local board of arbitration and conciliation as above provided, or to the state board; and said state board may, if it deems it advisable, investigate the cause or causes of such controversy, and ascertain which party thereto is mainly responsible or blameworthy for the existence or continuance of the same, and may make and publish a report finding such cause or causes, and assigning such responsibility or blame. The board shall have the same powers for the foregoing purposes as are given it by section 41-904 of this code.

(3) Witnesses summoned by the state board shall be allowed the sum of fifty cents for each attendance, and the further sum of twenty-five cents for each hour of attendance in excess of two hours, and shall be allowed five cents a mile for travel each way from their respective places of employment or business to the place where the board is in session. Each witness shall certify in writing the amount of his travel and attendance, and the amount due him shall be certified to the state board of examiners for auditing, and the same shall be paid as other expenses of the state from any moneys in the state treasury.

History: En. Sec. 3337, Pol. C. 1895;
re-en. Sec. 1677, Rev. C. 1907; re-en. Sec.
3059, R. C. M. 1921.

41-909. (3060) Compensation. The arbitrators hereby created must be paid five dollars for each day of actual service and their necessary traveling expenses and necessary books or records, to be paid out of the treasury of the state, as by law provided.

History: En. Sec. 3338, Pol. C. 1895;
re-en. Sec. 1678, Rev. C. 1907; re-en. Sec.
3060, R. C. M. 1921.

CHAPTER 10

PROTECTION OF STREET CAR EMPLOYEES

- Section 41-1001. Enclosures for street car motormen.
41-1002. Penalties.
41-1003. Duties of county attorney to prosecute violations of this act.
41-1004. Vestibules of street cars to be heated.
41-1005. Penalty for violation of act.
41-1006. Brakes on street cars.
41-1007. Penalty for failure to provide.

41-1001. (3061) Enclosures for street car motormen. It shall be unlawful for any person or persons, partnership or corporation, or any agent or employee of such person, or persons, or any officer, agent or employee of such co-partnership or corporation, owning or operating any street railway in this state, using steam, cable, electric or other cars to cause, permit or require to be used upon said railway between November first of each year and May first of the following year any car or cars upon which the constant service, attention, or care of any employee is required, unless such car or cars shall be provided with a proper and sufficient enclosure constructed of wood, iron, glass or other suitable material, in such manner as to protect such employee or employees from exposure to the inclemencies of the weather. Such enclosures shall be so constructed as not to obscure the vision of the person operating the car, and during a fog or fall of

snow sufficient to obscure the view of the motorman he may be allowed to remove the glass in his immediate front so that such obstruction shall not prevent the safe operation of the car. The type of cars known as open cars or summer cars must be equipped with a wind-shield constructed of glass, iron, wood, or other suitable material extending completely across the front of said car to protect such employees from exposure to the inclemencies of the weather.

History: En. Sec. 1, Ch. 78, L. 1907; Ch. 104, L. 1913); amd. Sec. 1, Ch. 51, L. re-en. Sec. 1727, Rev. C. 1907; (see also, 1921; re-en. Sec. 3061, R. C. M. 1921.

41-1002. (3062) Penalties. Any person or persons, partnership, or corporation owning, operating, or superintending, or managing any such line of street railway, or managing or superintending officer or agent thereof, who shall be found guilty of a violation of the provisions of the preceding section, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than fifty dollars or more than one hundred dollars. Each and every day that any such person or persons cause or permit any of their employees to operate such cars in violation of the provisions of the preceding section shall be deemed a separate offense.

History: En. Sec. 3, Ch. 78, L. 1907; Sec. 1729, Rev. C. 1907; re-en. Sec. 3062, R. C. M. 1921.

41-1003. (3063) Duties of county attorney to prosecute violations of this act. It is hereby made the duty of the county attorney of any county in which any street railway is situated and operated, upon information given to him by any person that any person or persons, partnership, or corporation has violated any of the provisions of this act, to promptly prosecute such person or persons, partnership, or corporation for such violation.

History: En. Sec. 4, Ch. 78, L. 1907; Sec. 1730, Rev. C. 1907; re-en. Sec. 3063, R. C. M. 1921.

41-1004. (3064) Vestibules of street cars to be heated. From and after November 1, 1913, it shall be unlawful for any corporation, person, or association, owning or controlling or operating any street railway, electric car, or trolley car within the state of Montana, to run or operate its cars in the regular service of carrying passengers, during the months of November, December, January, February, and March, without first providing that the vestibule of such cars shall be heated in the same manner as the interior of said cars at all times.

History: En. Sec. 1, Ch. 44, L. 1913; re-en. Sec. 3064, R. C. M. 1921.

41-1005. (3065) Penalty for violation of act. Any corporation, person, or association owning, controlling, or operating any street railway, electric, or trolley car, failing to comply with the provisions of this act, shall be liable to a fine of ten dollars per car for each day operated in violation of the provisions of this act.

History: En. Sec. 2, Ch. 44, L. 1913; re-en. Sec. 3065, R. C. M. 1921.

41-1006. (3066) Brakes on street cars. On or before September 1, 1913, all double track street railway, electric cars or trolley cars, so called, conveying passengers in the state of Montana, shall be fitted with at least two independently operating brakes, one of which must be mechanical, such as airbrake, electric short-circuiting brake, or electric-magnetic brake.

History: En. Sec. 1, Ch. 80, L. 1913;
re-en. Sec. 3066, R. C. M. 1921.

41-1007. (3067) Penalty for failure to provide. Any corporation or person owning and operating street railway cars, electric or trolley cars, failing to comply with the provisions of this act, shall be liable to a fine of ten dollars per car for each day operated without such equipment.

History: En. Sec. 2, Ch. 80, L. 1913;
re-en. Sec. 3067, R. C. M. 1921.

CHAPTER 11

HOURS OF LABOR IN VARIOUS EMPLOYMENTS

- Section 41-1101. Hours of labor—hoisting engineers.
 41-1102. Penalties.
 41-1103. Hours of labor of drivers and attendants of motor busses.
 41-1104. Attendant defined—penalty for violation—liability for damages resulting from violations.
 41-1105. Computation of hours.
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 41-1110. Strip mining defined.
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 41-1112. Penalty for violations.
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 41-1114. Penalties for violations.
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 41-1121. Hours of labor for state and municipal governments, mines, mills, smelters.
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 41-1125. Act not to apply to relief or wreck trains.
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 41-1129. Penalties.
 41-1130. Exceptions.
 41-1131. Limitation of day's and week's work in restaurants.
 41-1132. Penalty.
 41-1133. Hours constituting work day, work week—for persons employed about public amusements.
 41-1134. Violation constitutes misdemeanor—penalty.
 41-1135. Employment of persons under twenty-one as bartenders forbidden.
 41-1136. Penalty.
 41-1137. Cooperative with federal agency.

41-1101. (3068) Hours of labor—hoisting engineers. On and after the first day of May, A. D. 1903, it shall be unlawful for any person or persons,

company, or corporation, to operate or handle, or to induce, persuade, or prevail upon any person or persons to operate or handle, for more than eight hours in twenty-four hours of each day, any hoisting-engine at or in any mine. This act shall apply only to such plants as are in continuous operation or are operated sixteen or more hours in twenty-four hours of each day, or at or in any mine where said hoisting-engine develops fifteen or more horsepower, or at or in any mine wherein there are fifteen or more men employed underground in twenty-four hours of each day; provided, however, that the provisions of this act shall not apply to any person or persons operating any hoisting-engine more than eight hours in each twenty-four hours for the purpose of relieving another employee in case of sickness or other unforeseen cause or causes.

History: En. Sec. 1, Ch. 53, L. 1903;
re-en. Sec. 1734, Rev. C. 1907; re-en. Sec.
3068, R. C. M. 1921.

Collateral References

Labor Relations—1351.

56 C.J.S. Master and Servant § 15.

Hours of labor, generally, see 31 Am.
Jur. 1050, Labor, §§ 437 et seq.

41-1102. (3069) Penalties. Any person or persons, company, or corporation, who shall violate any of the provisions of this act, shall, upon conviction, be punished by a fine of not less than ten dollars nor more than one hundred dollars; and each and every day that such person or persons, company, or corporation may continue to violate any of the provisions of this act shall be considered a separate and distinct offense, and shall be punishable as such.

History: En. Sec. 2, Ch. 53, L. 1903;
re-en. Sec. 1735, Rev. C. 1907; re-en. Sec.
3069, R. C. M. 1921.

Collateral References

Labor Relations—1648.

56 C.J.S. Master and Servant § 15.

41-1103. (3069.1) Hours of labor of drivers and attendants of motor busses. Drivers or attendants of motor busses employed in the state of Montana, shall not be employed for more than eight (8) hours in the twenty-four (24) hour period and drivers or attendants of motor busses shall be allowed a rest of at least twelve (12) hours between the completion of their services in any twenty-four (24) hour period and the beginning of their services in the next succeeding twenty-four (24) hour period.

Provided, the provisions of this act shall not be effective when life is in danger of destruction or in case of danger of property in imminent danger of destruction, or in case of delay due to accident or unpassable roads, or abnormal road conditions, snow blockades, or shall not affect the delay of mails for said drivers or attendants.

History: En. Sec. 1, Ch. 76, L. 1935.

41-1104. (3069.2) Attendant defined—penalty for violation—liability for damages resulting from violations. Attendants, for the purpose of this act, are defined as any employee engaged for a portion of the twenty-four (24) hour period in a day driving or repairing a motor bus, and who is required to remain on said vehicle as a relief driver or mechanic for time in excess of the eight (8) hour period, of which he shall be rightly employed. Any employer or supervisor in charge of employee who shall require a driver or attendant as above defined to labor contrary to the provisions of this act shall be declared guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than one hundred dollars

(\$100.00), or more than six hundred dollars (\$600.00), or by imprisonment of not less than thirty (30) days or more than seven (7) months or both such fine and imprisonment. All motor bus companies operating lines in this state shall be liable in damage for all injuries to the person or persons resulting in the violation of the provisions of said act.

History: En. Sec. 2, Ch. 76, L. 1935.

41-1105. (3069.3) Computation of hours. In computing the number of hours of employment made by the provisions of this act, evidence may be introduced showing that part of said time shall be consumed prior to entry within the state of Montana.

History: En. Sec. 3, Ch. 76, L. 1935.

41-1106. (3070) Hours of labor of jailors in certain counties. From and after the first day of April, 1909, eight hours shall constitute a day's work for jailors in counties of the first, second, and third classes, except in cases of emergency and when the peace and safety of the community require that such jailors work for a longer period than eight hours in any twenty-four.

History: En. Sec. 1, Ch. 93, L. 1909; re-en. Sec. 3070, R. C. M. 1921.

References

Cited or applied as section 4063, Polit-

ical Code, before amendment, in *Jobb v. County of Meagher*, 20 M 424, 435, 51 P 1034; as section 3119, Revised Codes, as amended, in *State ex rel. Hay v. Hindson*, 40 M 353, 106 P 362.

41-1107. (3071) Hours of labor—underground miners. The period of employment of working-men in all underground mines or workings, including railroad or other tunnels, shall be eight hours per day, except in cases of emergency where life and property is in imminent danger.

History: En. Sec. 1, p. 62, L. 1901; re-en. Sec. 1736, Rev. C. 1907; amd. Sec. 1, Ch. 21, L. 1911; re-en. Sec. 3071, R. C. M. 1921.

Sufficiency of Complaint for Injunction Involving Eight Hour Day

Suit by the Butte Miners' Union No. 1 and others against the A. C. M. Co. for an injunction restraining defendant from requiring the individual plaintiffs and others similarly situated to work longer than eight hours per day, under the facts stated, insisting that the time basis for payment be the so-called "collar to collar" rule, under which payment is made from the time the men report for work until the time they leave the mine, complaint held proof against a general demurrer, and plaintiff granted time to amend complaint necessitated by sustaining special demurrer. *Butte Miners' Union No. 1 v. Anaconda Copper Mining Co.*, 112 M 418, 436, 118 P 2d 148.

Underground Travel Time Included Within Eight-hour Limitation by Statute, Etc., In Many States

Citing Art. XVIII, Sec. 4, Montana Constitution and this section, the United States supreme court said, "Statutes of several important metal mining states provide that the eight-hour per day limitation upon work includes travel underground." Conclusion reached by administrator of wage and hour division approving informal report of representative after investigation, that "the workday in underground metal mining starts when the miner reports for duty as required at or near the collar (portal) of the mine and ends when he reaches the collar at the end of the shift." (Cites also 112 M 418, 118 P 2d 148.) *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123* (Fifth Circuit), 321 U S 590, 600, 88 L Ed 949.

References

Wirta v. North Butte Mining Co. et al., 64 M 279, 289, 210 P 332.

41-1108. (3072) Same—smeltermen. The period of employment of working-men in smelters, stamp-mills, sampling works, concentrators, and all other institutions for the reduction of ores, and refining of ores or

metals, shall be eight hours per day, except in cases of emergency where life or property is in imminent danger.

History: En. Sec. 2, p. 63, L. 1901;
re-en. Sec. 1737, Rev. C. 1907; re-en. Sec.
3072, R. C. M. 1921.

Collateral References
31 Am. Jur. 1055, Labor, § 445.

41-1109. (3073) Penalty. Any person or persons, body corporate, agent, manager, or employer, who shall violate any of the provisions of sections 41-1107 and 41-1108, shall be guilty of a misdemeanor, and upon conviction thereof for each offense, be subject to a fine of not less than one hundred dollars (\$100.00) or more than six hundred dollars (\$600.00), or by imprisonment in the county jail for a period of not less than one month, or more than seven months, or by both such fine and imprisonment.

History: En. Sec. 3, p. 63, L. 1901; 3073, R. C. M. 1921; amd. Sec. 1, Ch. 116, re-en. Sec. 1738, Rev. C. 1907; re-en. Sec. L. 1929.

41-1110. (3546.7) Strip mining defined. That for the purpose of this act "strip mining," is defined as the removal of the over burden, and coal or other materials from the ground, and all of the operations pertaining thereto, without the necessity of providing timbers for the holding of said ground in place.

History: En. Sec. 1, Ch. 76, L. 1933.

Collateral References
Labor Relations—1351.
56 C.J.S. Master and Servant § 15.

41-1111. (3546.8) Hours of labor in strip mining. A period of not more than eight (8) hours will constitute a day's labor of all employees working in "strip mining" except in cases of emergencies for the protection of life or property when same is in danger.

History: En. Sec. 2, Ch. 76, L. 1933.

Collateral References
31 Am. Jur. 1055, Labor, § 445.

41-1112. (3546.9) Penalty for violations. Any person, company, corporation, or lessee of the same, who shall violate the provisions of this act, shall, upon conviction be punished by a fine of not less than fifty dollars (\$50.00), or more than six hundred (\$600), or by imprisonment of not less than thirty (30) days or more than seven (7) months, or both such fine and imprisonment and each and every day that such person, company, corporation, or lessee may continue to violate the provisions of this act shall be considered a separate and distinct offense and shall be punished as such.

History: En. Sec. 3, Ch. 76, L. 1933.

41-1113. (3073.1) Hours of labor in retail stores—application of provisions. A period of eight (8) hours shall constitute a day's work and a period of not to exceed forty-eight (48) hours shall constitute a week's work in all cities and towns having a population of twenty-five hundred (2500), or over, for all persons employed in retail stores, and in all leased businesses where the lessor dictates the price, also kind of merchandise that is sold, and the hours and conditions of operation of the business, all persons employed in delivering goods sold in such stores, all persons employed in wholesale warehouses used for supplying retail establishments with goods, and all persons employed in delivering goods to retail establishments from such wholesale warehouses.

History: En. Sec. 1, Ch. 8, Ex. L. 1933.

NOTE.—This section held impliedly repealed by the amendment of Section 4, Article XVIII of the Constitution, insofar as said section 41-1113 allows employees of cities of less than 2500 to work more than eight hours a day. Opinions of Attorney General, Vol. 18, No. 16.

Constitutionality

Held, this section, enacted at the extraordinary session of 1933-34, prior to the adoption of Art. XVIII, Sec. 4 of the Constitution making eight hours a day's work, is not invalid as offending against the fourteenth amendment to the federal Constitution, nor Art. III, Sec. 27 of the state Constitution. *State v. Safeway Stores, Inc.*, 106 M 182, 198, 76 P 2d 81.

Classification as to Cities and Towns Reasonable

This section held not open to the com-

41-1114. (3073.2) Penalties for violations. Any person, corporation, agent, manager or employer who shall violate any of the provisions of the preceding section shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than fifty dollars (\$50.00) or more than six hundred dollars (\$600.00), or by imprisonment in the county jail for not less than thirty (30) days or more than seven (7) months, or by both such fine and imprisonment.

History: En. Sec. 2, Ch. 8, Ex. L. 1933.

41-1115. (3073.3) Act not applicable to pharmacists. The provisions of this act shall not apply to registered pharmacists or assistant pharmacists.

History: En. Sec. 3, Ch. 8, Ex. L. 1933.

41-1116. (3074) Hours of telephone operators. On all lines of public telephones, operated in whole or in part within this state, it shall hereafter be unlawful for any owner, lessee, company, or corporation to hire or employ any operator or operators, other person or persons, to run or operate a telephone board or boards for more than nine hours in twenty-four hours, in cities or towns having a population of three thousand inhabitants, or over; provided, however, that the provisions of this act shall not apply to any person or persons, operator or operators, operating any telephone board or boards more than nine hours in each twenty-four for the purpose of relieving another employee in case of sickness or other unforeseen cause or causes.

History: En. Sec. 1, Ch. 75, L. 1909;
re-en. Sec. 3074, R. C. M. 1921.

41-1117. (3075) Penalty for violation of preceding section. Any owner, lessee, company, or corporation, who shall violate any of the provisions of this act shall, upon conviction, be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and each and every day that such owner, lessee, company, or corporation may continue

plaint that in designating retail stores in cities and towns having a population of 2,500 or over subject to its provisions the legislature made an arbitrary discrimination instead of a reasonable classification, it being presumed in the absence of a contrary showing that, when the legislature made the classification, it had all the controlling facts before it. *State v. Safeway Stores, Inc.*, 106 M 182, 204, 76 P 2d 81.

Held Not So Indefinite as To Be Unenforceable

Held, that the eight-hour law, sections 41-1113 to 41-1115, taken as a whole, is not so indefinite as to be unenforceable. *State v. Safeway Stores, Inc.*, 106 M 182, 206, 76 P 2d 81.

Collateral References

31 Am. Jur. 1050, Labor, §§ 437 et seq.

to violate any of the provisions of this act shall be considered a separate and distinct offense and shall be punished as such.

History: En. Sec. 2, Ch. 75, L. 1909;
re-en. Sec. 3075, R. C. M. 1921.

41-1118. (3076) Hours of labor for female employees. No female shall be employed in any manufacturing, mechanical, or mercantile establishment, telephone exchange room, or office, or telegraph office, laundry, hotel, or restaurant in this state, for more than eight hours in any one day. The hours of work may be so arranged as to permit the employment of females at any time so that they shall not work more than eight hours during the twenty-four of any one day; provided, that females may be employed in retail stores to work not to exceed ten hours in any one day for one week immediately preceding Christmas day.

History: En. Sec. 1, Ch. 108, L. 1913; amd. Sec. 1, Ch. 18, L. 1917; re-en. Sec. 1, Ch. 70, L. 1917; re-en. Sec. 3076, R. C. M. 1921.

NOTE.—This section held repealed by amendment of Section 4, Article XVIII of the Constitution insofar as said section allows females to work in retail stores for ten hours a day for the week preceding Christmas. Opinions of Attorney General, Vol. 18, No. 63.

Collateral References

31 Am. Jur., Labor, p. 1050, §§ 437 et seq.; p. 1062, §§ 462 et seq.

Liability of employer for injury to employee as affected by expiration of statutory hours of labor before injury. 71 ALR 861.

Constitutionality of statutes limiting hours of labor in private industry. 90 ALR 814.

What is a "manufacturing establishment" within meaning of regulatory statutes. 96 ALR 1351.

Validity, construction, and application of statute designed to prevent discrimination between male and female employees as regards wages or other conditions of work. 130 ALR 436.

41-1119. (3077) Seats for female employees. Every employer in any manufacturing, mechanical, or mercantile establishment, laundry, hotel, or restaurant, or other establishment employing any female, shall provide suitable seats for all female employees and shall permit them to use such seats when they are not employed in the active duties of their employment.

History: En. Sec. 2, Ch. 108, L. 1913; amd. Sec. 2, Ch. 18, L. 1917; re-en. Sec. 2, Ch. 70, L. 1917; re-en. Sec. 3077, R. C. M. 1921.

Collateral References

Labor Relations—10.

56 C.J.S. Master and Servant § 24.

41-1120. (3078) Violation of two preceding sections a misdemeanor—penalty. Any employer who shall require any female to work in any of the places mentioned in section 41-1118, more than the number of hours provided in this act during any day of twenty-four hours, or who shall fail, neglect, or refuse to so arrange the work of females in his employ so that they shall not work more than the number of hours provided for in this act during any day of twenty-four hours, or who shall fail, neglect, or refuse to provide suitable seats, as provided in section 41-1119, or who shall permit or suffer any overseer, superintendent, or other agent of any such employer to violate any of the provisions of this act, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined for each offense not less than fifty dollars nor more than two hundred dollars, or be imprisoned in the county jail for a period of not less than ten nor more than sixty days, or both such fine and imprisonment.

History: En. Sec. 3, Ch. 108, L. 1913; amd. Sec. 3, Ch. 18, L. 1917; re-en. Sec. 3, Ch. 70, L. 1917; re-en. Sec. 3078, R. C. M. 1921.

Collateral References

Labor Relations—10.
56 C.J.S. Master and Servant § 23.

41-1121. (3079) Hours of labor for state and municipal governments, mines, mills, smelters. A period of eight hours shall constitute a day's work in all works and undertakings carried on or aided by any municipal, county, or state government, first class school districts, and on all contracts let by them, and for all janitors, except in court houses of sixth and seventh class counties, engineers, firemen, caretakers, custodians and laborers employed in or about any buildings, works, or grounds used or occupied for any purpose by any municipal, county, or state governments, school districts of first class, and in mills and smelters for the treatment of ores, and in underground mines, and in the washing, reducing and treatment of coal; except in cases of emergency when life or property are in imminent danger.

History: En. Sec. 1, Ch. 50, L. 1905; amd. Sec. 1, Ch. 108, L. 1907; Sec. 1739, Rev. C. 1907; amd. Sec. 1, Ch. 30, L. 1917; re-en. Sec. 3079, R. C. M. 1921; amd. Sec. 2, Ch. 116, L. 1929; amd. Sec. 1, Ch. 135, L. 1943. Cal. Pol. C. Secs. 3244, 3245.

NOTE.—Eight hours constitutes a day's work for all janitors in schools, and therefore a school board may not contract to employ janitors for a work day in excess of eight hours. Opinions of Attorney General, Vol. 20, No. 105.

Constitutionality

This statute, prior to its amendment, was held to be constitutional. *State v. Livingston Concrete etc. Mfg. Co.*, 34 M 570, 87 P 980.

Operation and Effect

If a statute makes a requirement, or prohibits a thing, for the benefit of a person or class of persons, one injured by reason of a violation of it, if free from fault himself, is entitled to maintain an action against him by whose disobedience

he has suffered injury; and this is true whether the statute is penal in its character or not, a violation of the statute being negligence per se, or legal negligence. *Melville v. Butte-Balaklava Copper Co.*, 47 M 1, 6, 130 P 441. See *Kelley v. John R. Daily Co.*, 56 M 63, 73, 181 P 326.

Under the rule that an action does not lie at the suit of one who must base his claim, in whole or in part, on the violation of a criminal or penal law of the state, a miner who was killed while working in violation of a statute providing that eight hours shall constitute a day's work in mines, under penalty of fine and imprisonment in the county jail, could not, if he had survived his injuries, recover damages in an action brought for that purpose. *Melville v. Butte-Balaklava Copper Co.*, 47 M 1, 7, 130 P 441.

References

Cited or applied as section 1739, Revised Codes, before amendment, in *State v. Hughes*, 38 M 468, 471, 100 P 610.

41-1122. (3080) Penalty. Every person, corporation, stock company, or association of persons who violate any of the provisions of the preceding section shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars (\$100.00) nor more than six hundred dollars (\$600.00), or by imprisonment in the county jail for not less than thirty days nor more than seven months, or by both such fine and imprisonment.

History: En. Sec. 2, Ch. 50, L. 1905; re-en. Sec. 2, Ch. 108, L. 1907; Sec. 1740, Rev. C. 1907; re-en. Sec. 3080, R. C. M. 1921; amd. Sec. 3, Ch. 116, L. 1929.

Operation and Effect

The inhibition contained in this section includes both employer and employee, and renders both subject to the penalty when-

ever the former causes the employee to work, and the latter works for a period longer than eight hours. *State v. Livingston Concrete etc. Mfg. Co.*, 34 M 570, 577, 87 P 980; *Melville v. Butte-Balaklava Copper Co.*, 47 M 1, 6, 130 P 441.

The person who occupies a position of authority over one engaged as an employee, and who exercises control over

him, is the employer who comes within the prohibition of the eight-hour law. *State v. Hughes*, 38 M 468, 472, 100 P 610.

Id. One who does not sustain the rela-

tion of employer to any of the men employed by subcontractors is not answerable for the conduct of the latter in requiring their men to work more than eight hours per day.

41-1123. (3081) Railway employees—hours of labor. On all lines of steam railroads or railways operated in whole or in part within this state, the time of labor of locomotive engineers, locomotive firemen, conductors, trainmen, operators, and agents acting as operators, employed in running or operating the locomotive engines or trains on or over such railroads or railways in this state, shall not at any time exceed sixteen consecutive hours, or to be on duty for more than sixteen hours in the aggregate in any twenty-four hour period. At least eight hours shall be allowed them off duty before said engineers, firemen, conductors, trainmen, operators, and agents acting as operators, are again ordered or required to go on duty; provided, however, that nothing in this section shall be construed to allow any engineer, fireman, conductor, or trainman to desert his locomotive or train in case of accident, storms, wrecks, washouts, snow blockade, or any unavoidable delay arising from like causes, or to allow said engineer, fireman, conductor, or trainman to tie up any passenger or mail train between terminals.

History: En. Sec. 1, Ch. 5, L. 1907; Sec. 1741, Rev. C. 1907; re-en. Sec. 3081, R. C. M. 1921.

NOTE.—Sections 41-1123 and 41-1124 (3081 and 3082) held inoperative insofar as they affect members engaged in the operation of trains handling interstate commerce in view of the act of Congress of March 7, 1907 (34 Stat. 1415). *Opinions of Attorney General*, Vol. 3, pg. 46.

Operation and Effect

Until Congress has acted, the regulation of the hours of railway employees is a matter for state control, under the exercise of its police power to provide for the public safety and to preserve the health and lives of the employees, and

a federal statute, effective at a future date, does not supersede existing state legislation. *State v. Northern Pac. Ry. Co.*, 36 M 582, 584, 93 P 945.

Evidence held insufficient to support a verdict finding the defendant railway company guilty of a violation of the provisions of this section and the following section, prohibiting railroads from requiring their trainmen to work for more than sixteen consecutive hours. *State v. Northern Pacific Ry. Co.*, 41 M 557, 558, 111 P 141.

In *Northern Pac. Ry. Co. v. State of Washington*, 222 U S 370, 56 L Ed 237, 32 S Ct 160, held the state loses control upon the enactment of a federal statute, though not effective until a subsequent date.

41-1124. (3082) Penalties. Any railroad company or superintendent, train dispatcher, trainmaster, master mechanic, or other railroad or railway official, who shall order or require any locomotive engineer, locomotive fireman, conductor, trainman, operator, or agent acting as operator, to labor contrary to the provisions of the preceding section, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one hundred dollars or more than five hundred dollars, or by imprisonment of not less than thirty days or more than sixty days in the county jail; and all railroad or railway corporations operating lines of railroads or railways in whole or in part in this state shall be liable in damages for all injuries to any person or persons resulting from violations of the provisions of said section.

History: En. Sec. 2, Ch. 5, L. 1907; Sec. 1742, Rev. C. 1907; re-en. Sec. 3082, R. C. M. 1921.

References

Cited or applied as section 2, Laws

1907, in State v. Northern Pacific Ry. 1742, Revised Codes, in State v. Northern Co., 36 M 582, 585, 93 P 945; as section Pacific Ry. Co., 41 M 557, 558, 111 P 141.

41-1125. (3083) Act not to apply to relief or wreck trains. The provisions of section 41-1123 shall not apply to relief or wreck trains.

History: En. Sec. 3, Ch. 5, L. 1907; Sec. 1743, Rev. C. 1907; re-en. Sec. 3083, R. C. M. 1921.

41-1126. (3083.1) Hours of labor in cement plants, quarries and hydro-electric dams. A period of eight (8) hours shall constitute a day's work, except in cases of emergency where life and property is in imminent danger, for all persons employed in or about cement plants and at quarries and hydro-electric dams.

History: En. Sec. 1, Ch. 77, L. 1933.

41-1127. (3083.2) Penalties. Any person, corporation, agent, manager or employer who shall violate any of the provisions of the preceding section shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than fifty dollars (\$50.00) or more than six hundred dollars (\$600.00), or by imprisonment in the county jail for not less than thirty (30) days or more than seven (7) months, or by both such fine and imprisonment.

History: En. Sec. 2, Ch. 77, L. 1933.

41-1128. (3083.3) Hours of labor in sugar refineries. A period of not to exceed eight (8) hours shall constitute a day's work for all persons employed in or about sugar refineries, except in a case of emergency when life and property are in danger.

History: En. Sec. 1, Ch. 90, L. 1933.

41-1129. (3083.4) Penalties. Any person, corporation, agent, manager or employer who shall violate the provisions of the preceding section shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than fifty dollars (\$50), or more than six hundred dollars (\$600), or by imprisonment in the county jail for not less than thirty (30) days, nor more than seven (7) months, or by both such fine and imprisonment.

History: En. Sec. 2, Ch. 90, L. 1933.

41-1130. (3083.5) Exceptions. The provisions of this act shall not apply to beet receiving station employees, or superintendents, master mechanics, beet end, sugar end and steffan house foreman.

History: En. Sec. 3, Ch. 90, L. 1933.

41-1131. Limitation of day's and week's work in restaurants. A period of not more than eight (8) hours shall constitute a day's work, and a period of not to exceed forty-eight (48) hours shall constitute a week's work for persons employed in or about restaurants, cafes, lunch counters and other commercial eating establishments.

The hours of work must be so arranged that persons employed in or about restaurants, cafes, lunch counters and other commercial eating establishments shall not be on duty more than eight (8) hours in the aggregate of any twelve (12) consecutive hours, such persons shall have

at least twelve (12) consecutive hours off duty; provided, however, that the provisions of this act shall not apply to any person or persons working more than eight (8) hours during any twelve (12) consecutive hours, or more than forty-eight (48) hours during any week for the purpose of relieving another employee in case of sickness, or where the health of the public is imperilled, or where life and property is in imminent danger, or for other unforeseen cause or causes.

History: En. Sec. 1, Ch. 199, L. 1939.

Collateral References

Labor Relations—1351.

56 C.J.S. Master and Servant § 15.

41-1132. Penalty. Any person, corporation, manager, agent or employer who shall violate any of the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than twenty-five dollars (\$25.00) nor more than fifty dollars (\$50.00), or by imprisonment in the county jail for not less than fifteen (15) days nor more than sixty (60) days, or by both such fine and imprisonment.

History: En. Sec. 2, Ch. 199, L. 1939.

Collateral References

Labor Relations—1648.

56 C.J.S. Master and Servant § 14.

41-1133. Hours constituting work day, work week—for persons employed about public amusements. A period of not to exceed eight (8) hours shall constitute a day's work, and a period of not to exceed forty-eight (48) hours shall constitute a week's work for persons employed or working in or participating in and about any carnival, circus, derby show, walkathon, marathon dance, marathon race, marathon walk or other endurance contest, by whatever name it may be called, within the state of Montana. The hours of work must be so arranged that persons employed in or participating or contesting in such an exhibition, show or contest shall not be on duty more than eight (8) hours in the aggregate of any twelve (12) consecutive hours; and such persons shall have at least twelve (12) consecutive hours off duty. Provided, however, that the provisions of this act shall not apply to any traveling circus or carnival which does not remain in any one county of the state of Montana for a period of more than three (3) days; and shall not apply to any person or persons working more than eight (8) hours in each twelve (12) hours for the purpose of relieving another employee in case of sickness, or where a breakdown in machinery occurs, or where life or property is in imminent danger.

History: En. Sec. 1, Ch. 21, L. 1941.

41-1134. Violation constitutes misdemeanor—penalty. Any person, corporation, agent, manager, employer, employee, contestant or participant who shall violate the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be punished for the first offense by a fine of not less than fifty (\$50.00) dollars; and for a second offense he shall be punished by a fine of not less than one hundred (\$100.00) dollars nor more than five hundred (\$500.00) dollars, or by imprisonment in the county jail for not less than ninety (90) days nor more than six (6) months, or by both such fine and imprisonment; and for a third or

subsequent offense he shall be punished by a fine of five hundred (\$500.00) dollars and imprisonment in the county jail for a term of six (6) months. Each day's violation of this act shall constitute a separate offense within the meaning of this act.

History: En. Sec. 2, Ch. 21, L. 1941.

41-1135. Employment of persons under twenty-one as bartenders forbidden. No person under the age of twenty-one (21) years of age shall be employed as a bartender, waiter, or waitress whose duty is to serve customers purchasing liquors, beer or wines in any establishment which sells liquors, beer or wines at retail.

History: En. Sec. 1, Ch. 114, L. 1941.

41-1136. Penalty. Any retail vendor of liquors, beer or wines who employs any such person under the age of twenty-one (21) years is guilty of a misdemeanor.

History: En. Sec. 2, Ch. 114, L. 1941.

41-1137. Cooperative with federal agency. The department of agriculture, labor and industry through the division of labor and publicity, may, and it is hereby authorized to assist and cooperate with the wage and hour division, and the children's bureau, U. S. department of labor, in the enforcement within this state of the Fair Labor Standards Act of 1938, approved June 25, 1938, and, subject to the regulations of the administrator of the wage and hour division or the chief of the children's bureau, as the case may be, and the laws of the state applicable to the receipt and expenditure of moneys, may be reimbursed by said wage and hour division, or said children's bureau, for the reasonable cost of such assistance and cooperation.

History: En. Sec. 1, Ch. 56, L. 1939.

CHAPTER 12

APPRENTICESHIP COUNCIL AND CONTRACTS

- Section 41-1201. Apprenticeship council.
 41-1202. Duties of state apprenticeship council.
 41-1203. Local and state joint apprenticeship committees.
 41-1204. Standards for apprenticeship agreements.
 41-1205. Apprenticeship agreements.
 41-1206. Limitation.

41-1201. Apprenticeship council. (a) The commissioner of labor and industry shall appoint an apprenticeship council, composed of three (3) representatives each from employer and employee organizations respectively. The terms of office of the members of the apprenticeship council first appointed by the commissioner of labor and industry shall be as follows: One (1) representative each of employers and employees shall be appointed for one (1) year, two (2) years, and three (3) years respectively. Thereafter, each member shall be appointed for a term of three (3) years. Each member shall hold office until his successor is appointed and has qualified, and any vacancy shall be filled by appointment for the unexpired portion of the term. The state official who has been designated

by the state board for vocational education as being in charge of trade and industrial education and the state official who has immediate charge of the state public employment service shall be ex-officio members of said council without vote.

(b) Subject to the approval of the federal committee on apprenticeship, the apprenticeship council shall: (1) establish standards for apprenticeship agreements in conformity with the provisions of this act; (2) issue such rules and regulations as may be necessary to carry out the intent and purposes of this act; and (3) perform such other duties as are hereinafter imposed. Not less than once a year the apprenticeship council shall make a report through the commissioner of labor and industry of its activities and findings to the legislature which shall be made available to the public.

(c) The council may accept from the federal government or any agency thereof or from any state agency, any funds made available to carry out purposes within the scope of the activities and purposes of the apprenticeship council and to use such funds as said council may direct, for the purposes for which said funds are made available.

History: En. Sec. 1, Ch. 149, L. 1941; amd. Sec. 1, Ch. 99, L. 1947.

of the Montana Constitution and a later statutory enactment (Sec. 6, Ch. 177, Laws 1951; Sec. 3-101.1 of this code).

NOTE.—The name of the official directed to appoint an apprenticeship council has been changed to conform to an amendment to Section I of Article XVIII

Cross-Reference

Apprentices, minors, secs. 10-301 to 310.

41-1202. Duties of state apprenticeship council. The state apprenticeship council by a majority vote, shall:

(1) encourage and promote the making of apprenticeship agreements conforming to the standards established by or in accordance with this act;

(2) register such apprenticeship agreements as are in the best interests of the apprenticeship and conform to the standards established by or in accordance with this act;

(3) keep a record of apprenticeship agreements and upon performance thereof issue certificates of completion of apprenticeship;

(4) terminate or cancel any apprenticeship agreements in accordance with the provisions of such agreements; and who

(5) may act to bring about the settlement of differences arising out of the apprenticeship agreement where such differences cannot be adjusted locally or in accordance with the established trade procedure.

Related and supplemental instruction for apprentices, coordination of instruction with job experiences, and the selection and training of teachers and coordinators for such instruction shall be the responsibility of state and local boards responsible for vocational education. The commissioner of labor and industry is authorized to appoint such other personnel as may be necessary to aid the apprenticeship council in the execution of their functions under this act.

History: En. Sec. 2, Ch. 149, L. 1941.

NOTE.—The name of the official directed to appoint an apprenticeship council has been changed to conform to an

amendment to Section I of Article XVIII of the Montana Constitution and a later statutory enactment (Sec. 6, Ch. 177, Laws 1951; Sec. 3-101.1 of this code).

41-1203. Local and state joint apprenticeship committees. Local and state joint apprenticeship committees may be approved, in any trade or

group of trades, in cities or trade areas, by the apprenticeship council, whenever the apprentice training needs of such trade or group of trades justifies such establishment. Such local or state joint apprenticeship committees shall be composed of an equal number of employer and employee representatives chosen from names submitted by the respective local or state employer and employee organizations in such trade or group of trades. In a trade or group of trades in which there is no bona fide employer or employee organization, the joint committee shall be composed of persons known to represent the interests of employers and of employees respectively, or a state joint apprenticeship committee may be approved as, or the council may act itself as, the joint committee in such trade or group of trades. Subject to the review of the council and in accordance with the standards established by this act and by the council, such committee shall devise standards for apprenticeship agreements and give such aid as may be necessary in their operation, in their respective trades and localities.

History: En. Sec. 3, Ch. 149, L. 1941.

41-1204. Standards for apprenticeship agreements. Standards for apprenticeship agreements are as follows:

(1) A statement of the trade or craft to be taught and the required hours for completion of apprenticeship which shall be not less than four thousand (4000) hours of reasonably continuous employment.

(2) A statement of the processes in the trade or craft divisions in which the apprentice is to be taught and the approximate amount of time to be spent at each process.

(3) A statement of the number of hours to be spent by the apprentice in work and the number of hours to be spent in related and supplemental instruction which instruction shall be not less than one hundred forty-four (144) hours per year.

(4) A statement that apprentices shall be not less than sixteen (16) years of age.

(5) A statement of the progressively increasing scale of wages to be paid the apprentice.

(6) Provision for a period of probation during which the apprenticeship council, when authorized by the council, shall be directed to terminate an apprenticeship agreement at the request in writing of any party thereto. After the probationary period the apprenticeship council, when authorized by the council, shall be empowered to terminate the registration of an apprentice upon agreement of the parties.

(7) Provision that the services of the apprenticeship council may be utilized for consultation regarding the settlement of differences arising out of the apprenticeship agreement where such differences cannot be adjusted locally or in accordance with the established trade procedure.

(8) Provision that if an employer is unable to fulfill his obligation under the apprenticeship agreement he may transfer such obligation to another employer.

(9) Such additional standards as may be prescribed in accordance with the provisions of this act.

History: En. Sec. 4, Ch. 149, L. 1941.

41-1205. Apprenticeship agreements. For the purpose of this act an apprenticeship agreement is:

(1) An individual written agreement between an employer and apprentice, or

(2) a written agreement between an employer, or an association of employers, and an organization of employees describing conditions of employment for apprentices, or

(3) a written statement describing conditions of employment for apprentices in a plant where there is no bona fide employee organization.

All such agreements shall conform to the basic standards and other provisions of this act.

History: En. Sec. 5, Ch. 149, L. 1941.

41-1206. Limitation. The provisions of this act shall apply to a person, firm, corporation or craft only after such person, firm, corporation or craft has voluntarily elected to conform with its provisions.

History: En. Sec. 6, Ch. 149, L. 1941.

CHAPTER 13

PAYMENT OF WAGES AND PROTECTION OF DISCHARGED EMPLOYEES

- Section 41-1301. Semi-monthly payment of wages.
 41-1302. Penalty for failure to pay at times specified in law.
 41-1303. Discharged employee—wages, when payable.
 41-1304. Period within which employee may recover penalties.
 41-1305. Contracts in violation of act void.
 41-1306. Judgment for wages shall include attorney's fee.
 41-1307. Equal pay for women for equivalent service.
 41-1308. Violation of preceding section a misdemeanor—penalty.
 41-1309. Protection of discharged employees.
 41-1310. Blacklisting prohibited.
 41-1311. Employee to be furnished reason for discharge.
 41-1312. Certain acts extended to those engaged in mining.
 41-1313. Operator to file statement.
 41-1314. Penalty for failure to file.
 41-1315. Commissioner to report violations to county attorney.
 41-1316. District court proceedings.
 41-1317. Hearing—decree—restraining order—bond.
 41-1318. Service of process.
 41-1319. Enjoining further operations.
 41-1320. Punishment of employer for contempt.
 41-1321. Court may order publication of notice.
 41-1322. Attorney fee—assessment as costs.
 41-1323. Review by supreme court on certiorari.
 41-1324. Remedy cumulative.

41-1301. (3084) Semi-monthly payment of wages. Definitions for the purpose of this act.

(1) Each employer, or an authorized representative of the employer, shall on written demand, prior to the commencing of work, notify each employee as to the rate of wages to be paid, whether by the hour, day, week, month or yearly basis and date of paydays. Such notification shall be in writing to each employee or the posting of notice in a conspicuous place. The provisions of this section shall not apply in respect to an employer who has entered into a signed collective bargaining agreement, when such agreement contains conditions of employment, wages to be received and

hours to be worked, or to employers engaged in agriculture or stockraising, provided, however, such employers shall conform with the provisions of section 41-1303.

(2) Every employer of labor in the state of Montana, shall pay to each of his employees the wages earned by such employees at least twice in each month in lawful money of the United States, or checks on banks convertible into cash on demand at the full face value thereof, and no person for whom labor has been performed shall withhold from any employee any wages earned or unpaid for a longer period than five (5) days after the same became due and payable; provided, however, reasonable deductions may be made for board, room, and other incidentals supplied by the employer, whenever such deductions are a part of the conditions of employment, or other deductions provided for by law; provided further, that if at such time of payment of wages any employee shall be absent from the regular place of labor, he shall be entitled to such payment at any time thereafter. Provisions of this section shall not apply to any professional, supervisory or technical employees, who by custom, receive their wages earned at least once monthly.

(3) The following are the definitions used for the purpose of this act:

(a) "Employ" means permit or suffer to work.

(b) "Employer" includes any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons, acting directly or indirectly in the interest of an employer in relation to an employee, but shall not include the United States, the state of Montana or any legal subdivision thereof.

(c) "Employee" includes any person who works for another for hire.

(d) "Wages" includes any moneys due an employee from the employer or employers whether to be paid by the hour, day, week, semi-monthly, monthly or yearly and shall include bonus, piece work, tips and gratuities of any kind.

(e) "Commissioner of labor" refers to the director, commissioner or chief of the labor department as such department is defined by law, or any person or persons designated by him for the purpose of this act.

History: En. Sec. 1, Ch. 11, L. 1919; re-en. Sec. 3084, R. C. M. 1921; amd. Sec. 1, Ch. 169, L. 1941.

Cross-References

Discounting wages forbidden, sec. 94-1615.

Insolvency, wages as preferred claim, sec. 18-305.

Liens for salaries and wages, secs. 45-601 to 45-608.

Wages of children, to whom paid, sec. 61-120.

Wages preferred claim against employer's estate, sec. 45-603.

Collective Bargaining Agreements

Where the employer and a union entered into a collective bargaining agreement wherein a minimum scale of wages was established, the employer could not thereafter orally agree with the business agent

of the union to pay an employee less than the minimum scale set in the contract. Any such oral agreements were void since the business agent was not authorized to make them and they would have the effect of nullifying the minimum wage scale set in the agreement. *Eversole v. La Combe*, 125 M 87, 231 P 2d 945.

Employer of Labor

Held, that the legislature in enacting this section, requiring employers of labor to make semi-monthly payment of wages, under penalty of five per cent of the wages due and unpaid, did not intend that the act should apply to a school district as employer and a teacher, as employee, receiving a fixed compensation, and that therefore the court properly struck out of the complaint of a teacher in her action for breach of contract an allegation that plaintiff was entitled to the five per cent

penalty. *McBride v. School District No. 2*, 88 M 110, 290 P 252.

Evidence as to Type of Labor—Statement in Cost Bill Sufficient

Where pleadings did not show nature of labor performed by plaintiff suing for wages, and for the first time in the record the nature of the services as coming within this section appeared in the memorandum of costs, and later in the bill of exceptions to the court's ruling on costs, this constituted a prima facie showing and was sufficient until overturned. *Swanson v. Gnose*, 106 M 262, 265, 76 P 2d 643.

"Labor"

One who acted as watchman, messenger and general repairman, held to have been performing "labor" within the meaning of this section, requiring physical exertion, rather than mental, and therefore entitled to maintain an action to recover wages. *Britt v. Cotter Butte Mines*, 108 M 174, 177, 91 P 2d 403.

Not Applicable to Agricultural Labor

Since this section excludes agricultural labor from the operation of the act (Ch. 11, Laws 1919), the provision of section 41-1306 for a reasonable attorney's fee to be taxed as costs does not apply in action by ranch hand to recover wages, and attorney's fee was properly disallowed. *Gah-*

agan v. Gugler, 100 M 599, 611, 52 P 2d 150.

Penalties—Instructions in Language of Statutes Proper

An instruction relative to the penalties accruing to employees by reason of the failure of their employer to pay semi-monthly wages when due, in the language of this section and section 41-1302, held properly given in an action to recover wages. *Meister v. Farrow*, 109 M 1, 21, 92 P 2d 753.

Collateral References

Labor Relations ⇨ 1322; *Master and Servant* ⇨ 74.

56 C.J.S. *Master and Servant* §§ 119, 156.

31 Am. Jur. 1088, *Labor*, §§ 518 et seq.

Constitutionality of statute regulating the time of payment of wages. 12 ALR 612.

Validity of minimum wage statutes relating to private employment. 24 ALR 1259.

Employees contemplated by statutes imposing penalty for nonpayment of, or delaying in paying, wages. 51 ALR 1208.

Statutes prescribing medium of payment of wages or salary as prohibiting compensation by corporate stock or other interest in business. 137 ALR 846.

41-1302. (3085) Penalty for failure to pay at times specified in law. Whenever any employer, as such employer is defined in this act, fails to pay any of his employees, as provided in the preceding section, he shall be guilty of a misdemeanor. A penalty shall also attach to such employer and become due such employee as follows: A sum equivalent to a penalty of five (5%) per cent of the wages due and not paid, as herein provided, as liquidated damages, and such penalty shall attach and suit may be brought in any court of competent jurisdiction to recover the same and the wages due.

It shall be the duty of the commissioner of labor to inquire diligently for any violations of this act, and to institute the actions for penalties provided for herein, in such cases as he may deem proper, and to enforce generally the provisions of this act.

Nothing herein contained shall be construed to limit the authority of the county attorney of any county of the state of Montana to prosecute actions, both civil and criminal, for such violations of this act as may come to his knowledge, or to enforce the provisions hereof independently and without specific direction of the commissioner of labor.

History: En. Sec. 2, Ch. 11, L. 1919; re-en. Sec. 3085, R. C. M. 1921; amd. Sec. 2, Ch. 169, L. 1941.

Penalties—Instructions in Language of Statutes Proper

An instruction relative to the penalties

accruing to employees by reason of the failure of their employer to pay semi-monthly wages when due, in the language of this section and section 41-1301 held properly given in an action to recover wages. *Meister v. Farrow*, 109 M 1, 21, 92 P 2d 753.

References

Swanson v. Gnose, 106 M 262, 268, 76 P 2d 643; Meister v. Farrow, 109 M 1, 21, 92 P 2d 753.

Collateral References

Labor Relations—1647; Master and Servant—84.
56 C.J.S. Master and Servant § 156.

41-1303. (3086) Discharged employee—wages, when payable. Whenever any employee is discharged from the employ of any such employer, on leaving said employment, then all the unpaid wages of such employee shall immediately become due and payable on demand, and if such employer fails to pay any such discharged employee, within seven (7) days after such discharge and demand, all the wages due and payable to him, then the same penalties as provided for in the preceding section shall attach, provided, however, that if the employer shall, within the period herein specified, tender in money to such discharged employee, the full amount of the wages lawfully due such employee, the penalties herein provided shall not attach.

History: En. Sec. 3, Ch. 11, L. 1919; amd. Sec. 1, Ch. 66, L. 1921; re-en. Sec. 3086, R. C. M. 1921; amd. Sec. 3, Ch. 169, L. 1941.

Collateral References

Labor Relations—1324, 1647.
56 C.J.S. Master and Servant § 156.

References

Anderson v. Commercial Credit Co., 110 M 333, 337, 101 P 2d 367.

41-1304. (3087) Period within which employee may recover penalties. Any employee may recover all such penalties as are provided for the violation of section 41-1302, which have accrued to him, at any time within six months succeeding such default or delay in the payment of such wages.

History: En. Sec. 4, Ch. 11, L. 1919; re-en. Sec. 3087, R. C. M. 1921.

References

Swanson v. Gnose, 106 M 262, 268, 76 P 2d 643.

41-1305. (3088) Contracts in violation of act void. Any contract or agreement made between any person, copartnership, or corporation and any parties in his, its, or their employ, whose provision shall be in violation, evasion, or circumvention of this act, shall be unlawful and void; but such employee may sue to recover his wages earned, together with such five per cent penalty, or separately to recover the penalty, if the wages have been paid.

History: En. Sec. 5, Ch. 11, L. 1919; re-en. Sec. 3088, R. C. M. 1921.

41-1306. (3089) Judgment for wages shall include attorney's fee. Whenever it shall become necessary for the employee to enter or maintain a suit at law for the recovery or collection of wages due, as provided for by this act, then such judgment shall include a reasonable attorney's fee in favor of the successful party, to be taxed as part of the costs in the case.

History: En. Sec. 6, Ch. 11, L. 1919; re-en. Sec. 3089, R. C. M. 1921.

Allowed Where Administrator Claimed Suit Unnecessary**Constitutionality**

Held, that this section is not invalid as violating the due process of law clause of either the state or federal constitutions, (Art. III, Sec. 27, Const.) nor as denying to either party the equal protection of the law. Britt v. Cotter Butte Mines, 108 M 174, 176, 91 P 2d 403.

Where administrator contended suit was unnecessary to recover for work done at request of his decedent as he would have allowed claim if it had not been an overcharge, and contention that he had no other alternative than to pay it as presented, therefore an attorney's fee was not permissible under this section, held, that in view of the record, and section 91-2715,

permitting administrators to pay claims in part, and section 91-2719, providing for court approval, his contention was not maintainable. *Swanson v. Gnose*, 106 M 262, 266, 76 P 2d 643.

Applies Although Action Brought After Six Months

The provision of section 41-1304 declaring that an employee may recover the penalties provided by section 41-1302 at any time within six months after default or delay in payment of wages, does not affect the provision of this section relating to including a reasonable attorney's fee; in the instant case the action was brought about three years after plaintiff's employment ceased and held that it was the duty of the district court to allow a reasonable attorney's fee as a proper and legal cost item. *Swanson v. Gnose*, 106 M 262, 268, 76 P 2d 643.

Attorney's Fee by "Express Provision of Law"

Under the rule provided by section 93-8618, that costs are not allowable unless expressly authorized by statute, the provision of this section for reasonable attorney's fee in favor of successful party, in an "express provision of law" for the allowance of costs. *Swanson v. Gnose*, 106 M 262, 265, 76 P 2d 643.

Operation and Effect

In an action to recover wages due, the plaintiff is entitled to a reasonable attorney's fee as a part of the costs without being required to either plead or prove such item. *Gardiner v. Eclipse Grocery Co.*, 72 M 540, 550, 234 P 490.

Attorney's fee not allowable in suit for wages of a general ranch-hand, coming under the exception as to agricultural labor provided in section 41-1301. *Gahagan v. Gugler*, 100 M 599, 611, 52 P 2d 150.

41-1307. (3090) Equal pay for women for equivalent service. It shall be unlawful for any person, firm, state, county, municipal, or school district, public or private corporation, to employ any woman or women in any occupation or calling within the state of Montana for salaries, wages, or compensation which are less than that paid to men for equivalent service or for the same amount or class of work, or labor in the same industry, school, establishment, office, or place of any kind or description.

History: En. Sec. 1, Ch. 147, L. 1919; re-en. Sec. 3090, R. C. M. 1921.

References

Farrell v. Yellowstone County, 68 M 313, 316, 218 P 559.

Collateral References

Labor Relations—1133.

Prima Facie Case—Memorandum of Costs—Appeal

A memorandum of costs, including an item of attorneys' fees, in an action to recover wages due, and setting forth the nature of the services rendered, makes out a prima facie case upon which the claim for such fees is based, by this section, and no further proof is required until such prima facie case is overturned. An alleged error in striking an item of attorney's fees from cost bill by order made two months after entry of judgment, held properly reviewable on appeal from the judgment, even though the item did not appear as a part of such judgment. *Swanson v. Gnose*, 106 M 262, 265, 76 P 2d 643.

Right to Attorney's Fee passes to Assignee in the Assignment of Claim for Wages

The right to include a reasonable attorney's fee where an employee is forced to bring suit to recover wages due is statutory, and found in this section, and the assignment of the wage claim carries with it the right to recover a reasonable attorney's fee, however, where thirty-nine claims are established in one suit, the attorney's fee should not amount to as much as it would have been if thirty-nine individual suits had been brought. (See sec. 67-1523.) *Meister v. Farrow*, 109 M 1, 18, 92 P 2d 753.

Suit on Quantum Meruit Rather Than for Lump Sum

The fact that plaintiff was suing on quantum meruit for the reasonable value of his services rather than for a lump sum, did not deprive him of the right to have his attorneys' fees taxed as costs against defendant upon rendition of judgment in his favor under this section. *Britt v. Cotter Butte Mines*, 108 M 174, 178, 91 P 2d 403.

56 C.J.S. Master and Servant § 152.

Validity, construction, and application of statute designed to prevent discrimination between male and female employees as regards wages or other conditions of work. 130 ALR 436.

41-1308. (3091) Violation of preceding section a misdemeanor—penalty. Any person, firm, state, county, municipal, or school district officers, or public or private corporation, violating any of the provisions of section 41-1307, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than twenty-five dollars nor more than five hundred dollars for each offense.

History: En. Sec. 2, Ch. 147, L. 1919;
re-en. Sec. 3091, R. C. M. 1921.

References

Farrell v. Yellowstone County, 68 M
313, 316, 218 P 559.

41-1309. (3092) Protection of discharged employees. If any person, after having discharged an employee from his service, prevents, or attempts to prevent, by word or writing of any kind, such discharged employee, from obtaining employment with any other person, such person is punishable as provided in section 94-3555, and is liable in punitive damages to such discharged person, to be recovered by civil action; no person is prohibited from informing, by word or writing, any person to whom such discharged person or employee has applied for employment, a truthful statement of the reason for such discharge.

History: Ap. p. Sec. 1, p. 257, L. 1891;
amd. Sec. 3390, Pol. C. 1895; re-en. Sec.
1755, Rev. C. 1907; re-en. Sec. 3092, R. C.
M. 1921.

Collateral References

Labor Relations⇒24.
56 C.J.S. Master and Servant § 44.

41-1310. (3093) Blacklisting prohibited. If any company or corporation in this state authorizes or allows any of its agents to blacklist, or any person does blacklist, any discharged employee, or attempts by word or writing, or any other means whatever, to prevent any discharged employee, or any employee who may have voluntarily left said company's service, from obtaining employment with another person, except as provided for in the next preceding section, such company or corporation or person is liable in punitive damages to such employees so prevented from obtaining employment, to be recovered by him in civil action; and is also punishable as provided in section 94-3555.

History: Ap. p. Sec. 2, p. 258, L. 1891;
amd. Sec. 3391, Pol. C. 1895; re-en. Sec.
1756, Rev. C. 1907; re-en. Sec. 3093, R. C.
M. 1921.

References

Phelps Dodge Corp. v. National Labor
Relations Board, 313 U S 177, 184, 85 L
Ed 1271.

41-1311. (3094) Employee to be furnished reason for discharge. It is the duty of any person, after having discharged any employee from his service, upon demand by such discharged employee, to furnish him in writing a full, succinct, and complete statement of the reason of his discharge, and if such person refuses so to do within a reasonable time after such demand, it is unlawful thereafter for such person to furnish any statement of the reason of such discharge to any person, or in any way to blacklist or to prevent such discharged person from procuring employment elsewhere, subject to the penalties and damages prescribed in this chapter.

History: Ap. p. Sec. 3, p. 258, L. 1891;
amd. Sec. 3392, Pol. C. 1895; re-en. Sec.
1757, Rev. C. 1907; re-en. Sec. 3094, R. C.
M. 1921.

Relations Board, 313 U S 177, 184, 85
L Ed 1271.

Collateral References

Labor Relations⇒24.
56 C.J.S. Master and Servant § 44.

References

Phelps Dodge Corp. v. National Labor

41-1312. Certain acts extended to those engaged in mining. For the purposes of this act, all the provisions of sections 41-1301 to 41-1311, shall extend to and govern every person, firm, partnership or corporation engaged in the business of extracting, or of extracting and refining or reducing metals and minerals, or mining for coal, or drilling for oil, save and except such persons, firms, partnerships or corporations as have a free and unencumbered title to not less than one-half ($\frac{1}{2}$) the fee of the property being worked; for this purpose outstanding unpaid or unredeemed tax sale certificate shall not be considered an encumbrance.

History: En. Sec. 1, Ch. 39, L. 1939.

Collateral References

Labor Relations—24, 1133, 1322, 1324, 1647.

56 C.J.S. Master and Servant § 81.

41-1313. Operator to file statement. Every person, firm or partnership coming within the provisions of this act shall before commencing operations, file with the commissioner of labor of the state of Montana and also in the office of the county clerk and recorder of each county where such operations are to be carried on, a verified statement showing the names and addresses of each party interested therein, or, if a corporation, the names and addresses of its officers and directors, the principal place of business of such corporation and the names and addresses of the person, or persons, resident of Montana, designated as the person, or persons, upon whom service of process may be made.

History: En. Sec. 2, Ch. 39, L. 1939.

Collateral References

Labor Relations—1081.

56 C.J.S. Master and Servant § 151.

41-1314. Penalty for failure to file. Every person, firm, partnership or corporation failing to file a statement with the commissioner of labor and in the offices of the county clerks and recorders, as provided in section 41-1313 shall be deemed guilty of a misdemeanor and punishable as provided by law.

History: En. Sec. 3, Ch. 39, L. 1939.

41-1315. Commissioner to report violations to county attorney. (1) Whenever it shall appear from reliable information satisfactory to the commissioner of labor of the state of Montana that any person, firm, partnership or corporation engaged in the business mentioned in section 41-1312, and not exempt from the effect of this act, shall have failed to pay any wages or salaries due his employees as required by sections 41-1301 to 41-1311, he shall have the right to deliver such information to the county attorney of the county wherein the operations of the employer are being carried on and to request such county attorney to file a complaint in the district court of said county in accordance with the provisions of this act and said sections 41-1301 to 41-1311.

(2) Should such complaint be filed by the county attorney upon his own motion, or at said request of said commissioner of labor, the same shall pray that relief be had against the employer for the greater security for the payment of salaries and wages of the employees; provided, however, that any such employees may make complaint direct to the county attorney relative to any violation of this act or of said sections 41-1301 to 41-1311.

If said county attorney believes, after receiving said information, that the provisions of sections 41-1301 to 41-1311, or any thereof, have been violated, and that such violation or violations of said sections 41-1301 to 41-1311 was or were wilful, or that the financial condition of the employer is such as to endanger employees in receiving prompt payment or collection of wages, it shall be his duty to file the complaint aforesaid in said district court.

(3) The county attorney of the county shall promptly notify the commissioner of labor of any complaint made by any employee relative to the violation of any of the provisions of this act or said sections 41-1301 to 41-1311, and shall in writing keep said commissioner of labor advised of each step in any proceeding taken by said county attorney thereunder. Upon the filing of such complaint, summons shall issue thereon and a copy of such complaint and a copy of the summons shall be served upon the employer who shall have ten (10) days after such service to appear and defend such action. All proceedings upon such complaint shall be promptly prosecuted.

History: En. Sec. 4, Ch. 39, L. 1939.

Collateral References

Master and Servant \S 80(1).
56 C.J.S. Master and Servant \S 122.

41-1316. District court proceedings. Upon the conclusion of the hearing upon such complaint, the judge of the district court may make findings and shall issue an order to the employer in default to pay within five (5) days all wages and salaries found by the court to be due and unpaid; or an order to appear before the court within ten (10) days and show cause why a judgment and order should not issue requiring said employer to give bond for the payment of all wages and salaries then due and thereafter to accrue to his employees within said county. Service of such order shall be made at least five (5) days before the date set for hearing or the date to which such hearing may be continued by the court upon good cause shown.

History: En. Sec. 5, Ch. 39, L. 1939.

Collateral References

Master and Servant \S 80(16).
56 C.J.S. Master and Servant \S 134.

41-1317. Hearing—decree—restraining order—bond. (1) Upon the hearing of such order, if the court shall determine that the default of said employer in the payment of wages and salaries was wilful, or that the financial condition of the employer is such as to endanger or delay or impede employees in collecting their wages and salaries, or that the employer is a nonresident of the state of Montana without visible property in said county subject to execution, or who has within two (2) years defaulted in payroll payments, the court may adjudge and decree that the employee or employees are endangered in the collection of their just demands, and the court may issue a restraining order against the employer forbidding further prosecution of operations by said employer until after the employer has furnished a good and sufficient bond, in form to be approved by the court with good and sufficient surety or sureties who can and do legally justify, and deposit said bond with the clerk of court of said county, obligating the employer to pay all wages and salaries as required by said sections 41-1301 to 41-1311. Said bond may be that of a surety company licensed and author-

ized to do business within the state of Montana, or of two (2) owners of real estate situate in said county and who can and do justify as sureties in the same manner as sureties justify on appeal bonds or bail bonds. Said bond shall be in the sum of not less than five hundred dollars (\$500.00) for each unit of five (5) men or less employed by such person, firm, partnership, or corporation. Any person whose wages or salary has remained unpaid for fifteen (15) days or more after due, shall have a right to sue upon said bond for the recovery of his wages or salary.

(2) Said bond shall continue in force for one (1) year. Said bond shall run in the name of the state of Montana and shall be examined and approved by the judge of the district court, said approval to be endorsed thereon; provided, however, that nothing contained in this act shall be considered as requiring any person, firm, partnership or corporation to file a bond or bonds if he or it pays for all labor in full each day, or where such labor has been performed upon a written building or construction contract to furnish material or other consideration as well as labor; provided, however, that nothing herein shall prohibit the making or entering into of any wage or working agreement, such as grubstake agreements and/or similar agreements; provided such employer or contractor keeps in force proper workmen's compensation insurance.

History: En. Sec. 6, Ch. 39, L. 1939.

41-1318. Service of process. All orders and other process provided for in this act shall be served by the sheriff upon the employer in the same manner as a summons in a civil suit is served; service upon any partner or member of any firm shall be considered service upon each partner and each member of the firm. In the event that the employer is a non-resident, or a corporation without officers or directors within the county, who cannot conveniently and promptly be found for service, then service upon the manager, superintendent or foreman in charge of the work, or, there being none such, then posting a copy of the order, or other process provided to be served herein, in a conspicuous place at or near the entrance to the principal workings shall be deemed sufficient service.

History: En. Sec. 7, Ch. 39, L. 1939.

41-1319. Enjoining further operations. In the event that the bond ordered by the district court is not executed and filed with the county treasurer within the time fixed by the court, the court may, if he deems the persons working for such employer to be insecure in the prompt payment or collection of their wages or salaries, enjoin any and all further operations of said employer within the state of Montana, for a period of one (1) year, at any mine or reduction works, or oil well or until the order, judgment or decree of the court shall have been fully complied with. The said district court shall include in any order, judgment or decree against the employer, all costs of the proceeding, which shall be taxed against the employer and paid into the clerk of the court to be by him deposited with the county treasurer to the credit of the general fund of the county. The county attorney of the county wherein such proceedings are had, or the attorney general of the state, shall, at his or their discretion, file such action and prosecute the same.

History: En. Sec. 8, Ch. 39, L. 1939.

41-1320. Punishment of employer for contempt. In event the employer fails for thirty (30) days or more to pay the costs of the proceeding and/or fails to furnish the bond required by the court, the court may proceed against and punish said employer for contempt of court.

History: En. Sec. 9, Ch. 39, L. 1939.

41-1321. Court may order publication of notice. In the discretion of the court, it may order the clerk of the court to publish a brief notice or memorandum in a newspaper published in the county, of the entry of the order against the employer, requiring said employer to furnish said bond, said publication shall be for four (4) consecutive weeks. The cost of such publication shall be assessed against the employer as one of the costs of the proceeding.

History: En. Sec. 10, Ch. 39, L. 1939.

41-1322. Attorney fee—assessment as costs. In event any person whose wages or salary has remained unpaid for fifteen (15) days or more after due, shall bring suit as in section 41-1317 provided, the court shall assess as costs against the unsuccessful party a reasonable attorney fee.

History: En. Sec. 11, Ch. 39, L. 1939.

41-1323. Review by supreme court on certiorari. In event any employer against whom an order to furnish the bond described in this act feels aggrieved by any order or injunction of the district court, he shall be entitled, upon payment for the transcript of record, to have his objections and exceptions reviewed and determined by the supreme court as upon a writ of certiorari.

History: En. Sec. 12, Ch. 39, L. 1939.

41-1324. Remedy cumulative. The remedy herein provided for the greater security for the payment of wages and salaries and the collection thereof, shall be in addition to any remedy now provided by law for the payment and collection of wages and salaries.

History: En. Sec. 13, Ch. 39, L. 1939.

CHAPTER 14

EMPLOYMENT AGENCIES, REGULATION

- Section 41-1401. Definition of terms used in act.
 41-1402. License to conduct employment agency—fee.
 41-1403. Contents of license.
 41-1404. Application for license.
 41-1405. Bond of applicant.
 41-1406. Action upon bond.
 41-1407. Registers to be kept by licensed persons.
 41-1408. Fees which may be charged applicants—repayment of fees.
 41-1409. Receipts to be delivered to applicants for employment and help.
 41-1410. Gifts or other things of value in lieu of fees prohibited.
 41-1411. Applicants for employment entitled to card—contents of card.
 41-1412. Copies of act to be posted where.
 41-1413. Duty of licensed persons when sending contract laborers outside of county.
 41-1414. Female applicants not to be sent to questionable places.
 41-1415. False and fraudulent advertising—name and address of agency to appear on advertising matter.
 41-1416. Violation of act a misdemeanor—penalty.

41-1401. (4157) Definition of terms used in act. The term "person," when used in this act, means and includes any individual, company, association, or corporation, or their agents, and the term "employment agency" means and includes the business of keeping an intelligence office, employment bureau, or other agency or office for procuring work or employment for persons seeking employment, where a fee or privilege is exacted, charged, or received, directly or indirectly, for procuring or assisting to procure employment, work, or a situation of any kind, or for procuring or providing help for any person, whether such fee is collected from the applicant for employment or the applicant for help, excepting agencies for procuring employment for school teachers exclusively. The term "fee" as used in this act means money or other thing of value, or a promise to pay money or thing of value.

History: En. Sec. 1, Ch. 225, L. 1919;
re-en. Sec. 4157, R. C. M. 1921.

Collateral References

Licenses⇒11(7).

53 C.J.S. Licenses § 30.

Cross-Reference

Employment agencies, establishment in cities and towns, sec. 3-1502.

41-1402. (4158) License to conduct employment agency—fee. No person shall open, keep, or carry on any such employment agency in the state of Montana, unless every such person shall procure a license therefor from the county treasurer of the county in which such person intends to conduct such agency. Such license shall be granted upon the payment to said county treasurer of a fee of five dollars annually for such employment agencies.

History: En. Sec. 2, Ch. 225, L. 1919;
re-en. Sec. 4158, R. C. M. 1921.

Collateral References

Unlicensed agency's right to recover for services. 30 ALR 863.

Constitutionality of statute regulating employment agencies. 56 ALR 1340.

Cross-Reference

Carrying on business without license, penalty, sec. 94-1511.

41-1403. (4159) Contents of license. Every license shall contain the name of the person licensed, a designation of the city, street, and number of the house in which the person licensed is authorized to carry on said employment agency, and the number and date of such license.

History: En. Sec. 3, Ch. 225, L. 1919;
re-en. Sec. 4159, R. C. M. 1921.

41-1404. (4160) Application for license. The application for such license shall be filed not less than one month prior to the granting of said license, and shall be accompanied by the affidavits of two or more persons who have known the applicant or the chief officer thereof, if the applicant is a corporation, for five years, stating that the said applicant or officer thereof is a person of good moral character.

History: En. Sec. 4, Ch. 225, L. 1919;
re-en. Sec. 4160, R. C. M. 1921.

Collateral References

Licenses⇒22.

53 C.J.S. Licenses § 39.

41-1405. (4161) Bond of applicant. The county treasurer of each county shall require such person to file with his application for a license a bond in due form to the state of Montana, in the penal sum of three thousand dollars, with two or more sufficient securities, and conditioned that the

obligor will not violate any of the duties, terms, conditions, provisions, or requirements of this act.

History: En. Sec. 5, Ch. 225, L. 1919;
re-en. Sec. 4161, R. C. M. 1921.

Collateral References
Licenses⇒26.
53 C.J.S. Licenses § 36.

41-1406. (4162) Action upon bond. If any person shall be aggrieved by the misconduct of any such licensed person, such person may maintain an action in his own name upon the bond of said employment agent in any court having jurisdiction of the amount claimed.

History: En. Sec. 6, Ch. 225, L. 1919;
re-en. Sec. 4162, R. C. M. 1921.

41-1407. (4163) Registers to be kept by licensed persons. It shall be the duty of every such licensed person to keep a register, approved by the county treasurer, in which shall be entered the date of every application for employment; the name and address of the applicant; the amount of the fee received. Such licensed person shall also enter in a separate register approved by the county treasurer the name and address of every applicant for help, the date of such application, the kind of help requested, the names of the persons sent, with the designation of the one employed, the amount of the fee received, and the rate of wages agreed upon. The aforesaid registers of applicants for employment and for help shall be open during office hours to inspection by the county treasurer.

History: En. Sec. 7, Ch. 225, L. 1919;
re-en. Sec. 4163, R. C. M. 1921.

Collateral References
Labor Relations⇒18.
56 C.J.S. Master and Servant § 26.

41-1408. (4164) Fees which may be charged applicants—repayment of fees. The fees charged applicants for any employment shall not exceed the sum of three dollars. In case the applicant, through no fault, neglect, or refusal of his own, shall not obtain help or employment through such agency, then such licensed person shall, on demand, repay the full amount of the said fee, allowing five days' time to determine the fact of the applicant's failure to obtain help or employment.

History: En. Sec. 8, Ch. 225, L. 1919;
re-en. Sec. 4164, R. C. M. 1921.

41-1409. (4165) Receipts to be delivered to applicants for employment and help. It shall be the duty of such licensed person to give to every applicant for employment from whom a fee shall be received a receipt in which shall be stated the name of said applicant, the date and amount of the fee, and the purpose for which it is paid, and to every applicant for help a receipt stating the name and address of said applicant, the date and amount of the fee, and the kind of help to be provided. Every such receipt shall have printed on the back thereof a copy of this section.

History: En. Sec. 9, Ch. 225, L. 1919;
re-en. Sec. 4165, R. C. M. 1921.

41-1410. (4166) Gifts or other things of value in lieu of fees prohibited. No such licensed person shall receive or accept any valuable thing or gift as a fee in lieu thereof, and no fee shall be accepted by such licensed person for any other purpose, directly or indirectly, by any pretense or subterfuge employed to evade the intent or purpose of this section, except

as herein provided. No such licensed person shall divide fees with contractors or other employers to whom applicants for employment are sent.

History: En. Sec. 10, Ch. 225, L. 1919;
re-en. Sec. 4166, R. C. M. 1921.

41-1411. (4167) Applicants for employment entitled to card—contents of card. Every such licensed person shall give to each applicant for employment a card containing the name and address of such employment agency, and the written name and address of the person to whom the applicant is sent for employment.

History: En. Sec. 11, Ch. 225, L. 1919;
re-en. Sec. 4167, R. C. M. 1921.

41-1412. (4168) Copies of act to be posted where. Every such licensed person shall post in a conspicuous place in each room of such agency a plain and legible copy of this act.

History: En. Sec. 12, Ch. 225, L. 1919;
re-en. Sec. 4168, R. C. M. 1921.

41-1413. (4169) Duty of licensed persons when sending contract laborers outside of county. Whenever such licensed person or any other acting for him agrees to send one or more persons to work as contract laborers in any one place outside the county in which such agency is located, the said licensed person shall file with the county treasurer, within five days after the contract is made, a statement containing the following items: Name and address of the employer, name and address of the employee, nature of work to be performed, hours of labor, wages offered, designation of the persons employed, and terms of transportation.

History: En. Sec. 13, Ch. 225, L. 1919;
re-en. Sec. 4169, R. C. M. 1921.

41-1414. (4170) Female applicants not to be sent to questionable places. No such licensed person shall send or cause to be sent any female help as servants or inmates to any questionable place, or place of bad repute, house of ill fame, or assignation house, or to any house or place of amusement kept for immoral purposes, the character of which such licensed person could have ascertained upon reasonable inquiry.

History: En. Sec. 14, Ch. 225, L. 1919;
re-en. Sec. 4170, R. C. M. 1921.

41-1415. (4171) False and fraudulent advertising—name and address of agency to appear on advertising matter. No such licensed person shall publish or cause to be published any false or fraudulent notice or advertisement; all advertisements of such employment agency by means of cards, circulars, or signs, and in newspapers and other publications, and all letterheads, receipts, and blanks shall contain the name and address of such employment agency, and no such licensed person shall give any false information, or make any false promise concerning employment to any applicant who shall register for employment or help.

History: En. Sec. 15, Ch. 225, L. 1919;
re-en. Sec. 4171, R. C. M. 1921.

Cross-Reference

Advertisements for workmen to state existence of labor trouble, secs. 94-3556, 94-35-256, 94-35-257.

41-1416. (4172) Violation of act a misdemeanor—penalty. Any violation of the provisions of this act shall constitute a misdemeanor punishable by a fine of not less than one hundred dollars nor more than five hundred dollars, or imprisonment for a period of not more than ninety days, or by both such fine and imprisonment.

History: En. Sec. 16, Ch. 225, L. 1919;
re-en. Sec. 4172, R. C. M. 1921.

CHAPTER 15

WAGE BROKERS

- Section 41-1501. Wage brokers to procure license and give bond.
 41-1502. Issuance of license—terms and amount thereof.
 41-1503. Wage broker defined.
 41-1504. Restrictions upon assignment of wages or salary.
 41-1505. Interest on loan—amount and computation.
 41-1506. Wife must join in assignment of wages—acknowledgment.
 41-1507. Assignments invalid without notice to employer—filing assignments.
 41-1508. Assignment to be considered a loan.
 41-1509. Violation of act constitutes misdemeanor—penalties.
 41-1510. Note, instrument or assignment contrary to act void.

41-1501. (4173) Wage brokers to procure license and give bond. From and after the passage of this act, no person, company, corporation, or association shall establish or conduct the business of wage broker within the state of Montana, unless such person, company, corporation, or association shall have first procured a license from the proper authorities as hereinafter provided, and shall have executed a bond in such sum as said authorities may require for the faithful carrying out of the provisions of this act, and of the ordinances of any town or city in which such business may be carried on.

History: En. Sec. 1, Ch. 56, L. 1911;
re-en. Sec. 4173, R. C. M. 1921.

Operation and Effect

In an action by a bank as assignee of a contractor for a balance due on a contract assigned as security for a loan, an allegation in the answer that the assignment had not been acknowledged nor filed with the county clerk as required by sections 41-1501 to 41-1510, regulating the business of wage brokers, was properly stricken, it appearing affirmatively that the assignor was neither a wage-earner nor an em-

ployee but a contractor, and therefore the assignee was not a wage broker. *Security State Bank of Roy v. Melchert*, 67 M 535, 539, 216 P 340.

References

Costello v. Great Falls Iron Works, 59 M 417, 418, 196 P 982.

Collateral References

Pawnbrokers and Money Lenders 4. 70 C.J.S. *Pawnbrokers* § 3.

41-1502. (4174) Issuance of license—terms and amount thereof. The board of county commissioners of any county in this state, or, in case said business be carried on in any incorporated city or town, the city council or board of trustees of said city or town, may in their discretion, from time to time, grant licenses to any person or persons, company, corporation, or association to conduct or carry on the business of wage broker upon payment of such sum therefor, and upon such terms and conditions as the said board of county commissioners or city council or board of trustees shall by resolution or ordinance require.

History: En. Sec. 2, Ch. 56, L. 1911; re-en. Sec. 4174, R. C. M. 1921.

41-1503. (4175) Wage broker defined. Any person, company, corporation, or association parting with, giving, or loaning money, either directly or indirectly to any employee or wage-earner, upon the security of or in consideration of any assignment or transfer of wages or salary of such employee or wage-earner, shall be deemed to be a wage broker within the meaning of this act.

History: En. Sec. 3, Ch. 56, L. 1911;
re-en. Sec. 4175, R. C. M. 1921.

Operation and Effect

One who parts with money, either directly or indirectly, in consideration of the assignment of wages, is a wage broker within the meaning of this section. Costello v. Great Falls Iron Works, 59 M 417, 418, 196 P 982.

References

Security State Bank of Roy v. Melchert, 67 M 535, 539, 216 P 340.

Collateral References

Pawnbrokers and Money Lenders 3.
70 C.J.S. Pawnbrokers § 4.

41-1504. (4176) Restrictions upon assignment of wages or salary. No assignment of his or her wages or salary by any employee or wage-earner to any wage broker for his or her benefit shall be valid or enforceable, nor shall any employer or debtor recognize or honor such assignment for any purpose whatever, unless it be for a fixed and definite part or all of the wages or salary theretofore earned.

History: En. Sec. 4, Ch. 56, L. 1911;
re-en. Sec. 4176, R. C. M. 1921.

Collateral References

Pawnbrokers and Money Lenders 6.7.
70 C.J.S. Pawnbrokers § 6.

41-1505. (4177) Interest on loan—amount and computation. No wage broker shall ask, demand, or receive, either as compensation or interest, or in any other manner, directly or indirectly, any compensation or interest for the use of money advanced or loaned by him to any employee or wage-earner in excess of twelve per cent per annum, and said compensation or rate of interest shall be computed upon the amount actually advanced to and received by the employee or wage-earner, and shall include all commissions or compensation whatsoever to the wage broker or any other person for making or procuring said loan.

History: En. Sec. 5, Ch. 56, L. 1911;
re-en. Sec. 4177, R. C. M. 1921.

41-1506. (4178) Wife must join in assignment of wages—acknowledgment. No assignments of his wages or salary to a wage broker by a married man, who shall have a wife residing in this state, shall be valid or enforceable without the consent of his wife, evidenced by her signature to said assignment, executed and acknowledged before a notary public or other officer empowered to take acknowledgments, and no wage broker or person connected with him, directly or indirectly, shall be authorized to take any such acknowledgments.

History: En. Sec. 6, Ch. 56, L. 1911;
re-en. Sec. 4178, R. C. M. 1921.

41-1507. (4179) Assignments invalid without notice to employer—filing assignments. No assignment of wages or salary to a wage broker shall be valid or enforceable unless notice in writing of the same, accompanied by a copy of the assignment, shall be given to the employer within one day from the date of its execution; and all assignments shall be filed in the

office of the county clerk of the county where the assignor resides, and no assignment shall be valid unless so filed.

History: En. Sec. 7, Ch. 56, L. 1911;
re-en. Sec. 4179, R. C. M. 1921.

41-1508. (4180) Assignment to be considered a loan. Every purchase by a wage broker of an assignment of the wages or salary of any employee or wage-earner shall be held and considered a loan, in the sum of the amount actually paid to and received by such employee or wage-earner, and shall be subject to all the provisions of this act. .

History: En. Sec. 8, Ch. 56, L. 1911;
re-en. Sec. 4180, R. C. M. 1921.

41-1509. (4181) Violation of act constitutes misdemeanor—penalties. Any person, company, corporation or association, and any officer, member, agent or employee thereof violating any or either of the provisions of sections 41-1501 to 41-1508, both inclusive, shall be deemed guilty of a misdemeanor, and upon conviction shall be liable to a fine in the sum of not less than one hundred dollars (\$100.00) nor more than five hundred dollars (\$500.00), for each offense or to imprisonment in the county jail for a period not to exceed ninety (90) days or both, and in addition thereto the debt and accrued interest thereon shall be discharged and the security shall be void.

History: En. Sec. 9, Ch. 56, L. 1911;
re-en. Sec. 4181, R. C. M. 1921; amd. Sec.
1, Ch. 112, L. 1929.

Collateral References

Pawnbrokers and Money Lenders 11.
70 C.J.S. Pawnbrokers § 15.

41-1510. (4182) Note, instrument or assignment contrary to act void. Any note, bill, or other evidence of indebtedness, and any assignment of wages or salary given to or received by any wage broker in violation of any of the provisions of this act, shall be void as against the creditors of the assignor or transferrer.

History: En. Sec. 10, Ch. 56, L. 1911;
re-en. Sec. 4182, R. C. M. 1921.

CHAPTER 16

DEPARTMENT OF LABOR AND INDUSTRY

- Section 41-1601. Department of labor and industry created.
41-1602. Department administered by commissioner of labor and industry.
41-1603. Commissioner of labor and industry—term—salary—oath—bond.
41-1604. Organization of department.
41-1605. Duties of department.
41-1606. Transfer of powers of division of labor and publicity.
41-1607. Annual report.
41-1608. Publication of reports.
41-1609. Legislative intent—construction of act.

41-1601. Department of labor and industry created. There is hereby created a department of the government of the state of Montana to be known as the "department of labor and industry."

History: Ep. Sec. 1, Ch. 177, L. 1951.

41-1602. Department administered by commissioner of labor and industry. The department of labor and industry shall be administered by a

chief executive officer to be known as the commissioner of labor and industry to be appointed by the governor, subject to the confirmation of the senate.

History: En. Sec. 2, Ch. 177, L. 1951.

41-1603. Commissioner of labor and industry—term—salary—oath—bond. The term of office of the commissioner of labor and industry appointed at this time shall terminate on March 4, 1953; and, the term of office of the commissioner of labor and industry appointed thereafter shall be four (4) years and until his successor is appointed and qualified. The commissioner shall receive an annual salary of five thousand dollars (\$5,000.00) payable monthly. Before entering on the duties of his office he must take and subscribe to the oath of office prescribed by section 1, Article XIX of the Montana Constitution and execute an official bond in the amount of one thousand dollars (\$1,000.00).

History: En. Sec. 3, Ch. 177, L. 1951.

41-1604. Organization of department. For the purpose of administration the commissioner shall organize the department subject to the approval of the governor, in the manner which he deems necessary properly to segregate and conduct the work of the department.

History: En. Sec. 4, Ch. 177, L. 1951.

41-1605. Duties of department. The department of labor and industry shall be charged with the duty of enforcing all the laws of Montana relating to hours of labor, conditions of labor, prosecution of employers who default in payment of wages, protection of employees, all laws relating to child labor regulating the employment of children in any manner, and to administer the laws of the state relating to free employment offices.

History: En. Sec. 5, Ch. 177, L. 1951.

3-1502, 3-1503, 3-1504, 41-1201, 41-1202 and 92-104, see sec. 3-101.1.

Compiler's Notes

The commissioner of labor and industry has authority over the laws set out in secs.

Sections 6 and 7 of Ch. 177, Laws 1951 are set out as secs. 3-101.1 and 3-109 respectively.

41-1606. Transfer of powers of division of labor and publicity. The duties, powers and functions placed by the Revised Codes of Montana, 1947, in the division of labor and publicity of the department of agriculture, labor and industry are hereby transferred to the department of labor and industry.

History: En. Sec. 8, Ch. 177, L. 1951.

41-1607. Annual report. The commissioner shall collect, assort and arrange, systematize and present in an annual report to the governor, on or before the first day of December in each year, statistical details relating to the department of labor and industry in the state of Montana.

History: En. Sec. 9, Ch. 177, L. 1951.

41-1608. Publication of reports. The annual reports of the commissioner shall be combined in one volume and published biennially and shall contain such statistical and descriptive matter as shall be approved by the state board of examiners.

History: En. Sec. 10, Ch. 177, L. 1951.

41-1609. Legislative intent—construction of act. It is the legislative intent in enacting this bill that the provisions of chapter 6, Laws of Montana in 1949, as approved by the people of Montana at the general election on November 7, 1950, amending section 1 of Article XVIII of the Montana Constitution be made effective. The purpose of this act is to separate the powers, functions and duties of the present department of agriculture, labor and industry into two separate departments under two separate commissioners as prescribed by the above mentioned constitutional amendment. Except as specifically provided herein, it is not intended to change, amend or vary any of the laws herein mentioned except to separate the powers heretofore granted the commissioner of agriculture, labor and industry and allocate the duties now prescribed by statute to the separate departments of agriculture and of labor and industry, and the two commissioners in charge. This act shall not be construed to enlarge or diminish or in any way alter present laws except as specifically herein provided.

History: En. Sec. 12, Ch. 177, L. 1951.

CHAPTER 17

SAFETY CODES

- Section 41-1701. Definitions.
41-1702. Employers' duties as to safety.
41-1703. Code-making power.
41-1704. Variations.
41-1705. Court review.
41-1706. Penalties.
41-1707. Other laws or regulations unaffected.

41-1701. Definitions. When used in this act: (a) "Board" shall mean the industrial accident board of the state of Montana;

(b) "Employer" includes a person, firm, corporation, partnership, association, receiver or trustee in bankruptcy having one or more persons in his or its employ, or any person acting in the interest of an employer, directly or indirectly, but the term shall not apply to any person as an employer of employees engaged in domestic service or agricultural pursuits;

(c) "Code" shall mean a standard body of rules for safety formulated, adopted and issued by the board under the provisions of this act;

(d) "Amendment" shall mean such modification or change in a code as shall be intended to be of universal or general application;

(e) "Variation" shall mean a special limited modification or change in a code which is applicable only to the particular place of employment of the employer or person petitioning for such modification or change.

History: En. Sec. 1, Ch. 193, L. 1951.

41-1702. Employers' duties as to safety. (a) Every employer shall furnish a place of employment which shall be safe for the employees therein and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such places of employment safe, and shall do every other thing reasonably necessary to protect the life and safety of such employees;

(b) Every employer and every owner of a place of employment, shall repair, and maintain the same as to render it safe. If [In] any civil suit

or action brought against a landlord by an employee or by a member of the public for recovery of damages for injury or death the provisions of this section shall not be construed to apply or in any way increase or affect the present liability of said landlord.

History: En. Sec. 2, Ch. 193, L. 1951.

Compiler's Note

The bracketed word "In" was inserted by the compiler.

41-1703. Code-making power. (a) In addition to such other powers and duties as may be conferred upon it by law, the industrial accident board shall have the power to promulgate, amend, repeal and enforce rules and regulations for the prevention of accidents to be known as "Safety Codes" in every employment and place of employment, including the repair and maintenance of places of employment, to render them safe. In the performance of its duties, the industrial accident board shall appoint advisory committees to deal with specified industries composed of employers and employees to suggest safety codes or amendments thereto. The membership of each committee shall consist of at least five (5) members, two-fifths (2/5) of which number shall represent labor, two-fifths (2/5) shall represent employers, and one-fifth (1/5) represent the general public. One person representing the general public shall be chairman of each committee. No code may be adopted by the industrial accident board without the approval of said committee. All such safety codes, rules and regulations shall, when adopted, be not inconsistent with the then existing widely accepted safety codes of such engineering bodies as the American Society of Mechanical Engineers, the American Standards Association, the American Society of Safety Engineers, and other accepted codes. Any amendments made to such codes by said board shall be such that when amended such codes shall be consistent with the widely accepted safety codes as then existing.

(b) Before any code is adopted, amended or repealed, there shall be a public hearing thereon, notice of which shall be published at least once, not less than ten days prior thereto, in such newspapers or newspaper of general circulation as the board may prescribe. A record shall be made of all proceedings at such public hearings.

(c) All codes and all amendments thereto and repeals thereof shall, unless otherwise prescribed by the board, take effect thirty days after certified copies thereof shall be filed in the office of the secretary of state.

(d) Every code adopted and every amendment or repeal thereof shall be published in such manner as the board may determine. A printed list of the titles of all codes including amendments thereof issued and adopted by the board under the provisions of this act, together with the dates of adoption thereof, shall be published from time to time.

History: En. Sec. 3, Ch. 193, L. 1951.

41-1704. Variations. Any employer may consult with the industrial accident board, for advice and assistance in complying with the provisions of this act or any codes adopted thereunder. In case of practical difficulties the board may grant variations from particular provisions of a code and permit the use of other or different devices or methods; provided, however, that such variation shall be granted only when it is clear that the reason-

able safety of the workers in said plant is not thereby endangered. In any case where the industrial accident board shall decline or refuse to grant any requests for variations on the grounds that the safety of the workers involved would be endangered, the said employer may, within thirty days of such refusal petition the board in writing for the variations denied. The petitioner shall state the grounds or reasons for requesting such variations. The board shall fix a day for a hearing on such petition and shall give reasonable notice thereof to the petitioner. A properly indexed record of all variations made shall be kept in the office of the industrial accident board and be open to public inspection.

History: En. Sec. 4, Ch. 193, L. 1951.

41-1705. Court review. (a) Any employer aggrieved by any decision of the board refusing to grant a variation pursuant to the provisions of section 41-1704 may, within thirty days after such decision, commence an action in the district court against the industrial accident board for a review of such decision.

(b) Any person aggrieved by the enforcement against him of any code adopted under this act, or any amendment thereof may, after its effective date, commence an action in the district court against the industrial accident board to set aside such code or portion thereof on the ground that it is unlawful or unreasonable. The court may set aside such code or portion thereof if, upon all the evidence, it appears to the court that such code, or portion thereof is unlawful or unreasonable.

(c) In any proceedings under this section the court shall order notice to be given to the board in such manner as it shall determine. Any such proceedings and the pleadings therein shall be governed by the laws and rules of practice applicable to other civil actions in such court.

History: En. Sec. 5, Ch. 193, L. 1951.

41-1706. Penalties. Any employer or employee who intentionally refuses to comply with any safety code adopted by the board, shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than five hundred dollars (\$500.00).

History: En. Sec. 6, Ch. 193, L. 1951.

41-1707. Other laws or regulations unaffected. Nothing in this act shall be construed to repeal or to limit or restrict in any way any present state law, statute, regulation or order governing the safety of health of employees in any place of employment.

History: En. Sec. 8, Ch. 193, L. 1951.

TITLE 42

LANDLORD AND TENANT—HIRING

- Chapter 1. Hiring—in general, 42-101 to 42-111.
2. Hiring of real property—of personal property, 42-201 to 42-215.

CHAPTER 1

HIRING—IN GENERAL

- Section 42-101. Hiring defined.
42-102. Products of thing.
42-103. Quiet possession.
42-104. Degree of care, etc., on part of hirer.
42-105. Must repair injuries, etc.
42-106. Things let for a particular purpose.
42-107. When letter may terminate the hiring.
42-108. When hirer may terminate the hiring.
42-109. When hiring terminates.
42-110. When terminated by death, etc., of party.
42-111. Apportionment of hire.

42-101. (7730) Hiring defined. Hiring is a contract by which one gives to another the temporary possession and use of property, other than money, for reward, and the latter agrees to return the same to the former at a future time.

History: En. Sec. 2600, Civ. C. 1895; re-en. Sec. 5215, Rev. C. 1907; re-en. Sec. 7730, R. C. M. 1921. Cal. Civ. C. Sec. 1925. Field Civ. C. Sec. 979.

Collateral References

Bailment⊖1.
8 C.J.S. Bailments § 1.
Generally, see 6 Am. Jur. 127, Bailments; 32 Am. Jur. 1, Landlord and Tenant.

42-102. (7731) Products of thing. The products of a thing hired, during the hiring, belong to the hirer.

History: En. Sec. 2601, Civ. C. 1895; re-en. Sec. 5216, Rev. C. 1907; re-en. Sec. 7731, R. C. M. 1921. Cal. Civ. C. Sec. 1926. Field Civ. C. Sec. 980.

her colt, where there is nothing to show that the plaintiff was a hirer of the dam. Frank v. Symons, 35 M 56, 62, 88 P 561.

Operation and Effect

This section has no application in an action to recover possession of a mare and

Collateral References

Accession⊖1.
1 C.J.S. Accession §§ 1, 2.

42-103. (7732) Quiet possession. An agreement to let upon hire binds the letter to secure to the hirer the quiet possession of the thing hired, during the term of the hiring, against all persons lawfully claiming the same.

History: En. Sec. 2602, Civ. C. 1895; re-en. Sec. 5217, Rev. C. 1907; re-en. Sec. 7732, R. C. M. 1921. Cal. Civ. C. Sec. 1927. Field Civ. C. Sec. 981.

Collateral References

Bailment⊖7.
8 C.J.S. Bailments § 20.

42-104. (7733) Degree of care, etc., on part of hirer. The hirer of a thing must use ordinary care for its preservation in safety and in good condition.

History: En. Sec. 2603, Civ. C. 1895; re-en. Sec. 5218, Rev. C. 1907; re-en. Sec. 7733, R. C. M. 1921. Cal. Civ. C. Sec. 1928. Field Civ. C. Sec. 982.

Operation and Effect

The statutory provisions (this section

42-105. (7734) Must repair injuries, etc. The hirer of a thing must repair all deteriorations or injuries thereto occasioned by his ordinary negligence.

History: En. Sec. 2604, Civ. C. 1895; re-en. Sec. 5219, Rev. C. 1907; re-en. Sec. 7734, R. C. M. 1921. Cal. Civ. C. Sec. 1929. Field Civ. C. Sec. 983.

Operation and Effect

The statutory provisions (the preceding section and this one) that the hirer of a thing must use ordinary care for its preservation and repair all deteriorations occa-

and the next) that the hirer of a thing must use ordinary care for its preservation and repair all deteriorations occasioned by his ordinary negligence, apply to real as well as personal property. *Mitchell v. Thomas*, 91 M 370, 381, 8 P 2d 639.

References

Cited or applied as section 5219, Revised Codes, in *Mitchell v. Henderson*, 37 M 515, 519, 97 P 942; *Noe v. Cameron*, 62 M 527, 532, 205 P 256; *Quong et al. v. Mc Evoy et al.*, 70 M 99, 105, 224 P 266.

42-106. (7735) Things let for a particular purpose. When a thing is let for a particular purpose, the hirer must not use it for any other purpose; and if he does, the letter may hold him responsible for its safety during such use in all events, or may treat the contract as thereby rescinded.

History: En. Sec. 2605, Civ. C. 1895; re-en. Sec. 5220, Rev. C. 1907; re-en. Sec. 7735, R. C. M. 1921. Cal. Civ. C. Sec. 1930. Field Civ. C. Sec. 984.

Exclusive—Does Not Authorize Recovery for Use and Occupation of Land—Applies to Real Property

Where plaintiffs leased land to defendant for purpose of mining coal, and lease did not grant defendant a right to mine by "outstroke," which is mining by hoisting or removing ore from an adjoining mine through a shaft or opening in demised premises, to which use defendants put the land without consent, and it was not claimed that such use damaged freehold or reversionary interest, plaintiffs

could not, on theory of implied or quasi contract, recover reasonable value of unauthorized use as "wayleave rent," since the remedy under this section is exclusive, and where plaintiffs reserved no right of use in themselves, defendant's use was not "wrongful" under section 17-402. *Speck v. Cottonwood Coal Co.*, 116 F 2d 489, 491.

References

Hall v. Hilling, 107 M 432, 440, 86 P 2d 648.

Collateral References

Express or implied restriction on lessee's use of residential property for business purposes. 2 ALR 2d 1151-1155.

42-107. (7736) When letter may terminate the hiring. The letter of a thing may terminate the hiring and reclaim the thing before the end of the term agreed upon:

1. When the hirer uses or permits a use of the thing hired in a manner contrary to the agreement of the parties; or,

2. When the hirer does not, within a reasonable time after request, make such repairs as he is bound to make.

History: En. Sec. 2606, Civ. C. 1895; re-en. Sec. 5221, Rev. C. 1907; re-en. Sec. 7736, R. C. M. 1921. Cal. Civ. C. Sec. 1931. Field Civ. C. Sec. 985.

Collateral References

Bailment § 22.
8 C.J.S. Bailments § 41.

42-108. (7737) When hirer may terminate the hiring. The hirer of a thing may terminate the hiring before the end of the term agreed upon:

1. When the letter does not, within a reasonable time after request, fulfil his obligations, if any, as to placing and securing the hirer in the

quiet possession of the thing hired, or putting it into good condition, or repairing; or,

2. When the greater part of the thing hired, or that part which was and which the letter had at the time of the hiring reason to believe was the material inducement to the hirer to enter into the contract, perishes from any other cause than the ordinary negligence of the hirer.

History: En. Sec. 2607, Civ. C. 1895; 7737, R. C. M. 1921. Cal. Civ. C. Sec. 1932. re-en. Sec. 5222, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 986.

42-109. (7738) When hiring terminates. The hiring of a thing terminates:

1. At the end of the term agreed upon;
2. By the mutual consent of the parties;
3. By the hirer acquiring a title to the thing hired superior to that of the letter; or,
4. By the destruction of the thing hired.

History: En. Sec. 2608, Civ. C. 1895; re-en. Sec. 5223, Rev. C. 1907; re-en. Sec. 7738, R. C. M. 1921. Cal. Civ. C. Sec. 1933. Field Civ. C. Sec. 987.

References

Stiemke v. Jankovich et al., 68 M 60, 62, 217 P 650.

Collateral References

Expiration of term of invalid lease as terminating tenancy. 6 ALR 2d 729.

42-110. (7739) When terminated by death, etc., of party. If the hiring of a thing is terminable at the pleasure of one of the parties, it is terminated by notice to the other of his death or incapacity to contract. In other cases it is not terminated thereby.

History: En. Sec. 2609, Civ. C. 1895; 7739, R. C. M. 1921. Cal. Civ. C. Sec. 1934. re-en. Sec. 5224, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 988.

42-111. (7740) Apportionment of hire. When the hiring of a thing is terminated before the time originally agreed upon, the hirer must pay the due proportion of the hire for such use as he has actually made of the thing, unless such use is merely nominal, and of no benefit to him.


History: En. Sec. 2610, Civ. C. 1895; re-en. Sec. 5225, Rev. C. 1907; re-en. Sec. 7740, R. C. M. 1921. Cal. Civ. C. Sec. 1935. Field Civ. C. Sec. 989.

Operation and Effect

Citing this section which did not prevent recovery by the United States of advance royalty and rentals due under leases of Indian lands which were canceled by United States subsequent to due date, held, that a Montana statute which would prevent more than proportionate recovery,

in conflict with regulations providing that such lessee shall not be relieved from obligation to pay royalties and rentals when due by reason of subsequent surrender of cancellation of lease would be invalid, because of repugnancy to federal statute pursuant to which regulation was made (25 U.S.C.A. sec. 396). Montana Eastern Limited v. United States, 95 F 2d 897, 900.

Collateral References

Bailment  20.
8 C.J.S. Bailments § 36.

CHAPTER 2

HIRING OF REAL PROPERTY—OF PERSONAL PROPERTY

- Section 42-201. Lessor to make dwelling-house fit for its purpose.
42-202. When lessee may make repairs, etc.
42-203. Term of hiring when no limit is fixed.
42-204. Hiring of lodgings for indefinite term.

- 42-205. Renewal of lease by lessee's continued possession.
- 42-206. Notice to quit.
- 42-207. Rent—when payable.
- 42-208. Attornment of a tenant to a stranger.
- 42-209. Tenant must deliver notice served on him.
- 42-210. Letting parts of rooms forbidden.
- 42-211. Obligations of letter of personal property.
- 42-212. Ordinary expenses.
- 42-213. Extraordinary expenses.
- 42-214. Return of the thing hired.
- 42-215. Charter-party defined.

42-201. (7741) Lessor to make dwelling-house fit for its purpose. The lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof which render it untenable, except such as are mentioned in section 42-105.

History: En. Sec. 2620, Civ. C. 1895; re-en. Sec. 5226, Rev. C. 1907; re-en. Sec. 7741, R. C. M. 1921. Cal. Civ. C. Sec. 1941. Based on Field Civ. C. Sec. 990.

Cross-Reference

Assignee of lessor, rights, sec. 67-706.

Operation and Effect

This section is confined to property used for dwelling-house purposes, and is not applicable to business property. *Landt v. Schneider*, 31 M 15, 18, 77 P 307. See *York v. Stewart*, 21 M 515, 55 P 29, for decision prior to enactment of this statute.

Instruction held unwarranted under facts of case. *Mitchell v. Henderson*, 37 M 515, 519, 97 P 942.

This section and the following were taken from California, and the construction placed upon them is to the effect that, if the landlord fails to repair after notice, the tenant may himself repair, within a certain limit, or move out; but he has no redress in damages for injury to person or property consequent upon the landlord's failure to repair. *Bush v. Baker*, 51 M 326, 335, 152 P 750; *Dier v. Mueller*, 53 M 288, 291, 163 P 466.

In the absence of a provision in a lease of a building requiring the tenant to do so, it is the duty of the landlord to keep the premises in a condition fit for occupation, and where by his failure in that re-

spect a nuisance is created, its presence is not a justification for evicting the tenant because of its existence and in reliance upon the right given a person by section 57-112, to abate a nuisance under certain conditions. *Quong et al. v. McEvoy et al.*, 70 M 99, 104, 224 P 266.

The provisions of this and the following section requiring that landlord repair dilapidations not caused by tenant's ordinary negligence but authorizing tenant to make repairs, if landlord fails to do so within a reasonable time after notice and deduct expense from the rent, or vacate the premises without further liability for rent, apply only to dilapidations which render the leased premises unfit for habitation. *Lake v. Emigh*, 118 M 325, 167 P 2d 575, 579.

References

Noe v. Cameron, 62 M 527, 532, 205 P 256.

Collateral References

Landlord and Tenant §§ 125, 151.
51 C.J.S. *Landlord and Tenant* §§ 303, 367.
32 Am. Jur. 514, *Landlord and Tenant*, §§ 653 et seq.

Statute requiring property to be kept in good repair as affecting landlord's liability for personal injury to tenant or his privies. 17 ALR 2d 704.

42-202. (7742) When lessee may make repairs, etc. If, within a reasonable time after notice to the lessor of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself, where the costs of such repairs do not require an expenditure greater than one month's rent of the premises, and deduct the expenses of such repairs from the rent, or the lessee may vacate the premises, in which case he shall be discharged from further payment of rent, or performance of other conditions.

History: En. Sec. 2621, Civ. C. 1895; re-en. Sec. 5227, Rev. C. 1907; re-en. Sec. 7742, R. C. M. 1921. Cal. Civ. C. Sec. 1942. Based on Field Civ. C. Sec. 991.

Cross-Reference

Action against cotenant for injury to property, sec. 93-2829.

Operation and Effect

Where a landlord, after notice of dilapidations in a hotel building in need of repair, failed to repair, the tenant under this section had the option of making the repairs himself at a cost not to exceed one month's rent and deducting the expense from the rent, or vacating the premises without further liability for rent, but had no cause of action for damages for injury to his personal property and for loss of profits. *Noe v. Cameron*, 62 M 527, 532, 205 P 256.

The provisions of this and the preceding section requiring that landlord repair dilapidations not caused by tenant's ordinary negligence but authorizing tenant to make repairs, if landlord fails to do so within a

reasonable time after notice and deduct expense from the rent, or vacate the premises without further liability for rent, apply only to dilapidations which render the leased premises unfit for habitation. *Lake v. Emigh*, 118 M 325, 167 P 2d 575, 579.

References

Cited or applied as section 2621, Civil Code, in *Landt v. Schneider*, 31 M 15, 18, 77 P 307; as section 5227, Revised Codes, in *Bush v. Baker*, 51 M 326, 336, 152 P 750; *Dier v. Mueller*, 53 M 288, 291, 163 P 466; *Noe v. Matlock et al.*, 64 M 35, 39, 208 P 591.

Collateral References

Landlord and Tenant §150(5).
51 C.J.S. *Landlord and Tenant* § 369.
32 Am. Jur. 590, *Landlord and Tenant*, § 715.

42-203. (7743) Term of hiring when no limit is fixed. A hiring of real property, other than lodgings and dwelling-houses, in places where there is no usage on the subject, is presumed to be for one year from its commencement, unless otherwise expressed in the hiring.

History: En. Sec. 2622, Civ. C. 1895; re-en. Sec. 5228, Rev. C. 1907; re-en. Sec. 7743, R. C. M. 1921. Cal. Civ. C. Sec. 1943.

Cross-References

Leases for more than one year to be in writing, sec. 93-1401-7.

Leases on town or city lots for over seventy-five years void, sec. 67-409.

Limitation on leases of agricultural land, sec. 67-408.

Operation and Effect

Where a store building is leased, and there is no testimony of any usage on the subject, the lease is presumed to run for at least one year. *Giovanetti v. Schab*, 41 M 297, 302, 109 P 141.

42-204. (7744) Hiring of lodgings for indefinite term. A hiring of lodgings or a dwelling-house for an unspecified time is presumed to have been made for such length of time as the parties adopt for the estimation of the rent. Thus a hiring at a monthly rate of rent is presumed to be for one month. In the absence of any agreement respecting the length of time or the rent, the hiring is presumed to be monthly.

History: En. Sec. 2623, Civ. C. 1895; re-en. Sec. 5229, Rev. C. 1907; re-en. Sec. 7744, R. C. M. 1921. Cal. Civ. C. Sec. 1944. Based on Field Civ. C. Sec. 993.

Operation and Effect

Generally, a tenant holding by a verbal letting or for an indefinite term at a monthly rental becomes a tenant from month to month. *Mahoney v. Lester*, 118 M 551, 168 P 2d 339, 342.

Id. The law does not favor a tenancy at will and will not imply a contract necessary to create such a tenancy.

References

Boucher v. St. George et al., 88 M 162, 293 P 315.

Collateral References

Landlord and Tenant §42, 72.
51 C.J.S. *Landlord and Tenant* §§ 29, 244.

42-205. (7745) Renewal of lease by lessee's continued possession. If a lessee of real property remains in possession thereof after the expiration of the hiring, and the lessor accepts a rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one month, when the rent is payable monthly, nor in any case one year.

History: En. Sec. 2624, Civ. C. 1895; re-en. Sec. 5230, Rev. C. 1907; re-en. Sec. 7745, R. C. M. 1921. Cal. Civ. C. Sec. 1945. Based on Field Civ. C. Sec. 994.

Operation and Effect

Where a tenant, after the expiration of his lease, held over at the invitation of the owner, paying rental to the latter, a tenancy from year to year was created, which upon proper notice, was terminable at the pleasure of the purchaser of the property. *Stoltze Land Co. v. Westberg*, 63 M 38, 47, 206 P 407.

Where at the time a writ of assistance was issued pursuant to foreclosure decree, the land in question was held by a lessee whose term had expired, a payment was

made by him to the owner, not as rent but as the owner's share of wool grown by the tenant under the lease agreement, such payment did not have the effect of a renewal of the lease under this section and hence did not defeat the writ. *Lepper v. Home Ranch Co. et al.*, 90 M 558, 566, 4 P 2d 722.

References

Boucher v. St. George et al., 88 M 162, 293 P 315; *Mahoney v. Lester et al.*, 118 M 551, 168 P 2d 339, 344.

Collateral References

Landlord and Tenant—90.
51 C.J.S. Landlord and Tenant § 73.

42-206. (7746) Notice to quit. A hiring of real property, for a term not specified by the parties, is deemed to be renewed as stated in the last section, at the end of the term implied by law, unless one of the parties gives notice to the other of his intention to terminate the same, at least as long before the expiration thereof as the term of the hiring itself, not exceeding one month.

History: En. Sec. 2625, Civ. C. 1895; re-en. Sec. 5231, Rev. C. 1907; re-en. Sec. 7746, R. C. M. 1921. Cal. Civ. C. Sec. 1946. Based on Field Civ. C. Sec. 995.

Cross-References

Fixtures, right of tenant to remove, sec. 67-1307.

Forcible entry and detainer, secs. 93-9701 to 93-9720.

Tenancies at will, how terminated, sec. 67-523.

Tenant wrongfully holding over, damages, secs. 17-501, 17-502.

Operation and Effect

Where the parties had a verbal rental arrangement from month to month, notice given April 15, 1949 to vacate May 1, 1949 was not sufficient to form a basis of a court action to remove the tenants

from the premises. *Welsh v. Roehm*, 125 M 517, 241 P 2d 816, 817.

Collateral References

32 Am. Jur. 836, Landlord and Tenant, §§ 993 et seq.

Right to notice to quit, of tenant holding after termination of definite term. 19 ALR 1405.

Computation and requisites of period of notice given to terminate tenancy. 86 ALR 1346.

Absence of notice to quit as affecting right to recover, from tenant holding over, increased rent in virtue of notice of change in rent. 109 ALR 209.

Waiver or revocation by landlord of notice given by him determining tenancy. 120 ALR 557.

42-207. (7747) Rent—when payable. When there is no usage or contract to the contrary, rents are payable at the termination of the holding, when it does not exceed one year. If the holding is by the day, week, month, quarter, or year, rent is payable at the termination of the respective periods, as it successively becomes due.

History: En. Sec. 2626, Civ. C. 1895; re-en. Sec. 5232, Rev. C. 1907; re-en. Sec. 7747, R. C. M. 1921. Cal. Civ. C. Sec. 1947.

Operation and Effect

Where landlord and tenant agree upon a certain rental per year, it is payable at the end of each year of the tenancy, in the absence of an agreement to the contrary. *Besse v. McHenry*, 89 M 520, 530, 300 P 199.

Collateral References

Landlord and Tenant—202.
52 C.J.S. Landlord and Tenant § 511.

Right of lessor to retain advance rental payments made under lease terms upon lessee's default in rent. 27 ALR 2d 656.

42-208. (7748) Attornment of a tenant to a stranger. The attornment of a tenant to a stranger is void unless it is made with the consent of the landlord, or in consequence of a judgment of a court of competent jurisdiction.

History: En. Sec. 48, p. 487, Bannack Stat.; re-en. Sec. 48, p. 403, Cod. Stat. 1871; re-en. Sec. 225, 5th Div. Rev. Stat. 1879; re-en. Sec. 283, 5th Div. Comp. Stat. 1887; re-en. Sec. 2627, Civ. C. 1895; re-en. Sec. 5233, Rev. C. 1907; re-en. Sec. 7748, R. C. M. 1921. Cal. Civ. C. Sec. 1948.

Cross-Reference

Adverse possession, sec. 93-2512.

References

Wells-Dickey Co. v. Embody, 82 M 150,

164, 266 P 869; Long v. W. P. Devereux Co. et al., 87 M 198, 206, 286 P 402.

Collateral References

Landlord and Tenant 68.
51 C.J.S. Landlord and Tenant § 278.
32 Am. Jur. 116, Landlord and Tenant, § 110.

Effect of attornment to stranger by vendee under executory contract to make his holding adverse as against vendor. 1 ALR 1351.

42-209. (7749) Tenant must deliver notice served on him. Every tenant who receives notice of any proceeding to recover the real property occupied by him, or the possession thereof, must immediately inform his landlord of the same, and also deliver to the landlord the notice, if in writing, and is responsible to the landlord for all damages which he may sustain by reason of any omission to inform him of the notice, or to deliver it to him if in writing.

History: En. Sec. 2628, Civ. C. 1895; re-en. Sec. 5234, Rev. C. 1907; re-en. Sec. 7749, R. C. M. 1921. Cal. Civ. C. Sec. 1949. Based on Field Civ. C. Sec. 997.

Collateral References

Landlord and Tenant 51.
51 C.J.S. Landlord and Tenant § 252.

42-210. (7750) Letting parts of rooms forbidden. One who hires part of a room for a dwelling is entitled to the whole of the room, notwithstanding any agreement to the contrary; and if a landlord lets a room as a dwelling for more than one family, the person to whom he first lets any part of it is entitled to the possession of the whole room for the term agreed upon, and every tenant in the building, under the same landlord, is relieved from all obligation to pay rent to him while such double letting of any room continues.

History: En. Sec. 2629, Civ. C. 1895; re-en. 5235, Rev. C. 1907; re-en. Sec. 7750, R. C. M. 1921. Cal. Civ. C. Sec. 1950. Based on Field Civ. C. Sec. 998.

Collateral References

Landlord and Tenant 4, 122, 199½.
51 C.J.S. Landlord and Tenant §§ 3, 101, 289; 52 C.J.S. Landlord and Tenant, §§ 480, 556.

42-211. (7751) Obligations of letter of personal property. One who lets personal property must deliver it to the hirer, secure his quiet enjoyment thereof against all lawful claimants, put it into a condition fit for the purpose for which he lets it, and repair all deteriorations thereof not occasioned by the fault of the hirer and not the natural result of its use.

History: En. Sec. 2640, Civ. C. 1895; re-en. Sec. 5236, Rev. C. 1907; re-en. Sec. 7751, R. C. M. 1921. Cal. Civ. C. Sec. 1955. Field Civ. C. Sec. 999.

Collateral References

Bailment 9.
8 C.J.S. Bailments § 25.

42-212. (7752) Ordinary expenses. A hirer of personal property must bear all such expenses concerning it as might naturally be foreseen to attend it during its use by him. All other expenses must be borne by the letter.

History: En. Sec. 2641, Civ. C. 1895;
re-en. Sec. 5237, Rev. C. 1907; re-en. Sec.
7752, R. C. M. 1921. Cal. Civ. C. Sec. 1956.
Field Civ. C. Sec. 1000.

Collateral References
Bailment⊖19.
8 C.J.S. Bailments § 34.

42-213. (7753) Extraordinary expenses. If a letter fails to fulfil his obligations, as prescribed by section 42-211, the hirer, after giving him notice to do so, if such notice can conveniently be given, may expend any reasonable amount necessary to make good the letter's default, and may recover such amount from him.

History: En. Sec. 2642, Civ. C. 1895; 7753, R. C. M. 1921. Cal. Civ. C. Sec. 1957.
re-en. Sec. 5238, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1001.

42-214. (7754) Return of the thing hired. At the expiration of the term for which personal property is hired, the hirer must return it to the letter at the place contemplated by the parties at the time of hiring; or, if no particular place was so contemplated by them, at the place at which it was at that time.

History: En. Sec. 2643, Civ. C. 1895;
re-en. Sec. 5239, Rev. C. 1907; re-en. Sec.
7754, R. C. M. 1921. Cal. Civ. C. Sec. 1958.
Field Civ. C. Sec. 1002.

Collateral References
Bailment⊖23.
8 C.J.S. Bailments § 37.

References

Stiemke v. Jankovich et al., 68 M 60,
217 P 650.

42-215. (7755) Charter-party defined. The contract by which a ship is let is termed a charter-party. By it the owner may either let the capacity or burden of the ship, continuing the employment of the owner's master, crew, and equipments, or may surrender the entire ship to the charterer, who then provides them himself. The master or part owner may be a charterer.

History: En. Sec. 2644, Civ. C. 1895;
re-en. Sec. 5240, Rev. C. 1907; re-en. Sec.
7755, R. C. M. 1921. Cal. Civ. C. Sec. 1959.
Field Civ. C. Sec. 1003.

Collateral References
Shipping⊖39.
80 C.J.S. Shipping § 32.
48 Am. Jur. 202, Shipping, §§ 296 et seq.

TITLE 43

LEGISLATURE AND ENACTMENT OF LAWS

- Chapter 1. Senatorial, representative and congressional districts, 43-101 to 43-107.
2. The legislative assembly—its composition, organization, officers and employees, 43-201 to 43-214.
 3. The powers, duties and compensation of members, officers and employees of the legislative assembly, 43-301 to 43-318.
 4. Witnesses before the legislative assembly, 43-401 to 43-405.
 5. Statutes—their enactment and operation—governor's approval or veto, 43-501 to 43-515.
 6. Press room, 43-601.
 7. Legislative council—Unconstitutional.

CHAPTER 1

SENATORIAL, REPRESENTATIVE AND CONGRESSIONAL DISTRICTS

- Section 43-101. Senatorial districts defined.
- 43-102. Districts in new counties.
- 43-103. Apportionment of legislative assemblies.
- 43-104. Number of representatives from each county.
- 43-105. New counties.
- 43-106. New counties—representative districts.
- 43-107. Congressional districts.

43-101. (42) Senatorial districts defined. Each county of the state of Montana shall constitute a senatorial district and each senatorial district is entitled to one senator.

History: Ap. p. Sec. 110, Pol. C. 1895; re-en. Sec. 41, Rev. C. 1907 (See Sec. 5; Art. VI, Const. of Mont.); amd. Sec. 1, Ch. 6, L. 1921; re-en. Sec. 42, R. C. M. 1921.

"One" Senator from Each County

Contention that it is competent for the legislative assembly to provide for a proxy or substitute to perform the duties of a duly elected member in the event of temporary disability, such as is created by absence in the military service under Ch. 47, Laws 1941 (77-701 et seq.), may not be sustained, since to act, to vote, to

participate in the proceedings of the assembly the legislator must function in person and not by proxy. A county may not, at one time, have one duly elected, qualified living senator and one duly acting senator. The duties are purely personal in nature, and during a legislative session his presence is required at the seat of government. State ex rel. Grant v. Eaton, 114 M 199, 206, 133 P 2d 588.

Collateral References

States \Leftrightarrow 27.
81 C.J.S. States § 31.

43-102. (43) Districts in new counties. Whenever new counties are created, each of said counties shall be entitled to one senator, but in no case shall a senatorial district consist of more than one county.

History: En. Sec. 111, Pol. C. 1895; re-en. Sec. 42, Rev. C. 1907; re-en. Sec. 43, R. C. M. 1921.

Collateral References

States \Leftrightarrow 27.
81 C.J.S. States § 31.

References

State ex rel. Grant v. Eaton, 114 M 199, 208, 133 P 2d 588.

43-103. (44) Apportionment of legislative assemblies. That after the expiration of the thirty-second legislative assembly of the state of Montana,

the membership of the house of representatives of all legislative assemblies of Montana shall be apportioned amongst, and to the several counties of the state, upon and according to the official federal census enumeration of the inhabitants of the several counties of Montana, as taken by authority of law in the year of 1950, and upon the ratio of one (1) representative, or member, therein from each county for each seven thousand (7,000) persons in such county, or fractional part thereof in excess of three thousand five hundred (3,500) persons; provided that each county now created, shall be entitled to at least one (1) member.

History: En. Sec. 1, Ch. 37, L. 1941; amd. Sec. 1, Ch. 191, L. 1951.

1921; Sec. 44, R. C. M. 1935; amd. Sec. 1, Ch. 144, L. 1939.

NOTE.—Earlier apportionment acts were Sec. 112, Pol. C. 1895; Sec. 43, Rev. C. 1907; amd. Sec. 2, Ch. 38, L. 1911; amd. Sec. 2, Ch. 192, L. 1921; Sec. 44, R. C. M.

Collateral References

States—27.

81 C.J.S. States § 31.

43-104. (45) Number of representatives from each county. In accordance therewith each county of the state shall be entitled to, and shall elect at each biennial general, state and county election, the number of members of the house of representatives in the legislative assembly of Montana herein below allotted and apportioned to it and set opposite its name as follows:

Beaverhead County	One member
Big Horn County	One member
Blaine County	One member
Broadwater County	One member
Carbon County	One member
Carter County	One member
Cascade County	Seven members
Chouteau County	One member
Custer County	Two members
Daniels County	One member
Dawson County	One member
Deer Lodge County	Two members
Fallon County	One member
Fergus County	Two members
Flathead County	Four members
Gallatin County	Three members
Garfield County	One member
Glacier County	One member
Golden Valley County	One member
Granite County	One member
Hill County	Two members
Jefferson County	One member
Judith Basin County	One member
Lake County	Two members
Lewis and Clark County	Three members
Liberty County	One member
Lincoln County	One member
McCone County	One member

Madison County	One member
Meagher County	One member
Mineral County	One member
Missoula County	Five members
Musselshell County	One member
Park County	Two members
Petroleum County	One member
Phillips County	One member
Pondera County	One member
Powder River County	One member
Powell County	One member
Prairie County	One member
Ravalli County	Two members
Richland County	One member
Roosevelt County	One member
Rosebud County	One member
Sanders County	One member
Sheridan County	One member
Silver Bow County	Seven members
Stillwater County	One member
Sweet Grass County	One member
Teton County	One member
Toole County	One member
Treasure County	One member
Valley County	Two members
Wheatland County	One member
Wibaux County	One member
Yellowstone County	Eight members

History: En. Sec. 112, Pol. C. 1895; 1921; re-en. Sec. 45, R. C. M. 1921; amd. re-en. Sec. 43, Rev. C. 1907; amd. Sec. 2, Sec. 1, Ch. 144, L. 1939; amd. Sec. 2, Ch. 38, L. 1911; amd. Sec. 2, Ch. 192, L. 37, L. 1941; amd. Sec. 2, Ch. 191, L. 1951.

43-105. (46) New counties. Whenever a new county is created it shall have and be entitled to one (1) member of the house of representatives until otherwise apportioned.

History: En. Sec. 3, Ch. 37, L. 1941. C. 1907; Sec. 3, Ch. 38, L. 1911; Sec. 3, Ch. 192, L. 1921; Sec. 46, R. C. M. 1921.

NOTE.—Earlier Acts, now repealed, were Sec. 113, Pol. C. 1895; Sec. 44, Rev.

43-106. (47) New counties—representative districts. Whenever a new county is created, it shall be attached to, and become a part of the representative district, embracing the county from which the largest area included in the new county has been taken.

History: En. Sec. 4, Ch. 37, L. 1941;
First Enacted as Sec. 4, Ch. 192, L. 1921;
Sec. 47, R. C. M. 1921.

43-107. (48) Congressional districts. All that portion of the state of Montana lying west of the east boundary of Flathead, Lewis and Clark, Broadwater, and Gallatin counties, to-wit: the counties of Beaverhead, Broadwater, Deer Lodge, Flathead, Gallatin, Granite, Jefferson, Lake, Lewis and Clark, Lincoln, Madison, Mineral, Missoula, Powell, Ravalli,

Sanders, and Silver Bow shall constitute the first congressional district of the state; and that all that portion of the State of Montana lying east of the east boundary of Flathead, Lewis and Clark, Broadwater, and Gallatin counties, to-wit: the counties of Big Horn, Blaine, Carbon, Carter, Cascade, Chouteau, Custer, Daniels, Dawson, Fallon, Fergus, Garfield, Glacier, Golden Valley, Hill, Judith Basin, Liberty, McCone, Meagher, Musselshell, Park, Petroleum, Phillips, Pondera, Powder River, Prairie, Richland, Rosebud, Roosevelt, Sheridan, Stillwater, Sweet Grass, Teton, Toole, Treasure, Valley, Wheatland, Wibaux and Yellowstone shall constitute the second congressional district of the state.

Whenever any county is created, comprised partly of the territory of both such districts, said county shall belong to and become a part of the district to which major portion of the territory of said county belonged and was a part prior to the creation of such new county.

History: Ap. p. Sec. 120, Pol. C. 1895; re-en. Sec. 47, Rev. C. 1907; amd. Sec. 1, Ch. 44, L. 1917; re-en. Sec. 48, R. C. M. 1921; amd. Sec. 1, Ch. 113, L. 1945.

Collateral References

United States 11.
65 C.J. United States § 13.

CHAPTER 2

THE LEGISLATIVE ASSEMBLY—ITS COMPOSITION, ORGANIZATION, OFFICERS AND EMPLOYEES

- Section 43-201. Composition of legislative assembly.
43-202. Term of office.
43-203. Election of senators.
43-204. Same.
43-205. Time and place of meeting.
43-206. Certificate of election evidence of a right to seat.
43-207. Senate, organization of.
43-208. House of representatives, organization of.
43-209. Oath to be entered on journals.
43-210. Election of officers.
43-211. Compelling attendance of members.
43-212. Officers and employees of senate.
43-213. Officers and employees of the house.
43-214. How elected.

43-201. (51) Composition of legislative assembly. The legislative assembly consists of senators and representatives elected from the several senatorial and representative districts of the state in the number specified by law.

History: En. Sec. 150, Pol. C. 1895; re-en. Sec. 50, Rev. C. 1907; amd. Sec. 1, Ch. 5, L. 1921; re-en. Sec. 51, R. C. M. 1921.

Interest of members in contracts forbidden, sec. 59-501.

Offenses relating to legislature, sec. 94-2901 et seq.

Cross-References

Bribery of legislators, secs. 94-2905 to 94-2919.

Disqualification of members on conviction of crime, sec. 94-2914.

Collateral References

States 25.
81 C.J.S. States § 29.

43-202. (52) Term of office. The term of office of a senator is four years, and of a representative two years; and the term of service thereof shall begin on the first Monday of January next succeeding his election,

and if a senator or representative be elected to fill a vacancy, his term of service shall begin on the next day after his election.

History: Ap. p. Sec. 151, Pol. C. 1895; re-en. Sec. 51, Rev. C. 1907; amd. Sec. 1, Ch. 17, L. 1909; re-en. Sec. 52, R. C. M. 1921. Cal. Pol. C. Sec. 226.

Legislature generally, 49 Am. Jur. 247 et seq., States, Territories, and Dependencies.

Collateral References

States \hookrightarrow 28(1).

81 C.J.S. States § 33.

43-203. (53) Election of senators. At the general election in the year 1892, there must be elected a senator from each of the odd-numbered senatorial districts and hold office for four years, and their successors must be elected in the year 1896, and every four years thereafter.

History: En. Sec. 153, Pol. C. 1895; re-en. Sec. 53, Rev. C. 1907; re-en. Sec. 53, R. C. M. 1921.

Collateral References

States \hookrightarrow 28(1).

81 C.J.S. States § 33.

43-204. (54) Same. At the general election in the year 1894, there must be elected a senator from each of the even-numbered senatorial districts, who shall hold office for four years, and their successors must be elected in the year of 1898, and every four years thereafter.

History: En. Sec. 154, Pol. C. 1895; re-en. Sec. 54, Rev. C. 1907; re-en. Sec. 54, R. C. M. 1921.

Collateral References

States \hookrightarrow 28(1).

81 C.J.S. States § 33.

43-205. (55) Time and place of meeting. The legislative assembly shall meet at the seat of government, at twelve o'clock, noon, on the first Monday of January, 1897, and each alternate year thereafter, and at other times when convened by the governor.

History: En. Sec. 160, Pol. C. 1895; re-en. Sec. 55, Rev. C. 1907; re-en. Sec. 55, R. C. M. 1921. Cal. Pol. C. Sec. 235.

Power of legislature or branch thereof as to time of assembling, and length of session. 56 ALR 721.

Collateral References

States \hookrightarrow 32.

81 C.J.S. States § 37.

43-206. (56) Certificate of election evidence of a right to seat. The certificate of election from the clerk of the proper county is prima facie evidence of the right to membership of the person certified therein to be elected, for all purposes of organization of either branch of the legislative assembly.

History: En. Sec. 1, p. 89, L. 1885; re-en. Sec. 1325, 5th Div. Comp. Stat. 1887; amd. Sec. 161, Pol. C. 1895; re-en. Sec. 56, Rev. C. 1907; re-en. Sec. 56, R. C. M. 1921. Cal. Pol. C. Sec. 236.

55 M 471, 475, 178 P 832; State ex rel. Grant v. Eaton, 114 M 199, 209, 133 P 2d 588.

Collateral References

States \hookrightarrow 30.

81 C.J.S. States § 34.

49 Am. Jur. 251, States, Territories, and Dependencies, § 34.

References

Cited or applied as section 56, Revised Codes, in State ex rel. Boulware v. Porter,

43-207. (57) Senate, organization of. At the hour of twelve o'clock, noon, on the day appointed for the meeting of any regular session of the legislative assembly, the president of the senate, or in case of his absence or inability, then the senior member present, must take the chair, call the

senators and senators-elect to order, and then call over the senatorial districts, in their order, from which members have been elected at the preceding election, and as the same are called the members-elect must present their certificates, take the constitutional oath of office, and assume their seats. The senate may thereupon, if a quorum is present, proceed to elect its officers.

History: En. H. B. No. 69, p. 103, L. 1897; re-en. Sec. 163, Pol. C. 1895; re-en. Sec. 57, Rev. C. 1907; re-en. Sec. 57, R. C. M. 1921. Cal. Pol. C. Sec. 238.

Collateral References

States \rightsquigarrow 29
81 C.J.S. States § 30.
49 Am. Jur. 248, States, Territories, and Dependencies, §§ 30, 31.

43-208. (58) House of representatives, organization of. At the time specified in section 43-207, the secretary of state, or in case of his absence or inability, then the senior member-elect present, must take the chair, call the members-elect of the house of representatives to order, and then call over the roll of counties and districts; and as the same are called the members-elect must present their certificates, take the constitutional oath of office, and assume their seats. The house of representatives may thereupon, if a quorum is present, proceed to elect its officers.

History: En. Sec. 164, Pol. C. 1895; re-en. Sec. 58, Rev. C. 1907; re-en. Sec. 58, R. C. M. 1921. Cal. Pol. C. Sec. 239.

Collateral References

States \rightsquigarrow 29.
81 C.J.S. States § 30.
49 Am. Jur. 248, States, Territories, and Dependencies, §§ 30, 31.

43-209. (59) Oath to be entered on journals. An entry of the oath taken by the members of the legislative assembly must be made on the journals of the proper houses, respectively.

History: En. Sec. 165, Pol. C. 1895; re-en. Sec. 59, Rev. C. 1907; re-en. Sec. 59, R. C. M. 1921. Cal. Pol. C. Sec. 240.

Collateral References

States \rightsquigarrow 37.
81 C.J.S. States § 41.

Cross-Reference

Oath of members, secs. 59-413, 59-414.

43-210. (60) Election of officers. In all elections of officers of either branch of the legislative assembly, a majority of all the votes given is necessary to a choice.

History: En. Sec. 8, p. 90, L. 1885; re-en. Sec. 1332, 5th Div. Comp. Stat. 1887; re-en. Sec. 166, Pol. C. 1895; re-en. Sec. 60, Rev. C. 1907; re-en. Sec. 60, R. C. M. 1921.

Collateral References

States \rightsquigarrow 29.
81 C.J.S. States § 30.

43-211. (61) Compelling attendance of members. Whenever, at the commencement of or during the regular or extraordinary sessions of the legislative assembly, upon a call of either house it is found that no quorum of members is present, or if any member or members are found to be absent upon any such call, the members present are authorized to direct the sergeant-at-arms of such house, and in his absence, then any other person, to compel the attendance of any or all the absentees. If the house refuse to excuse such absentee, he is not entitled to any per diem during such absence, and is liable for the expenses incurred in procuring his attendance.

History: En. Sec. 9, p. 90, L. 1885; re-en. Sec. 1333, 5th Div. Comp. Stat. 1887; re-en. Sec. 167, Pol. C. 1895; re-en. Sec. 61, Rev. C. 1907; re-en. Sec. 61, R. C. M. 1921.

Collateral References
States 35.
81 C.J.S. States § 39.

43-212. (62) Officers and employees of senate. The officers and employees of the senate may consist of a president, a president pro tempore, one secretary of the senate, one assistant secretary of the senate, one chaplain, one sergeant-at-arms, three assistant sergeants-at-arms, one secretary to the sergeant-at-arms, one stenographer to the secretary of the senate, one secretary to the president, one journal clerk, one assistant journal clerk, one enrolling clerk, one assistant enrolling clerk, one engrossing clerk, one assistant engrossing clerk, one bill clerk, one assistant bill clerk, one reading clerk, one chief printing clerk, one assistant printing clerk, one chief stenographer, one assistant chief stenographer, two chief proofreaders, one judiciary committee clerk, one finance and claims committee clerk, one mailing clerk, one doorkeeper, three assistant doorkeepers, one janitor, three assistant janitors, three watchmen, four pages, and such number of committee clerks, stenographers, typists, proof-readers, and such other employees and attaches as the senate may, by motion, from time to time determine, not exceeding forty in number; provided, however, that when the orderly and expeditious conduct of the business of the senate so requires, the senate may, by resolution, authorize the employment of one senate law clerk and one assistant senate law clerk, in addition to the hereinabove specifically enumerated officers and employees.

History: En. Sec. 1, p. 170, L. 1891; re-en. Sec. 180, Pol. C. 1895; re-en. Sec. 62, Rev. C. 1907; amd. Sec. 1, Ch. 1, L. 1915; re-en. Sec. 62, R. C. M. 1921; amd. Sec. 1, Ch. 50, L. 1937; amd. Sec. 1, Ch. 1, and Sec. 1, Ch. 3, L. 1943.

Collateral References
States 29, 53.
81 C.J.S. States §§ 30, 70.

43-213. (63) Officers and employees of the house. The officers and employees of the house of representatives shall consist of a speaker, a speaker pro tem, one chief clerk, one sergeant-at-arms, one chaplain, one first assistant to the sergeant-at-arms, one second assistant to the sergeant-at-arms, one assistant to the chief clerk, one clerk to the chief clerk, one bill clerk, one assistant bill clerk, one reading clerk, one clerk to the sergeant-at-arms, one journal clerk, one assistant journal clerk, one enrolling clerk, one assistant enrolling clerk, one engrossing clerk, one assistant engrossing clerk, one printing clerk, one assistant printing clerk, one secretary to speaker, one mailing and filing clerk, one secretary to the judiciary committee, one secretary to the appropriations committee, one payroll clerk, one law clerk, one assistant law clerk, one head janitor, three assistant janitors, three doorkeepers, three watchmen, five pages, two telephone operators, two elevator operators, fifty stenographers, ten typists, twenty proof-readers, ten clerks and such other and further employees as the house of representatives and the senate may, by joint resolution, from time to time determine.

History: En. Sec. 2, p. 170, L. 1891; re-en. Sec. 181, Pol. C. 1895; re-en. Sec. 63, Rev. C. 1907; amd. Sec. 2, Ch. 1, L. 1915; re-en. Sec. 63, R. C. M. 1921; amd.

Sec. 1, Ch. 44, L. 1937; amd. Sec. 1, Ch. 23, L. 1939.

Collateral References

States~~C~~29, 53.
81 C.J.S. States §§ 30, 70.

43-214. (64) How elected. All officers and employees of the legislative assembly, except the president of the senate, must be elected by the house to which such officers and employees are attached.

History: En. Sec. 3, p. 170, L. 1891;
re-en. Sec. 182, Pol. C. 1895; re-en. Sec.
64, Rev. C. 1907; re-en. Sec. 64, R. C. M.
1921. Cal. Pol. C. Sec. 247.

Collateral References

States~~C~~29, 53.
81 C.J.S. States §§ 30, 49, 70.

CHAPTER 3

THE POWERS, DUTIES AND COMPENSATION OF MEMBERS, OFFICERS AND EMPLOYEES OF THE LEGISLATIVE ASSEMBLY

- Section 43-301. Power of officers to administer oaths.
43-302. Duties of secretary and clerk.
43-303. Duties of assistant secretary and assistant clerk.
43-304. Journals, how authenticated.
43-305. Duties of sergeant-at-arms.
43-306. Duties of assistant sergeant-at-arms.
43-307. Duties of subordinate officers.
43-308. Duties of engrossing and enrolling clerks.
43-309. Duties and pay of employees and attaches at close of session and subsequent to close of session.
43-310. Per diem and mileage of members.
43-311. Per diem and mileage of president of senate and speaker of house.
43-312. Compensation of other officers and employees.
43-313. Employment of additional help.
43-314. Compensation for services after close of session.
43-315. Inventories of property of legislature.
43-316. Custodian to care for property of legislature—appraisal and sale.
43-317. Purchasing agent to assist in caring for property of legislature.
43-318. Penalty for removing or defacing property of legislature.

43-301. (65) Power of officers to administer oaths. The president and president pro tem. of the senate, and the speaker and speaker pro tem. of the house of representatives, may administer the oath of office to any senator or representative, and to the officers and employees of their respective bodies. The members of any committee may administer oaths to witnesses in any matter under examination. The officers and employees must perform such duties as are required by the rules or orders of the respective bodies which elect them.

History: En. Secs. 4 and 5, p. 170, L. 1891; re-en. Sec. 200, Pol. C. 1895; re-en. Sec. 67, Rev. C. 1907; re-en. Sec. 65, R. C. M. 1921. Cal. Pol. C. Sec. 252.

Collateral References

States~~C~~34, 73, 74.
81 C.J.S. States §§ 42, 57, 62.

Cross-Reference

Offenses relating to legislature, sec. 94-2901 et seq.

43-302. (66) Duties of secretary and clerk. The secretary of the senate and the clerk of the house of representatives must attend each day, call the roll, prepare the journal, and read the journal and bills, and superintend all copying necessary to be done for their respective houses, and keep a correct record of the proceedings.

History: En. Sec. 201, Pol. C. 1895; re-en. Sec. 68, Rev. C. 1907; re-en. Sec. 66, R. C. M. 1921. Cal. Pol. C. Sec. 253.

Operation and Effect

This section and the following section do not place the custody of bills exclusively in the hands of the assistant sec-

retary of the senate, but the custody is also in the secretary. *State v. Bloor*, 20 M 574, 584, 52 P 611.

Collateral References

States↪73.

81 C.J.S. States § 59.

43-303. (67) Duties of assistant secretary and assistant clerk. The assistant secretary of the senate and the assistant clerk of the house must take charge of all bills, petitions, and other papers presented to their respective houses, file and enter the same in the books provided for that purpose, and perform such other duties as may be directed by the secretary of the senate and clerk of the house of representatives.

History: En. Sec. 202, Pol. C. 1895; re-en. Sec. 69, Rev. C. 1907; re-en. Sec. 67, R. C. M. 1921. Cal. Pol. C. Sec. 254.

Code, in *State v. Bloor*, 20 M 574, 584, 52 P 611.

References

Cited or applied as section 202, Political

Collateral References

States↪73.

81 C.J.S. States § 59.

43-304. (68) Journals, how authenticated. The journal of the senate must be authenticated by the signature of the president, and the journal of the house of representatives by the signature of the speaker.

History: En. Sec. 203, Pol. C. 1895; re-en. Sec. 70, Rev. C. 1907; re-en. Sec. 68, R. C. M. 1921. Cal. Pol. C. Sec. 256.

of those voting upon its final passage, in which case the journals may be consulted. *State ex rel. Gregg v. Erickson*, 39 M 280, 289, 102 P 336. See also *Barth v. Pock*, 51 M 418, 427, 155 P 282.

Journal When Consulted

In determining whether an act has been passed, the enrolled bill, signed and approved by the proper officers, is conclusive upon the courts, and recourse cannot be had to any other evidence, except where the alleged infirmity of the act is based upon a failure to enter the names

Collateral References

States↪37.

81 C.J.S. States § 41.

49 Am. Jur. 255, States, Territories, and Dependencies, § 37.

43-305. (69) Duties of sergeant-at-arms. The sergeant-at-arms of the senate and the sergeant-at-arms of the house of representatives must give a general supervision, under the direction of their presiding officers, to the senate and house, with the rooms attached; attend during the sittings of their respective bodies; execute their commands and all process issued by their authority; keep an account for pay and mileage of members, and prepare checks for the same.

History: En. Sec. 204, Pol. C. 1895; re-en. Sec. 71, Rev. C. 1907; re-en. Sec. 69, R. C. M. 1921. Cal. Pol. C. Sec. 259.

Collateral References

States↪73.

81 C.J.S. States § 59.

43-306. (70) Duties of assistant sergeant-at-arms. The assistant sergeant-at-arms of each house must prohibit all persons, except members, officers, and employees, and such other persons as may have the privilege of the floor assigned them by the rules of each house, from entering within the bar of the house, unless upon invitation, and keep order in the halls and lobbies, and perform such other duties as shall be imposed by the presiding officer or the sergeant-at-arms.

History: En. Sec. 205, Pol. C. 1895; re-en. Sec. 72, Rev. C. 1907; re-en. Sec. 70, R. C. M. 1921. Cal. Pol. C. Sec. 260.

43-307. (71) Duties of subordinate officers. The committee clerks, doorkeeper, janitor, day watchman, night watchman, and pages must perform such duties as shall be assigned to them by the presiding officers of the respective houses, or by the rules and orders of the respective bodies.

History: En. Sec. 206, Pol. C. 1895; Collateral References
re-en. Sec. 73, Rev. C. 1907; re-en. Sec. States 74.
71, R. C. M. 1921. 81 C.J.S. States § 59.

43-308. (72) Duties of engrossing and enrolling clerks. The engrossing clerks and enrolling clerks must, within forty-eight hours after their reception, engross or enroll all bills delivered to them for engrossment or enrollment, unless further time be granted.

History: En. Sec. 207, Pol. C. 1895; Ch. 1, L. 1915; re-en. Sec. 72, R. C. M.
re-en. Sec. 74, Rev. C. 1907; amd. Sec. 3, 1921.

43-309. (73) Duties and pay of employees and attaches at close of session and subsequent to close of session. The secretary of the senate, the sergeant-at-arms of the senate, the clerk of the house of representatives and the sergeant-at-arms of the house of representatives, and such other and additional employees and attaches of the senate and house, respectively, as may be certified by separate resolution adopted by each body, duly authenticated by the presiding officer of each body and by the secretary or clerk, respectively, shall be paid for such period of time and at such rates of payment, and for such services as may be assigned and prescribed for such officers and personnel at the close, and subsequent to the close of each legislative session, as shall be set forth in said respective resolutions. Said payments shall be made out of any funds remaining unexpended at the close of each session for legislative expenses.

In addition to other duties prescribed by such resolutions, the secretary of the senate and the clerk of the house of representatives, at the close of each session of the legislative assembly, must mark, label, and arrange all bills and papers belonging to the archives of their respective houses, and deliver them, together with all the books of both houses, to the secretary of state, who must certify to the reception of the same.

History: En. Sec. 6, p. 171, L. 1891;
re-en. Sec. 209, Pol. C. 1895; re-en. Sec.
76, Rev. C. 1907; re-en. Sec. 73, R. C. M.
1921; amd. Sec. 1, Ch. 210, L. 1943. Cal.
Pol. C. Sec. 261.

All Bills and Papers

Just what is meant to be included in the phrase, "all bills and papers," is not

clear; but it would be extremely dangerous to impeach a duly authenticated record—an enrolled bill—by papers which are not authenticated or identified in any manner; this, however, does not apply to the journals, for they are required, by section 43-304, ante, to be authenticated. State ex rel. Gregg v. Erickson, 39 M 280, 289, 102 P 336.

43-310. (74) Per diem and mileage of members. Members of the legislative assembly hereafter elected shall receive ten dollars per day, payable weekly, during the session of the legislative assembly, and six cents per mile for each mile of travel to and from their residences and the place of holding the session, by the nearest traveled route.

History: En. Sec. 220, Pol. C. 1895;
re-en. Sec. 77, Rev. C. 1907; amd. Sec. 1,
Ch. 45, L. 1909; re-en. Sec. 74, R. C. M.
1921. Cal. Pol. C. Sec. 266.

to conform to Sec. 1, Ch. 201, Laws 1947
(Sec. 59-801).

References

Cited or applied as section 220, Political Code, before amendment, in Wade v.

NOTE.—The mileage allowance prescribed by this section has been changed

Lewis and Clark County, 24 M 335, 338,
61 P 879.

81 C.J.S. States § 36.

Per diem compensation of public officer.

1 ALR 276.

Collateral References

States 60, 62.

43-311. (75) Per diem and mileage of president of senate and speaker of house. The president of the senate, after the first Monday in January, 1913, and the speaker of the house, shall receive the sum of twelve dollars per day during the session of the legislative assembly, and the same mileage as members.

History: En. Sec. 221, Pol. C. 1895; re-en. Sec. 78, Rev. C. 1907; amd. Sec. 2, Ch. 45, L. 1909; re-en. Sec. 75, R. C. M. 1921. Cal. Pol. C. Sec. 267.

ical Code, before amendment, in *Wade v. Lewis and Clark County*, 24 M 335, 338, 61 P 879.

Collateral References

Per diem compensation of public officer.

1 ALR 276.

References

Cited or applied as section 221, Polit-

43-312. (76) Compensation of other officers and employees. The compensation designated herein shall be paid to the following officers and employees of the legislative assembly:

The secretary of the senate, the chief clerk of the house of representatives, the sergeant-at-arms of each house, the senate law clerk and the house of representatives law clerk, ten dollars (\$10.00) per day each;

The assistant secretary of the senate, the assistant chief clerk of the house of representatives, the journal clerk, the enrolling clerk, the engrossing clerk, the bill clerk, the chief stenographer, the chief printing clerk, the assistant sergeants-at-arms of the senate, the assistant sergeants-at-arms of the house of representatives, eight dollars (\$8.00) per day each;

The assistant senate law clerk and the assistant house of representatives law clerk (in case such assistants are employed), seven dollars (\$7.00) per day;

The assistant journal clerk, the assistant enrolling clerk, the assistant engrossing clerk, the assistant bill clerk, the assistant printing clerk, the reading clerk, the secretary to the sergeant-at-arms, the assistant chief stenographer, the clerk to the judiciary committee, the clerk to the finance and claims committee, two chief proofreaders, and the mailing clerk of the senate, the clerk to the chief clerk of the house of representatives, the stenographer to the secretary of the senate, the secretary to the president of the senate, the payroll clerk of the house of representatives, the secretary to the speaker of the house of representatives, the mailing and filing clerk of the house of representatives, the secretary to the house of representatives appropriations committee, six dollars (\$6.00) per day each;

The chaplain, other committee clerks, stenographers, typists, other proofreaders, doorkeepers, assistant doorkeepers, janitors, assistant janitors and watchmen of each house, the telephone operators of the house of representatives, the elevator operators of the house of representatives, five dollars (\$5.00) per day each;

Pages, four dollars (\$4.00) per day each;

And all other employees of the legislative assembly not herein specifically enumerated, five dollars (\$5.00) per day each.

Each salary herein specified shall be paid for each and every day of the entire legislative session, commencing with the date of employment of

the officer or employee, save and except that any of said officers or employees whose services are dispensed with for any portion of the session shall receive pay only for the number of days during which services are performed by such officer or employee.

History: En. Sec. 222, Pol. C. 1895; Ch. 1, and Sec. 2, Ch. 3, L. 1943. Cal. Pol. re-en. Sec. 79, Rev. C. 1907; amd. Sec. 3, C. Sec. 268.
Ch. 45, L. 1909; amd. Sec. 1, Ch. 37, L. 1913; amd. Sec. 4, Ch. 1, L. 1915; amd. Sec. 1, Ch. 115, L. 1917; re-en. Sec. 76, R. C. M. 1921; amd. Sec. 1, Ch. 6, L. 1935; amd. Sec. 2, Ch. 50, L. 1937; amd. Sec. 2,

Collateral References

States⇌60, 61.
81 C.J.S. States § 49.

43-313. (77) Employment of additional help. The senate and house of representatives may, by a joint resolution adopted and spread upon the minutes of each house, provide for the employment of additional help in cases of emergency, where extraordinary conditions render such a course necessary for the orderly and expeditious conduct of the business of the legislative assembly. The resolution shall set forth the facts and circumstances which make such action necessary, and the number of additional employees required, and the general nature of their duties.

History: En. Sec. 5, Ch. 1, L. 1915; re-en. Sec. 77, R. C. M. 1921.

Collateral References

States⇌53.
81 C.J.S. States § 49.

43-314. (78) Compensation for services after close of session. For services performed under the provisions of section 43-309, each of the officers therein named receive a compensation of fifty dollars.

History: En. Sec. 223, Pol. C. 1895; re-en. Sec. 81, Rev. C. 1907; re-en. Sec. 78, R. C. M. 1921. Cal. Pol. C. Sec. 269.

Collateral References

States⇌60.
81 C.J.S. States § 49.

NOTE.—There appears to be a conflict between this section and section 43-309 as last amended.

43-315. (78.1) Inventories of property of legislature. On the last day of each session of the Montana state legislature, it shall be the duty of the sergeant-at-arms of the senate, the sergeant-at-arms of the house to make a complete inventory of all permanent furniture and fixtures belonging to the legislative department of the state, together with all office furniture and fixtures and all other fixtures, codes and session laws, tools and office supplies of every description on hand at the close of the session belonging to the legislative department of the state, or which have been purchased and charged to the incidental expense appropriation.

Such inventory shall be made in quadruple, one copy to be filed with the purchasing agent, and one to be filed with the state treasurer, and one copy to be left on file in the sergeant-at-arms office of the state senate, and one in the office of the sergeant-at-arms of the house of representatives.

History: En. Sec. 1, Ch. 112, L. 1927.

Collateral References

States⇌73, 75.
81 C.J.S. States § 49.

43-316. (78.2) Custodian to care for property of legislature—appraisal and sale. Upon the completion of the inventory and the adjournment of the legislature, all property listed therein shall be turned over to the custodian of the state capitol of the state, and he shall receipt to the

sergeant-at-arms of the senate, and to the sergeant-at-arms of the house of representatives, in detail for the same, and it shall be his duty to carefully care for and preserve all of such property and shall deliver the same to the sergeant-at-arms of the senate, and the sergeant-at-arms of the house of representatives, at the convening of the next session of the Montana legislature; provided, however, that any of said property which might deteriorate in value by being kept shall be appraised by the said purchasing agent, and the said custodian may sell any articles so appraised for not less than such appraised value to any department of the state government, and all moneys received from articles so sold shall forthwith be paid over by said custodian to the state treasurer which shall be credited to the general fund of the state and against the expenses of the legislative department. In the event of the sales of any articles by virtue of this provision, the said custodian shall, in lieu of delivering the same to the respective sergeant-at-arms of the next session of the Montana legislature, deliver to them a list of the articles sold, together with a list of the prices received and receipts of the state treasurer therefor.

History: En. Sec. 2, Ch. 112, L. 1927.

43-317. (78.3) Purchasing agent to assist in caring for property of legislature. It shall be the duty of the purchasing agent to assist the custodian in the preservation and safe keeping of the property of the legislative department.

History: En. Sec. 3, Ch. 112, L. 1927.

Collateral References

States¹ 75.

81 C.J.S. States § 66.

43-318. (78.4) Penalty for removing or defacing property of legislature. Any person, or persons, who wilfully takes, carries away from the legislative halls, defaces or attempts to take, carry away or deface any of the property listed in the inventory as herein provided or belonging to the legislative department shall be guilty of a misdemeanor and upon conviction thereof shall be fined in a sum of not less than fifty dollars (\$50.00), nor more than two hundred dollars (\$200.00).

History: En. Sec. 4, Ch. 112, L. 1927.

52 C.J.S. Larceny § 4; 54 C.J.S. Malicious Mischief § 4.

Collateral References

Larceny¹; Malicious Mischief¹.

CHAPTER 4

WITNESSES BEFORE THE LEGISLATIVE ASSEMBLY

Section 43-401. Subpoenas.

43-402. Service of subpoenas.

43-403. Contempt.

43-404. Compelling attendance.

43-405. Witness will not be held to answer criminally—refusal to testify.

43-401. (79) Subpoenas. A subpoena requiring the attendance of any witness before either house of the legislative assembly, or a committee thereof, may be issued by the president of the senate, speaker of the house, or the chairman of any committee before whom the attendance of the witness is desired; and it is sufficient if:

1. It states whether the proceeding is before the house of representatives, or the senate, or a committee.

2. It is addressed to the witness.

3. It requires the attendance of such witness at a time and place certain.

4. It is signed by the president of the senate, speaker of the house, or chairman of a committee.

History: En. Sec. 260, Pol. C. 1895;
re-en. Sec. 95, Rev. C. 1907; re-en. Sec.
79, R. C. M. 1921, Cal. Pol. C. Sec. 300.

81 C.J.S. States § 45.

Power of legislative body or committee
to compel attendance of nonmember as
witness. 50 ALR 21.

Collateral References

States 34, 39½.

43-402. (80) Service of subpoenas. The subpoena may be served by any elector of the state, and his affidavit that he delivered a copy to the witness is evidence of service.

History: En. Sec. 261, Pol. C. 1895;
re-en. Sec. 96, Rev. C. 1907; re-en. Sec.
80, R. C. M. 1921, Cal. Pol. C. Sec. 301.

43-403. (81) Contempt. If any witness neglects or refuses to obey such subpoena, or appearing, neglects or refuses to testify, the senate or house may, by resolution entered on the journal, commit him for contempt.

History: En. Sec. 262, Pol. C. 1895;
re-en. Sec. 97, Rev. C. 1907; re-en. Sec.
81, R. C. M. 1921, Cal. Pol. C. Sec. 302.

References

State v. District Court, 61 M 558, 567,
202 P 756; referred to as Sec. 97, R. C.
M. 1907.

Cross-Reference

Penalty for refusing to attend or testi-
fy, sec. 94-2912.

Collateral References

State 40.
81 C.J.S. States § 48.

43-404. (82) Compelling attendance. Any witness neglecting or refusing to attend in obedience to subpoena may be arrested by the sergeant-at-arms and brought before the senate or house. The only warrant of authority necessary to authorize such arrest is a copy of a resolution of the senate or house, signed by the president or speaker of the house of representatives, and countersigned by the secretary or clerk.

History: En. Sec. 263, Pol. C. 1895;
re-en. Sec. 98, Rev. C. 1907; re-en. Sec.
82, R. C. M. 1921, Cal. Pol. C. Sec. 303.

Collateral References

States 39½.
81 C.J.S. States § 47.

43-405. (83) Witness will not be held to answer criminally—refusal to testify. No person sworn and examined before either house of the legislative assembly, or any committee thereof, can be held to answer criminally, or be subject to any penalty or forfeiture, for any fact or act touching which he is required to testify; nor is any statement made or paper produced by any such witness competent evidence in any criminal proceeding against such witness; nor can such witness refuse to testify to any fact or to produce any paper touching which he is examined, for the reason that his testimony, or the production of such paper, tends to disgrace him or render him infamous. Nothing in this section exempts any witness from prosecution and punishment for perjury committed by him on such examination.

History: En. Sec. 264, Pol. C. 1895; re-en. Sec. 99, Rev. C. 1907; re-en. Sec. 83, R. C. M. 1921. Cal. Pol. C. Sec. 304.

Collateral References

States↔34, 39½; Witnesses↔293½.
81 C.J.S. States § 45; 70 C.J. Witnesses § 874.

Power of legislature to grant or authorize committee to grant immunity from criminal prosecution to witnesses summoned before legislative committee. 87 ALR 435.

CHAPTER 5

STATUTES—THEIR ENACTMENT AND OPERATION—GOVERNOR'S APPROVAL OR VETO

- Section 43-501. Bills received by the governor, how indorsed.
43-502. Approval of bills.
43-503. Bills returned without approval.
43-504. Return, when house not in session.
43-505. Bills remaining with the governor more than five days.
43-506. Effect of final adjournment on bills.
43-507. Statutes, when effective.
43-508. "Final passage," meaning of.
43-509. When joint resolutions take effect.
43-510. Effect of amendment.
43-511. Construction of statutes.
43-512. Repeal of statutes.
43-513. Act repealed not revived by repeal of repealing act.
43-514. Repeal of laws creating criminal offenses, when bar to prosecution.
43-515. Amendatory act, when void.

43-501. (84) Bills received by the governor, how indorsed. Every bill must, as soon as delivered to the governor, be indorsed as follows: "This bill was received by the governor this day of, 19....." The indorsement must be signed by the private secretary of the governor, or by the governor himself.

History: En. Sec. 270, Pol. C. 1895; re-en. Sec. 100, Rev. C. 1907; re-en. Sec. 84, R. C. M. 1921. Cal. Pol. C. Sec. 309.

Penalty for altering bills or resolution, secs. 94-2903, 94-2904.

Publication of session laws, sec. 82-2210.

Cross-References

Distribution of session laws, sec. 82-2203.

Law librarian to index session laws, sec. 44-411.

Collateral References

Statutes↔27.

82 C.J.S. Statutes § 48.

43-502. (85) Approval of bills. When the governor approves a bill he must set his name thereto, with the date of his approval, and deposit the same in the office of the secretary of state. If any bill presented to the governor contains several distinct items of appropriation of money, he may disapprove one or more items, while approving other portions of the bill. In such case he shall append to the bill, at the time of signing it, a statement of the items to which he objects, and his objections thereto. If the legislative assembly be in session, the governor must transmit to the house in which the bill originated a copy of such statement, and the items so objected to must be separately reconsidered in the same manner as bills which have been disapproved by the governor.

History: En. Sec. 271, Pol. C. 1895; re-en. Sec. 101, Rev. C. 1907; re-en. Sec. 85, R. C. M. 1921. Cal. Pol. C. Sec. 310.

Collateral References

Statutes↔31, 33.

82 C.J.S. Statutes §§ 51, 54.

43-503. (86) Bills returned without approval. When a bill has passed both houses of the legislative assembly, and is returned by the governor without his signature, and with objections thereto, or if it be a bill containing several items of appropriation of money, with objections to one or more items, and upon reconsideration, such bill, or item, or items, pass both houses by the constitutional majority, the bill, or item, or items, must be authenticated as having become a law by a certificate indorsed on or attached to the bill, or indorsed or attached to the copy of the statement of objections, in the following form: "This bill having been returned by the governor with his objections thereto, and, after reconsideration, having passed both houses by the constitutional majority, has become a law this day of, A. D."; or, "The following items in the within statement (naming them) having, after reconsideration, passed both houses by the constitutional majority, have become a law this day of, A. D.," which indorsement, signed by the president of the senate and the speaker of the house of representatives, is a sufficient authentication thereof. Such bill or statement must then be delivered to the governor, and by him must be deposited with the laws in the office of the secretary of state.

History: En. Sec. 272, Pol. C. 1895;
re-en. Sec. 102, Rev. C. 1907; re-en. Sec.
86, R. C. M. 1921. Cal. Pol. C. Sec. 311.

Collateral References
Statutes 32, 35.
82 C.J.S. Statutes §§ 55, 58.

43-504. (87) Return, when house not in session. If, on the day the governor desires to return a bill without his approval, and with his objections thereto, to the house in which it originated, that house has adjourned for the day (but not for the session), he may deliver the bill with his message to the presiding officer, secretary, clerk, or any member of such house, and such delivery is as effectual as though returned in open session, if the governor, on the first day the house is again in session, by message, notifies it of such delivery, and of the time when and the person to whom such delivery was made.

History: En. Sec. 273, Pol. C. 1895;
re-en. Sec. 103, Rev. C. 1907; re-en. Sec.
87, R. C. M. 1921. Cal. Pol. C. Sec. 312.

Power of executive to sign bill after adjournment, or during recess of legislature. 64 ALR 1468.

Collateral References

Statutes 32.
82 C.J.S. Statutes § 53.

43-505. (88) Bills remaining with the governor more than five days. Every bill which has passed both houses of the legislative assembly, and has not been returned by the governor within five days, thereby becoming a law, is authenticated by the governor causing the fact to be certified thereon by the secretary of state, in the following form: "This bill having remained with the governor five days (Sundays excepted), and the legislative assembly being in session, it has become a law this day of, A. D.," which certificate must be signed by the secretary of state and deposited with the laws in his office.

History: En. Sec. 274, Pol. C. 1895;
re-en. Sec. 104, Rev. C. 1907; re-en. Sec.
88, R. C. M. 1921. Cal. Pol. C. Sec. 313.

Collateral References
Statutes 34.
82 C.J.S. Statutes § 57.

Computation of time allowed for approval or disapproval by governor. 54 ALR 339.

Inclusion of Sunday in computation of period within which bill must be presented to governor. 71 ALR 1363.

43-506. (89) Effect of final adjournment on bills. No bill shall become a law after the final adjournment of the legislative assembly, unless approved by the governor within fifteen days after such adjournment. In case the governor fails to approve of any bill after the final adjournment of the legislative assembly, it must be filed, with his objections, in the office of the secretary of state.

History: En. Sec. 275, Pol. C. 1895; re-en. Sec. 105, Rev. C. 1907; re-en. Sec. 89, R. C. M. 1921.

Collateral References
Statutes 30.

82 C.J.S. Statutes § 50.

Power of executive to sign bill after adjournment, or during recess of legislature. 64 ALR 1468.

43-507. (90) Statutes, when effective. Every statute, unless a different time is prescribed therein, takes effect on the first day of July of the year of its passage and approval.

History: En. Sec. 3466, C. Civ. Proc. 1895; re-en. Sec. 8074, Rev. C. 1907; amd. Sec. 1, Ch. 92, L. 1921; re-en. Sec. 90, R. C. M. 1921. Cal. Pol. C. Sec. 323.

Statutes Take Effect, When, and Remain in Effect Until When

Under this section, every statute unless a definite time is prescribed therein, takes effect on the first day of July of the year of passage and approval, and remains in full force and effect during the interim in which the referendum clause of the constitution may be resorted to, under Art. V, Sec. 1, Const. by the people, and the date of the subsequent election, unless it shall become "inoperative" by reason of the signing of a petition for referendum by

15% of the legal voters of a majority of the whole number of counties of the state, under such constitutional provision. Lodge v. Ayers, 108 M 527, 534, 91 P 2d 691.

References

Gustafson v. Hammond Irr. Dist., 87 M 217, 219, 287 P 640; National Supply Co. Midwest v. Abell, 87 M 555, 557, 289 P 577; Glacier County v. Schlinski et al., 90 M 136, 145, 300 P 270; Benema v. Union Cent. Life Ins. Co., 94 M 138, 143, 21 P 2d 69; Continental Supply Co. v. Abell et al., 95 M 148, 163, 24 P 2d 133.

Collateral References

Statutes 250.
82 C.J.S. Statutes § 400.

43-508. (91) "Final passage," meaning of. The words "final passage," as used in the preceding section, shall be held to mean the enactment into law of a bill which has passed the legislative assembly, either with or without the approval of the governor, as provided in section 12 of article VII of the constitution.

History: En. Sec. 3467, C. Civ. Proc. 1895; re-en. Sec. 8075, Rev. C. 1907; re-en. Sec. 91, R. C. M. 1921.

Collateral References
Statutes 250.

82 C.J.S. Statutes § 400.

At what state does a statute pass beyond the power of legislative bodies to reconsider or recall. 96 ALR 1309.

43-509. (92) When joint resolutions take effect. Every joint resolution, unless a different time is prescribed therein, takes effect from its passage.

History: En. Sec. 291, Pol. C. 1895; re-en. Sec. 118, Rev. C. 1907; re-en. Sec. 92, R. C. M. 1921. Cal. Pol. C. Sec. 324.

Collateral References

Statutes 11, 255.
82 C.J.S. Statutes §§ 20, 405.

43-510. (93) Effect of amendment. Where a section or a part of a statute is amended, it is not to be considered as having been repealed and

re-enacted in the amended form, but the portions which are not altered are to be considered as having been the law from the time when they were enacted, and the new provisions are to be considered as having been enacted at the time of the amendment.

History: En. Sec. 292, Pol. C. 1895; re-en. Sec. 119, Rev. C. 1907; re-en. Sec. 93, R. C. M. 1921. Cal. Pol. C. Sec. 325.

Operation and Effect

This section merely states a general rule as it was recognized by the authorities at the time of the adoption of the codes. State ex rel. Jacobson v. Board of Commrs., 47 M 531, 539, 134 P 291.

Where the legislature declares that an existing statute is amended "to read as follows," the new act takes the place of the old one exclusively, and so much only of the original act as is repeated in the new statute is continued in force. State ex rel. Paige v. District Court, 54 M 332, 334, 169 P 1180.

Of two constructions either of which is warranted by the words of the amendment of a statute, that is to be preferred which best harmonizes the amendment with the general tenor and spirit of the act amended. In re Klune, 74 M 332, 336, 240 P 286.

The true rule, in this state, is that where a section or a part of a statute is amended it is not to be considered as repealed and enacted in its new form. The portions which are not amended are considered to have been in force from the time of the first enactment. Snidow v. Montana Home for the Aged, 88 M 337, 344, 292 P 723. See also State v. Yale Oil Corp. of South Dakota, 88 M 506, 513, 295 P 255.

Held, further, that in view of this section, relating to effect of amendment of statutes, and section 15-1202, providing that amendment or repeal of a code section relating to corporations shall not impair or take away a remedy given against a corporation or its officers for a liability previously incurred, prior decisions holding that amendment of section 15-811 "to read as follows" and repealing "all acts and parts of acts in conflict herewith" worked the extinction of the amended section "as though it had never existed" in the absence of a saving clause, were erroneous and are overruled. Continental Supply Co. v. Abell et al., 95 M 148, 164 et seq., 24 P 2d 133.

Where the substance of section 16-1015, was never changed, although other subdivisions of the statute as originally enacted had been subsequently amended, under this section (43-510) the unchanged

portion must be given the same meaning as it originally had. Northern Pacific Railway Co. v. Dunham, 108 M 333, 345, 90 P 2d 506.

Under this section, where a section or a part of a statute is amended, the portions thereof which are not altered are to be considered as having been the law from the time when they were enacted, and the new provisions are to be considered as having been enacted at the time of the amendment. Blackford v. Judith Basin County, 109 M 578, 587, 98 P 2d 872.

Where statute as originally enacted was clear as to meaning of word "return," language added by subsequent amendment will not be held to have changed the original meaning since the main clause first enacted will not be regarded as a complete new enactment to be explained or modified by the new matter added. State ex rel. Montgomery Ward & Co., Inc. v. District Court et al., 115 M 521, 526, 146 P 2d 1012.

Portion Carried Forward, Law Since the Beginning

Where a statute or section of the codes is amended merely by adding to or taking therefrom, the portion carried forward in the new law is not a new act, but has been the law since the beginning. State ex rel. State Board of Equalization v. Jacobson, 107 M 461, 464, 86 P 2d 9.

References

Cited or applied as section 292, Political Code, in Dowty v. Pittwood, 23 M 113, 116, 57 P 727; as section 119, Revised Codes, in State ex rel. Hay v. Hindson, 40 M 353, 356, 106 P 362; Edwards v. County of Lewis and Clark, 53 M 359, 367, 165 P 297; State ex rel. Esgar v. District Court, 56 M 464, 469, 185 P 157; Standard Oil Co. v. Idaho Community Oil Co., 95 M 412, 417 et seq., 27 P 2d 173; State ex rel. Lewis and Clark County v. State Board of Public Welfare, 112 M 380, 385, 117 P 2d 259; State ex rel. State Aeronautics Comm. v. Board of Examiners, 121 M 402, 194 P 2d 633, 641.

Collateral References

Statutes 230.
82 C.J.S. Statutes § 384.

43-511. (94) Construction of statutes. The general rules for the construction of statutes are contained in the provisions of these codes.

History: En. Sec. 293, Pol. C. 1895; re-en. Sec. 120, Rev. C. 1907; re-en. Sec. 94, R. C. M. 1921. Cal. Pol. C. Sec. 326.

Collateral References
Statutes \Rightarrow 178.
82 C.J.S. Statutes § 314.

43-512. (95) Repeal of statutes. Any statute may be repealed at any time, except when it is otherwise provided therein. Persons acting under any statute are deemed to have acted in contemplation of this power of repeal.

History: En. Sec. 294, Pol. C. 1895; re-en. Sec. 121, Rev. C. 1907; re-en. Sec. 95, R. C. M. 1921. Cal. Pol. C. Sec. 326.

Operation and Effect

It is the general rule that the repeal of a statute without any reservation takes away all the remedies existing under the repealed act and defeats all actions pending under it at the time of its repeal. The rule is peculiarly applicable to the repeal of a statute which creates a cause of action providing a remedy not known to the common law.

This principal is in harmony with the above section. *Continental Oil Co. v. Montana C. Co.*, 63 M 223, 230, 207 P 116.

Notwithstanding this section, an appellate court on appeal from an order of the livestock commission must apply the law in effect when the commission made its order. *Peterson v. Livestock Comm.*, 120 M 140, 181 P 2d 152, 157.

Collateral References
Statutes \Rightarrow 149.
82 C.J.S. Statutes § 279.

43-513. (96) Act repealed not revived by repeal of repealing act. No act or part of an act, repealed by another act of the legislative assembly, is revived by the repeal of the repealing act without express words reviving such repealed act or part of an act.

History: Ap. p. Sec. 2, p. 390, Cod. Stat. 1871; re-en. Sec. 146, 5th Div. Rev. Stat. 1879; re-en. Sec. 203, 5th Div. Comp. Stat. 1887; amd. Sec. 295, Pol. C. 1895; re-en. Sec. 122, Rev. C. 1907; re-en. Sec. 96, R. C. M. 1921. Cal. Pol. C. Sec. 328.

Codes, in State ex rel. *Esgar v. District Court*, 56 M 464, 469, 185 P 157.

Collateral References
Statutes \Rightarrow 169.
82 C.J.S. Statutes § 307.

References

Cited or applied as section 122, Revised

43-514. (97) Repeal of laws creating criminal offenses, when bar to prosecution. The repeal of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indictment or information and punishment is expressly declared in the repealing act.

History: Ap. p. Sec. 8, p. 390, Cod. Stat. 1871; re-en. Sec. 152, 5th Div. Rev. Stat. 1879; re-en. Sec. 209, 5th Div. Comp. Stat. 1887; amd. Sec. 296, Pol. C. 1895; re-en. Sec. 123, Rev. C. 1907; re-en. Sec. 97, R. C. M. 1921. Cal. Pol. C. Sec. 329.

22 C.J.S. Criminal Law § 27.

Withdrawal by constitutional amendment or legislative act or power under which political body acted in punishing act as crime, as affecting prior offenses. 89 ALR 1514.

Collateral References

Criminal Law \Rightarrow 15.

43-515. (98) Amendatory act, when void. An act amending a section of an act repealed is void.

History: En. Sec. 297, Pol. C. 1895; re-en. Sec. 124, Rev. C. 1907; re-en. Sec. 98, R. C. M. 1921. Cal. Pol. C. Sec. 330.

Repeal by Implication

This section applies where the act is repealed by implication. *State v. Holt*, 121 M 459, 194 P 2d 651, 657.

References

In re Naegle, 70 M 129, 136, 224 P
269; State v. Silver Bow Refining Co.,
78 M 1, 13, 252 P 301; State v. Brennan,
89 M 479, 486, 300 P 273.

Collateral References

Statutes 135.
82 C.J.S. Statutes § 245.

CHAPTER 6

PRESS ROOM

Section 43-601. Permanent press room to be provided.

43-601. Permanent press room to be provided. That the state furnishing board be, and the same hereby is required to provide for the use of representatives of the press, a room on the third floor of the capitol building, adjacent to the assembly hall of the senate, to be used as a permanent press room.

History: En. Sec. 1, Ch. 138, L. 1945.

CHAPTER 7

LEGISLATIVE COUNCIL

(Unconstitutional—State ex rel. Mitchell v. Holmes, 11 St. Rep. 31)

43-701 to 43-708. Unconstitutional.**Unconstitutional**

These sections (Laws 1953, Ch. 143)
providing for a legislative council were

declared unconstitutional in State ex rel.
Mitchell v. Holmes, 11 St. Rep. 31, —
P 2d —.

TITLE 44

LIBRARIES

- Chapter 1. The state library of Montana (44-101 to 44-125 Repealed), 44-126 to 44-130.
2. County and regional free libraries, 44-201 to 44-217.
 3. City free public libraries, 44-301 to 44-303.
 4. State law library, 44-401 to 44-412.
 5. Historical society—library and museum, 44-501 to 44-515.

CHAPTER 1

THE STATE LIBRARY OF MONTANA

Section 44-101 to 44-125. Repealed.

- 44-126. Employment and salary of assistant law librarian.
- 44-127. State library extension commission created.
- 44-128. Employment of secretary and assistants.
- 44-129. Powers and duties of the commission.
- 44-130. Authorization of commission to accept and administer funds or property from federal government and other agencies.

44-101 to 44-125. (1547 to 1568) Repealed—Chapters 134 and 153, Laws of 1949.

Repeal

These sections relating to the state library were repealed as Secs. 1547 to 1568, Revised Codes 1935, by Sec. 16, Ch. 134, Laws 1949, and Sec. 13, Ch. 153, Laws 1949.

Chapter 153, Laws 1949 provided for the separation of the law library of the state

library from the state library and created it as a separate state law library, see secs. 44-401 to 44-412 herein.

Chapter 134, Laws 1949 provided that the historical and miscellaneous library should be established as an independent and autonomous library in the historical society, see secs. 44-501 to 44-515 herein.

44-126. (1569) Employment and salary of assistant law librarian. To carry out the provisions of this act, the librarian of the law department of the state library is hereby authorized and empowered to employ an assistant who shall, in addition to the duties imposed by the provisions of this chapter, act as a law clerk for the justices of the supreme court and shall perform any and other duties prescribed by the supreme court. The salary of the librarian and assistant librarian shall be fixed at that figure the board of trustees of the state library shall deem reasonable; provided, however, that the salary of the librarian shall not exceed thirty-six hundred dollars (\$3,600.00) per annum, and the salary of the assistant librarian shall not exceed three thousand dollars (\$3,000.00) per annum.

History: En. Sec. 2, Ch. 77, L. 1921; re-en. Sec. 1569, R. C. M. 1921; amd. Sec. 1, Ch. 50, L. 1929; amd. Sec. 5, Ch. 38, L. 1939; amd. Sec. 3, Ch. 128, L. 1949.

Compiler's Notes

This section was both repealed and amended in 1949. The amending law was approved March 1, 1949, while the repealing laws (Sec. 16, Ch. 134, Laws 1949 and

Sec. 13, Ch. 153, Laws 1949) were approved March 1 and March 2, 1949, respectively. The repealing law (Ch. 153, Laws 1949) contains provisions almost identical with this section as amended (see secs. 44-408, 44-409, herein) and would therefore seem to supersede this section, insofar as it relates to the state law library, regardless of the validity of the repeal.

Sections 2 and 4 of Ch. 128, Laws 1949 are compiled as sections 82-508 and 82-509.

Collateral References

States↪53, 82.
81 C.J.S. States §§ 70, 102.

44-127. (1575.1) State library extension commission created. A commission is hereby created to be known as the state library extension commission. This commission shall consist of the librarian of the state university as chairman, the state superintendent of public instruction, ex-officio member, and three members to be appointed by the governor, who shall serve one, two and three years respectively. As these terms expire, annually thereafter one person shall be appointed, for a term of three years. The members of said commission shall receive no compensation for their services except their actual and necessary traveling expenses.

History: En. Sec. 1, Ch. 184, L. 1929;
amd. Sec. 1, Ch. 91, L. 1945.

44-128. (1575.2) Employment of secretary and assistants. The commission shall employ a secretary who shall be a trained and experienced librarian, not a member of the commission, for such compensation as the commission may deem adequate, and who shall perform the usual duties of a secretary and such other duties as may be assigned by the commission, to serve at the will of the commission. The commission may also employ such other assistants as shall be required for the performance of the commission's work. In addition to their salaries, the secretary and assistants shall be allowed their actual expenses while absent from the commission office in the service of the commission.

History: En. Sec. 2, Ch. 184, L. 1929;
amd. Sec. 2, Ch. 91, L. 1945.

Collateral References

States↪53.
81 C.J.S. States §§ 70, 77.

44-129. (1575.3) Powers and duties of the commission. The work of the commission shall be to give assistance and advice to all libraries in the state and to all communities in the state which may propose to establish libraries, as to the best means of establishing and administering such libraries, or improving established libraries, and aiding in the establishment of traveling libraries; the commission shall act as a state board of vocational standards and library examiners and perform all the duties of said board as provided in section 44-203; obtain, each year, from all libraries in the state, reports showing the condition, growth, and development and such other facts and statistics as may be deemed of public interest by the commission; the commission shall make a biennial report to the governor of the state on or before the first day of January covering the work of the commission, and incorporating reports of libraries in the state.

History: En. Sec. 3, Ch. 91, L. 1945.

44-130. (1575.4) Authorization of commission to accept and administer funds or property from federal government and other agencies. The commission is hereby designated a state library administrative agency and is empowered to accept and administer any moneys or property appropriated for or granted to it by any agency, public or private, for library service in the state, including the federal government, provided that the accept-

ance of such funds or property from the federal government does not entail any degree of federal control.

History: En. Sec. 4, Ch. 91, L. 1945.

CHAPTER 2

COUNTY AND REGIONAL FREE LIBRARIES

- Section 44-201. Proceedings to establish county library.
 44-202. Withdrawal of incorporated city or town.
 44-203. County librarian—appointment and removal—qualifications.
 44-204. Supervision of county commissioners over libraries—branches and stations—employees and apprentices.
 44-205. Duties and compensation of librarian.
 44-206. Library tax—bonds for building—gifts and bequests—funds and claims.
 44-207. Acceptance of property of school libraries.
 44-208. School libraries as branches of county library.
 44-209. Funds of district library turned over to county library.
 44-210. Disestablishment of library.
 44-211. How libraries of city or town may assume functions of county library.
 44-212. Joint county or regional libraries—establishment.
 44-213. Participation of other governmental units.
 44-214. Board of trustees—appointment and term.
 44-215. Appropriations for support of joint libraries.
 44-216. Tax levy.
 44-217. Qualifications of librarian.

44-201. (4563) Proceedings to establish county library. By petitions signed by not less than ten per centum (10%) of the resident taxpayers whose names appear upon the last completed assessment roll of the county, at least half of whom shall reside outside of the county seat, being filed with the board of county commissioners, requesting the establishment of a county free library, the county commissioners of such county shall appoint a meeting for a public hearing, and may in their discretion, by resolution, establish at the county seat a county free library, as provided in this act. For four successive weeks prior to taking such action, the board of county commissioners shall publish, in each issue of a newspaper of general circulation in such county, notice of such contemplated action, giving therein the date and place of the meeting for a public hearing at which such action is proposed to be taken.

History: En. Sec. 1, Ch. 45, L. 1915; amd. Sec. 1, Ch. 137, L. 1917; re-en. Sec. 4563, R. C. M. 1921; amd. Sec. 1, Ch. 202, L. 1943.

Libraries tax exempt, sec. 84-202.

Collateral References

Counties \Rightarrow 107.
 20 C.J.S. Counties § 169.

Cross-References

Injury to books, penalty, sec. 94-3325.

44-202. (4564) Withdrawal of incorporated city or town. After the establishment of a county free library as provided in this act, the board of trustees, common council, or other legislative body of any incorporated city or town in the county, may withdraw such incorporated city or town from the operation of this act, by notifying the board of county commissioners that such city or town no longer desires to be a part of the county free library system, and thereafter the residents of such city or town shall

cease to participate in the benefits of such county free library, and the property situated in such city or town shall not be liable to taxes for county free library purposes; provided, that public notice of such contemplated action by the board of trustees, common council, or other legislative body of any incorporated city or town desiring to withdraw such incorporated city or town from the operation of this act, shall be given by publication in some newspaper of general circulation in such city or town, for at least once a week for four successive weeks prior to taking such action, giving therein the date and place of the meeting at which such contemplated action is proposed to be taken.

History: En. Sec. 2, Ch. 45, L. 1915;
re-en. Sec. 4564, R. C. M. 1921.

44-203. (4565) County librarian—appointment and removal—qualifications. Upon the establishment of a county free library, the board of county commissioners may appoint a county librarian, who may be removed for cause after a hearing by said board. In counties of the first, second, third, fourth, and fifth classes, no person shall be eligible to the office of county librarian except a person who is graduate of a library school, or has had two years practical experience in a library of not less than three thousand volumes, provided that after the creation and organization of a state board of library examiners no person shall be eligible to the office of county librarian in counties of such class, unless, prior to his appointment, he has received from said board of library examiners a certificate of qualification for the office. Upon the establishment of a county free library in any county of the sixth or seventh class, if no experienced librarian is available, the county superintendent of such county may be the librarian, and may, with the permission of the county commissioners, appoint an assistant or assistants at a salary or salaries to be fixed by the board of county commissioners.

History: En. Sec. 3, Ch. 45, L. 1915;
amd. Sec. 2, Ch. 137, L. 1917; re-en. Sec.
4565, R. C. M. 1921; amd. Sec. 1, Ch. 56,
L. 1923; amd. Sec. 2, Ch. 202, L. 1943.

Collateral References

Counties—63, 64, 74(1).
20 C.J.S. Counties §§ 101, 102, 120.

44-204. (4566) Supervision of county commissioners over libraries—branches and stations—employees and apprentices. The county free library shall be under the general supervision of the board of county commissioners, who shall have the power to make general rules and regulations regarding the policy of the county free library. The county librarian shall have power to establish branches throughout the county, and may locate said branches and stations wherever deemed advisable; to determine the number and kind of employees of such library, and to employ and dismiss such employees. All employees of the county free library whose duties require special training in library work shall be graded in grades to be established by the county librarian, according to the duties required of them. Before appointment to a position in the graded service, the candidate must pass an examination appropriate to the position sought, satisfactory to the county librarian, and show a satisfactory experience in library work; provided, that the county librarian may also accept as apprentices, and who shall receive no compensation, candidates possessing personal qualifi-

cations satisfactory to the librarian, and the librarian may dismiss such apprentices at any time if in her judgment the work is not satisfactory.

History: En. Sec. 4, Ch. 45, L. 1915;
amd. Sec. 3, Ch. 137, L. 1917; re-en. Sec.
4566, R. C. M. 1921.

44-205. (4567) Duties and compensation of librarian. The county librarian shall, subject to the general rules adopted by the board of county commissioners, build up and manage, according to the accepted principles of library management, a library for the use of the people of the county, shall establish branches and stations throughout the county, shall determine what books, periodicals and other publications and equipment shall be purchased. The library building shall be under the general supervision and care of the county librarian. The county librarian shall be allowed actual and necessary traveling expenses incurred in the business of the office, the maximum amount which may be expended for such purposes in any year to be fixed by the board of county commissioners. In counties of the first, second, third, fourth, and fifth classes the compensation of the county librarian shall be fixed by the board of county commissioners.

History: En. Sec. 5, Ch. 45, L. 1915;
amd. Sec. 4, Ch. 137, L. 1917; re-en. Sec.
4567, R. C. M. 1921; amd. Sec. 3, Ch. 202,
L. 1943.

Collateral References

Counties—73, 74(1), 107.
20 C.J.S. Counties §§ 120, 129, 169.

44-206. (4568) Library tax—bonds for building—gifts and bequests—funds and claims. The board of county commissioners, after a county free library has been established, may annually levy, in the same manner and at the same time as other county taxes are levied, a special tax not to exceed two mills on the dollar upon all property in such county, for the purpose of maintaining the county free library. County bonds may be issued in the manner prescribed in sections 4614 to 4616 of these codes, for the erection and equipment of county free library buildings, and the purchase of land therefor. The board of county commissioners is authorized to receive, on behalf of the county, any gift, bequest, or devise for the county free library, or for any branch or subdivision thereof. The title to all property belonging to the county free library shall be vested in the county. All laws applicable to the collection of county taxes shall apply to the collection of the tax herein provided. All funds of the county free library, whether derived from taxation or otherwise, shall be in the custody of the county treasurer. They shall constitute a separate fund, called the county free library fund, and shall not be used for any purposes except those of the county free library. Each claim against the county free library fund shall be authorized and approved by the county librarian, or in his absence from the county, by his assistant. It shall then be acted upon in the same manner as are all other claims against the county.

History: En. Sec. 6, Ch. 45, L. 1915;
re-en. Sec. 4568, R. C. M. 1921; amd. Sec.
1, Ch. 14, L. 1949.

2008 to 16-2047 for county bonding provisions.

Collateral References

Counties—161, 174, 192.
20 C.J.S. Counties §§ 231, 261, 281.

NOTE.—Sections 4614 to 4616, referred to above, have been repealed. See secs. 16-

44-207. (4569) Acceptance of property of school libraries. The board of county commissioners shall have power to accept, on behalf of the county

free library, all books and other property of school libraries as provided by sections 75-3201 to 75-3203, and to manage and maintain the same as a part of the county free library.

History: En. Sec. 7, Ch. 45, L. 1915;
re-en. Sec. 4569, R. C. M. 1921.

44-208. (4570) School libraries as branches of county library. Whenever the county in which a school district library is situated shall maintain a county free library, the board of school trustees or city board of education may agree with the proper authorities of such county to make the school district library a branch of such county library. In this event this board of school trustees or city board of education shall turn over the books to the county free library, and shall annually transfer to such county free library its library fund, as soon as it is available, to be kept and expended as other funds of such county library. The said county free library shall thereupon have such district library managed and maintained according to the rules and regulations established by the authorities of the county free library.

History: En. Sec. 8, Ch. 45, L. 1915; 78 C.J.S. Schools and School Districts
re-en. Sec. 4570, R. C. M. 1921. § 269.

Collateral References

Schools and School Districts 76.

44-209. (4571) Funds of district library turned over to county library. Whenever a school district library shall have become a branch library, as provided in the preceding section, the county or city superintendent of schools may draw a warrant for the whole amount of the district library fund, payable to the proper authorities of the county free library, upon the filing with him of a copy of the resolution of the board of trustees of the district or the city board of education, embodying the agreement made with such county free library, which copy shall be duly certified as correct by the clerk and recorder of the county, or other proper officer.

History: En. Sec. 9, Ch. 45, L. 1915; 79 C.J.S. Schools and School Districts
re-en. Sec. 4571, R. C. M. 1921. § 331.

Collateral References

Schools and School Districts 92(1).

44-210. (4572) Disestablishment of library. After a county free library has been established, it may, upon petition signed by not less than ten per cent. of the qualified voters of a county requesting its disestablishment being filed with the board of county commissioners, be disestablished in the same manner as it was established. At least once a week for four successive weeks prior to taking such action, the board of county commissioners shall publish, in a newspaper designated by them and published in the county, notice of such contemplated action, giving therein the date and place of meeting for a public hearing at which contemplated action is proposed to be taken; provided, that an interval of three months shall elapse between such action and the disestablishment.

History: En. Sec. 10, Ch. 45, L. 1915;
re-en. Sec. 4572, R. C. M. 1921.

44-211. (4573) How libraries of city or town may assume functions of county library. Instead of establishing a separate county free library, the

board of county commissioners may enter into a contract with the board of library trustees, or other authority in charge of the free public library of any incorporated city or town, and the board of library trustees, or other authority in charge of such free public library, is hereby authorized to make such a contract. Such contract may provide that the free public library of such incorporated city or town shall assume the functions of a county free library within the county with which such contract is made, and the board of county commissioners may agree to pay out of the county free library fund into the library fund of such incorporated city or town such sum as may be agreed upon. Either party to such contract may terminate the same by giving six months' notice of intention to do so.

History: En. Sec. 11, Ch. 45, L. 1915;
re-en. Sec. 4573, R. C. M. 1921.

44-212. Joint county or regional libraries—establishment. Two (2) or more counties, by action of their boards of county commissioners, may join in establishing and maintaining a joint county or regional library under the terms of a contract to which all will agree. The expenses of the joint county or regional library shall be apportioned between or among the counties concerned on such a basis as shall be agreed upon in the contract. The treasurer of one of the counties, as shall be provided in the contract, shall have the custody of the funds of the joint county or regional library; and the treasurers of the other counties concerned shall transfer quarterly to him all moneys collected for the "free library fund" in their respective counties. If the board of county commissioners of any county decides to withdraw from a joint county or regional library contract, the county shall be entitled to a division of property in the same proportions as expenses were shared. Any library district organized under the provisions hereof, may, by majority vote of the qualified voters present and voting at a legal meeting of either of the counties which comprise said district, dissolve its cooperative existence.

History: En. Sec. 1, Ch. 132, L. 1939.

Collateral References

Counties—107.

20 C.J.S. Counties § 169.

44-213. Participation of other governmental units. When a joint county or regional library shall have been established, the legislative body of any government unit therein that is maintaining a library may decide, with the concurrence of the board of trustees of its library, to participate in the joint county or regional library; after which, beginning with the next fiscal year of the county, the governmental unit shall participate in the joint county or regional library and its residents shall be entitled to the benefits of the joint county or regional library, and property within its boundaries shall be subject to taxation for joint county or regional library purposes. A governmental unit participating in the joint county or regional library may retain title to its own property, continue its own board of library trustees, and may levy its own taxes for library purposes; or, by a majority vote of the qualified electors, a governmental unit may transfer, conditionally or otherwise, the ownership and control of its library, with all or any part of its property, to another governmental unit

which is providing or will provide free library service in the territory of the former, and the trustees or body making the transfer shall thereafter be relieved of responsibility pertaining to the property transferred.

History: En. Sec. 2, Ch. 132, L. 1939.

Collateral References

Counties⇒107.

20 C.J.S. Counties § 169.

44-214. Board of trustees—appointment and term. In a joint county or regional library district the board of five trustees shall be appointed by the joint action of all the county commissioners in the district. The first appointments or elections shall be for terms of one (1), two (2), three (3), four (4), and five (5) years respectively, and thereafter a trustee shall be appointed or elected annually to serve for five (5) years. Vacancies shall be filled for unexpired terms as soon as possible in the manner in which members of the board are regularly chosen. A trustee shall not receive a salary or other compensation for services as trustee, but necessary expenses actually incurred shall be paid from the library fund. A library trustee may be removed only by vote of the legislative body.

History: En. Sec. 3, Ch. 132, L. 1939.

Collateral References

Counties⇒62, 65, 74(1).

20 C.J.S. Counties §§ 101, 106, 107, 120.

44-215. Appropriations for support of joint libraries. After a joint county or regional library shall have been established or library service contracted for, the legislative body of the governmental unit for which the library was established or the service engaged, shall appropriate money annually for the support of the library and so far as possible, the taxes levied and collected for this purpose shall be levied and collected within the territory to be served. The board of trustees shall have the exclusive control of expenditures from the fund subject to any examination of accounts required by the state and money shall be paid from the fund only upon vouchers of the board of trustees, without further audit. The board shall not make expenditures or incur indebtedness in any year in excess of the amount of money appropriated and available for library purposes.

History: En. Sec. 4, Ch. 132, L. 1939.

Collateral References

Counties⇒162.

20 C.J.S. Counties § 235.

44-216. Tax levy. The board of county commissioners of each county that has joined in the establishment of a joint county or regional library as provided for in this act shall annually levy a tax equivalent to the tax which may be levied for a county library as provided in section 44-206.

History: En. Sec. 5, Ch. 132, L. 1939.

Collateral References

Counties⇒192.

20 C.J.S. Counties § 281.

44-217. Qualifications of librarian. The librarian of a joint county or regional library shall have the qualifications required by Montana law for county librarians and shall come under the same minimum salary regulation.

History: En. Sec. 6, Ch. 132, L. 1939.

Collateral References

Counties⇒64, 74(1).

20 C.J.S. Counties §§ 102, 104, 120.

CHAPTER 3

CITY FREE PUBLIC LIBRARIES

- Section 44-301. Establishment of free public library—tax levy for maintenance.
 44-302. Submission of questions to electors.
 44-303. Library to be established when majority vote favors—election at which question may be submitted.

44-301. (5049) Establishment of free public library—tax levy for maintenance. The council has power to establish and maintain a free public library, and in cities and towns having a free public library not established and maintained by such city or town, may contribute to the support and maintenance thereof, and for that purpose may provide by ordinance for a tax as follows: In a city or town having assessed valuation of seven hundred and fifty thousand dollars (\$750,000.00) or more, a tax not exceeding three and one-half mills on the dollar on the property may be levied. In a city or town having an assessed valuation of less than seven hundred fifty thousand dollars (\$750,000.00), a tax not exceeding three (3) mills on the dollar on the property may be levied. The tax so levied and collected constitutes a fund known as the "library fund," and must be expended only for the purchase of books and other things necessary for a library, and the support and maintenance thereof.

History: En. Sec. 1, p. 110, L. 1883; re-en. Sec. 1141, 5th Div. Comp Stat. 1887; amd. Sec. 5039, Pol. C. 1895; amd. Sec. 1, p. 229, L. 1897; amd. Sec. 1, Ch. 62, L. 1905; re-en. Sec. 3488, Rev. C. 1907; re-en. Sec. 5049, R. C. M. 1921; amd. Sec. 1, Ch. 32, L. 1931; amd. Sec. 1, Ch. 61, L. 1947.

Cross-References

Appointment of trustees, sec. 11-704.
 Injury to books, sec. 94-3325.
 Tax exemption, sec. 84-202.

44-302. (5050) Submission of questions to electors. Before any such ordinance is passed the council must submit to the qualified electors of the city or town at an election the question. At such election the ballot must have printed or written thereon the words, "Public Library—Yes," "Public Library—No," and in voting the elector must make a cross thus, "X," opposite the answer for which he intends to vote.

History: En. Sec. 5040, Pol. C. 1895; re-en. Sec. 3489, Rev. C. 1907; re-en. Sec. 5050, R. C. M. 1921.

Collateral References

Municipal Corporations 956(4).
 64 C.J.S. Municipal Corporations § 1988.

44-303. (5051) Library to be established when majority vote favors—election at which question may be submitted. If the majority of the votes cast at such election is in favor of the establishment of a public library, then such library must be established as above provided. Such question may be submitted at the annual or at any special election held in such city or town, and must be submitted at any such election on the petition of one hundred or more inhabitants of such city or town.

History: En. Sec. 5041, Pol. C. 1895; re-en. Sec. 3490, Rev. C. 1907; re-en. Sec. 5051, R. C. M. 1921.

CHAPTER 4

STATE LAW LIBRARY

- Section 44-401. State law library established.
 44-402. Location—board of trustees.
 44-403. Powers and duties of board.
 44-404. Librarian—term of office—bond.
 44-405. Duties of librarian—regulations for use of library.
 44-406. Injury to books or failure to return—liability.
 44-407. State law library fund.
 44-408. Assistant librarian.
 44-409. Salary of librarian and assistant librarian.
 44-410. Accounts—approval.
 44-411. Index to session laws.
 44-412. Assistance in preparing index.

44-401. State law library established. The library heretofore known as a department of the state library of Montana and called "the law library," shall become a separate and distinct library designated the "state law library of the state of Montana." The collections of laws, decisions of courts, law reports, text books, legal periodicals and miscellaneous books and journals together with pamphlets, papers, maps, charts and manuscripts now in the law library in the capitol building or belonging to such law library, or hereafter acquired by or donated to the law library, shall constitute the library hereby established, and the title to all of the property constituting the same, now or hereafter, shall be in the state of Montana, subject to the custody and control of the library board established herein.

History: En. Sec. 1, Ch. 153, L. 1949.

Collateral References

States \Rightarrow 82.

81 C.J.S. States § 102.

44-402. Location—board of trustees. The state law library of the state of Montana shall be located in the capitol building at Helena, Montana, and shall be in the immediate custody and subject to the control of a board of seven (7) trustees, consisting of the chief justice and the associate justices of the supreme court of the state of Montana, the secretary of state and the state auditor. The members of the board shall serve as such members without compensation and their terms shall be identical with the term of office of the chief justice and of the several associate justices from time to time.

History: En. Sec. 2, Ch. 153, L. 1949.

Collateral References

States \Rightarrow 82.

81 C.J.S. States § 102.

44-403. Powers and duties of board. The powers and duties of said board are as follows:

(1) To make rules and regulations, not inconsistent with law, for the government of the board and for the government and administration of the state law library, including rules designating when and for what periods of time the library shall be open to the public, and the office hours of the library.

(2) To appoint a librarian and prescribe the duties of such librarian, when not otherwise provided for by law.

(3) To sell or exchange duplicate copies of books and pay the moneys arising therefrom into the state law library fund.

(4) To see that the books and other properties of the library are maintained in good order and repair, and are protected from theft or injury.

(5) To draw from the state treasury at any time when needed for the legitimate expenses in maintaining and operating the library and acquiring books, reports, journals and other works and properties therefore, including complete sets of statutory laws and codified laws of the United States of America and of the several states of the union, and other jurisdictions, any moneys in the fund and available for such purposes.

(6) To report to the governor, biennially, a statement of all important transactions of the board, and of the operations of the library, with suggestions and recommendations as to what the board deems necessary for the increased utility and efficiency of the library.

(7) To establish such lawful relations and working arrangements with the library of congress of the United States, with the copyright office therein, and with the superintendent of documents of the United States, as may be for the benefit and advantage of the state law library and promote the acquisition of books and other works from such sources as may be useful to those resorting to the facilities of the state law library.

History: En. Sec. 3, Ch. 153, L. 1949.

44-404. Librarian—term of office—bond. The librarian appointed by the board shall hold office for the term of two (2) years, unless sooner removed by a majority vote of the trustees. The librarian must execute an official bond, in the sum of one thousand dollars (\$1,000.00), to be approved by the chief justice, and deposited with the secretary of state.

History: En. Sec. 4, Ch. 153, L. 1949.

Collateral References

States—51.

81 C.J.S. States § 77.

44-405. Duties of librarian—regulations for use of library. It shall be the duty of the librarian,

(1) to be in attendance at the library during office hours,

(2) to purchase, under the direction of the board of trustees, all compilations of statutory laws, reports of decisions of courts of last resort, or intermediate courts, in the several states of the union, the national reporters' series, and all encyclopedias, digests, text books and miscellaneous books, maps, charts, legal periodicals and a complete collection of all of the laws of the territory of Montana, the state of Montana, furniture, fixtures, and supplies,

(3) to number and stamp all books, digests, encyclopedias, printed works, maps, papers and pamphlets belonging to the library, for their ready and accurate identification and to keep a complete catalogue thereof in accordance with catalogue systems approved for law libraries,

(4) to have well and properly bound all books, and also, all pamphlets and papers when directed thereto by the trustees,

(5) to keep a register of all books and property belonging to the library, the additions made each year, and the cost thereof,

(6) to keep a register of all books or other property taken from the library under the authority of the trustees,

(7) to establish and maintain a system of domestic and foreign exchange of books, maps, or other publications which are properly the subject of collections for a state law library, and to obtain from the secretary of state and other state departments, boards, bureaus, commissions and agencies upon request, such numbers of all state publications as may be needed to supply the demands of the system established.

(8) The state law library shall be maintained and operated for the use of the members of the supreme court, the members of the legislative assembly while in session as such and the several officers of the senate and of the house of representatives, for state officers and employees, for members of the bar of the supreme court of Montana, for members of the bar of supreme courts of other states while in attendance before the supreme court of Montana, and members of the general public agreeing to the rules and regulations established by the board of trustees and enforced by the librarian. All persons, during library hours, are permitted to examine the library and its contents and to work within the library quarters. During sessions of the legislative assembly, the members thereof may take books from the library, and state officials may do so at any time. Law books may be taken from the library to a court room by any attorney-at-law, and must be returned to the library before five (5) o'clock P. M. of the same day. No book or other work that cannot be readily replaced in case of loss shall be removed from the state law library except by state officials, and by them only in pursuit of their official duties and subject to recall by the librarian on arrangements made by the borrower with the librarian.

Books taken by members of the legislative assembly must be returned at the close of the session; and before the state auditor draws his warrant in favor of any member of the legislative assembly for his last week's salary, he must be satisfied that such member has returned all books taken by him and paid for any injuries thereto.

The state auditor, if notified by the librarian that any officer has failed to return books taken by him within the time prescribed by the rules, and after demand made, must not draw his warrant for the salary of such officer until the return is made, or three (3) times the value of the books, or of any injuries thereto, has been paid to the librarian.

History: En. Sec. 5, Ch. 153, L. 1949.

Collateral References

States \hookrightarrow 73.

81 C.J.S. States § 66.

44-406. Injury to books or failure to return—liability. Every person who defaces, tears, or otherwise injures any book or other work, or who fails to return any book taken by him, is liable to the state in three (3) times the value thereof if such book is not replaced by a new one, or another book of identical title, in good order and condition, and no statute of limitations shall ever be effective against the claim of the state under this section.

History: En. Sec. 6, Ch. 153, L. 1949.

Collateral References

States \hookrightarrow 87.

81 C.J.S. States § 105.

44-407. State law library fund. There is hereby established the "state law library fund" which shall be under the control of the board of trustees and shall consist of,

(1) any appropriations made for the state law library by the legislative assembly, including all unexpended balances at the date of approval of this act,

(2) all of the fees authorized by law to be collected and paid into the state treasury by the clerk of the supreme court, as required by section 82-503, and

(3) all of the unexpended moneys in the attorneys' license tax fund on the 31st day of March, of each year, which are required by section 93-2025, to be transferred by the state treasurer from such attorneys' license tax fund to the state law library fund, and the moneys so transferred to the state law library fund shall be and remain available for the purposes stated in said section 93-2025, and be expended in the manner therein provided. If any part of said fund except legislative appropriations be unexpended in any year, said balance shall not revert to the general fund at the end of the fiscal year, but the same shall be reserved and set apart as a surplus fund for the purchase of books for the state law library, and the board of trustees of the library is hereby empowered and authorized to draw from the state treasury at any time when needed for purchase of additional books any moneys belonging to said surplus fund.

History: En. Sec. 7, Ch. 153, L. 1949.

Collateral References

States \hookrightarrow 127.

81 C.J.S. States § 158.

44-408. Assistant librarian. The librarian of the state law library is hereby authorized and empowered to employ an assistant who shall, in addition to the duties imposed by the provisions of this act, serve and act as a law clerk for the justices of the supreme court and shall perform any and all other duties prescribed by the supreme court.

History: En. Sec. 8, Ch. 153, L. 1949.

Collateral References

Cross-Reference

States \hookrightarrow 53.

81 C.J.S. States § 70.

Court attendant acts as law clerk, sec. 82-508.

44-409. Salary of librarian and assistant librarian. The salary of the librarian of the state law library, and of the assistant librarian, shall be fixed in such amount as the board of trustees shall deem reasonable; provided, however, that the salary of the librarian shall not exceed thirty-six hundred dollars (\$3,600.00) per annum, and the salary of the assistant librarian shall not exceed three thousand dollars (\$3,000.00).

History: En. Sec. 9, Ch. 153, L. 1949.

44-410. Accounts—approval. All accounts for the proofing and printing of books, legal periodicals, library collections, furniture, fixtures and supplies must be prepared by the librarian, submitted to and approved by at least one (1) member of the board of trustees and thereafter submitted to and approved by the state board of examiners and paid out of the state treasury from the library fund.

History: En. Sec. 10, Ch. 153, L. 1949.

Collateral References

States \hookrightarrow 76.

81 C.J.S. States § 159.

44-411. Index to session laws. It shall be the duty of the state law librarian to prepare a suitable index of all the laws and resolutions passed

or adopted at each session of the legislative assembly of Montana. Such index shall be a thorough index of such laws and resolutions, and of each subject contained in or covered by such laws and resolutions, together with such cross-index as will assist in readily finding any subject or matter contained in such volume; and for the purpose of procuring and preserving uniformity in such indexes, the index of each succeeding volume of the session laws shall conform, as near as practicable, with those of the volumes preceding it, prepared by said librarian. The librarian shall also prepare for each volume of such laws an additional index, showing what sections of the several codes of this state, and what session laws have been amended, repealed, altered, or changed by any laws published in that volume, which shall be known and designated as the "code index," and to deliver the said indexes to the secretary of state as soon as completed and all indexes prepared by the librarian for the succeeding volumes of session laws shall be published therein.

History: En. Sec. 11, Ch. 153, L. 1949.

Collateral References

States 73.

81 C.J.S. States § 66.

44-412. Assistance in preparing index. The law librarian is authorized and empowered to engage and employ stenographic assistance in the preparation of such indexes and said assistant shall be paid out of the library fund.

History: En. Sec. 12, Ch. 153, L. 1949.

CHAPTER 5

HISTORICAL SOCIETY—LIBRARY AND MUSEUM

- Section 44-501. Historical society made public department of state—purposes.
- 44-502. Historical and miscellaneous library placed under jurisdiction of historical society.
- 44-503. Members of board of trustees—appointment—election—terms—qualifications—executive committee.
- 44-504. Membership.
- 44-505. Powers and duties of board of trustees.
- 44-506. Librarian—appointment—term—assistants.
- 44-507. Duties of librarian and assistant librarians.
- 44-508. Bond of librarian and assistant librarians.
- 44-509. Salary of librarian and assistant librarians.
- 44-510. Historical society fund.
- 44-511. Seal of society.
- 44-512. Quarters for society.
- 44-513. Publications of society—sale.
- 44-514. Transportation of books—payment of charges.
- 44-515. Presentation, approval and payment of claims.

44-501. Historical society made public department of state—purposes. The historical society of Montana, originally organized under the provisions of an act of the legislative assembly of the territory of Montana, entitled an "act to incorporate the historical society of Montana," approved February 2, 1865, and thereafter made to become the historical society of the state of Montana by compliance with the terms, conditions and provisions of an act of the second regular session of the legislative assembly of the state of Montana, approved March 4, 1891, entitled an "act concerning the historical society of the state of Montana and making an appropriation

therefor" shall be, and the same is hereby continued and perpetuated as the historical society of the state of Montana and as such shall be and constitute a public department of the state of Montana for the use, learning, culture and enjoyment of the citizens of the state and for the preservation of historical records and saving and protection of historical places, sites and monuments and the custody, maintenance and operation of the historical and miscellaneous library.

History: En. Sec. 1, Ch. 134, L. 1949.

Collateral References

States⁸².

81 C.J.S. States § 102.

44-502. Historical and miscellaneous library placed under jurisdiction of historical society. The historical and miscellaneous library, heretofore one of two separate departments of the state library of Montana, shall be, and the same is hereby established as an independent and autonomous library in the historical society of the state of Montana, a department of the state, and in the custody and under the control of the board of trustees of the society. The books, pamphlets, papers, maps, charts, manuscripts, writings, paintings, engravings, military relics, collections of fossils, minerals, furniture, fixtures and supplies heretofore in the historical and miscellaneous library of the state library of Montana, shall be under the jurisdiction of the historical society of the state of Montana and shall be administered in accordance with the provisions of this act, independent of any other library owned, maintained or operated by the state of Montana.

History: En. Sec. 2, Ch. 134, L. 1949.

Collateral References

States⁸².

81 C.J.S. States § 102.

44-503. Members of board of trustees—appointment—election—terms—qualifications—executive committee. The government and administration of the historical society of the state of Montana shall be vested in a board of fifteen (15) trustees, comprised of three (3) groups of five (5) members in each group, the first group of five (5) members to be appointed by the governor upon his selection; the second group of five (5) members to be appointed by the governor from nominations made to him for that purpose by the chancellor of the greater university, after consultation with the presidents and deans of the university and several colleges, comprising the greater university of Montana; and the third group of five (5) members shall be elected to the board of trustees by the votes of the first two groups above designated. The appointment or election of any trustee shall be made by and with the advice and consent of the senate at the first regular session of the legislative assembly next succeeding the appointment or election of any trustee. In the event of a tie vote at the election of any trustee in the third group, the governor shall cast the deciding vote between those who have received an equal number of votes. The term of office of all trustees except those first appointed or deemed to be elected under this act, shall be for five (5) years and until their successors are appointed or elected and qualify. In the event of a vacancy in any group, a successor shall be appointed or elected for the group in which the vacancy occurred and such successor shall serve for the unexpired term of the predecessor in office. The five (5) trustees in office at the time of the passage of this act shall

continue in office for a new term of two (2) years from and after July 1, 1949, and shall be deemed to have been elected by the votes of the first two groups. The members of the first group appointed directly by the governor shall serve for a term of three (3) years and the members of the second group appointed by the governor from nominations made to him, shall serve for a term of four (4) years, and thereafter the terms of the members of each group shall be five (5) years, so that the terms of not more than one-third ($\frac{1}{3}$) of the members of the board shall expire in any year.

All members of the board of trustees, whether appointed or elected, shall be appointed solely with reference to their special interest in the accomplishment of the purposes of the society, their fitness for discharging the duties of the trustees and their willingness to devote time and effort in the public interest and to serve without compensation. Special recognition in the matter of appointments shall be given to actual pioneers of Montana qualified as members, or to become members of the Montana society of pioneers, and to the actual sons and daughters of such pioneers when they are otherwise qualified. The board of trustees shall have power to select an executive committee of five (5) members from among its numbers and to delegate to such committee such functions in aid of the efficient administration of the affairs of the society, and the work of the librarians, as the board may deem advisable.

History: En. Sec. 3, Ch. 134, L. 1949.

Compiler's Note

The office of the chancellor of the University of Montana, referred to in this section, was abolished in 1953. See sec. 75-403.1.

Collateral References

States ~~82~~.

81 C.J.S. States § 102.

44-504. Membership. The board of trustees of the society is hereby authorized and empowered to create memberships in the society, which shall be composed of the following classes:

1. Active members.
2. Associate members.
3. Corresponding members.
4. Honorary members.
5. Affiliated members, comprising affiliated societies.

Members of the classes one, two and three may be divided into annual members and life members. The board of trustees shall determine the qualifications of members of any class or subdivision, and the fees to be paid for membership. All members shall have the right to attend the meetings of the board, and may speak upon all questions before the society and present resolutions and recommendations, but no members shall have the privilege of voting. Members of classes one, two and three, when bona fide residents of Montana, are eligible for election to the board of trustees, which board is vested with the government and administration of the society.

History: En. Sec. 4, Ch. 134, L. 1949.

44-505. Powers and duties of board of trustees. The powers and duties of the board of trustees are as follows:

1. To elect from among their number, a president of the board and a vice-president, who shall serve as such in the event of the death or disability of the president; to adopt by-laws for their own government, and to make rules and regulations, not inconsistent with law for the government and administration of the society and its collections and to organize the collections of the society in a library department and in a museum department.

2. To appoint a librarian and assistant librarians and prescribe their duties.

3. To sell or exchange duplicate copies of books and pay the money arising therefrom into the historical society fund, hereafter established.

4. To see that the books, collections and other properties of the society, both in the library and in the museum, are maintained in good order and repair.

5. To draw from the fund in the state treasury at any time when needed, and moneys are available in the fund, for legitimate and proper expenses in aid of the maintenance, development and operation of the society and its collections. To report to the governor biennially, a statement of all important transactions and acquisitions, with suggestions and recommendations for the better realization of the purposes of the society and the improvement of its collections and services.

6. To collect, assemble, arrange and preserve books, pamphlets, maps, charts, manuscripts, journals, diaries, papers, paintings, engravings, photographs, statuary, relics, including military relics and other materials illustrative of the history of Montana in particular, and generally of the northwest and of the United States of America; to procure from pioneers and early settlers, narratives of the events relative to the early settlement of Montana, the Indian occupancy, overland travel and immigration to the territories of the west; to gather information, specimens and other materials calculated to exhibit faithfully the antiquities in the area, particular attention being paid to Indian artifacts and implements; to collect and preserve fossils, concretions, native plants and animals, natural history specimens of Montana, specimens of ores and minerals, objects of curiosity connected with the history of Montana and all such books, maps, writings, charts or other material as will tend to facilitate historical, scientific and antiquarian research; to take steps to promote the study of Montana history by lectures and publications, and to publish annually or at such other intervals as the board of trustees may determine, the proceedings of the society in continuation of the publications originated by it, or other different title and in different format, including paper upon historical pamphlets, or both; to collect and to keep the collections of newspaper files and to bind and carefully preserve all unbound books, manuscripts and newspaper files; to employ microfilm process and to store and catalogue microfilms of papers in danger of disappearance or injury from age or other imperfections, or rare papers and documents, and other papers and documents as the librarian may deem advisable; to enter into such arrangements, as are permitted by law, with the library of congress of the United States, the copyright office and the superintendent of documents of the United States as may be for the benefit and advantage of the society in the acquisition of books and publications, or otherwise.

History: En. Sec. 5, Ch. 134, L. 1949.

Cross-References

Section 2 of Ch. 93, Laws 1953 transferred the duties and functions of the custodian of the records, etc., of the Grand Army of the Republic and United Spanish

War Veterans to the state historical society. See secs. 82-2502 and 82-2506.

Section 1 of Ch. 113, Laws 1953 transferred the powers and duties of the science commission to the state historical society. See secs. 75-1201.1 to 75-1206.

44-506. Librarian—appointment—term—assistants. The librarian appointed by the board shall be appointed solely with reference to fitness for the duties of librarian, curator and museum manager, and the term of the librarian shall be five (5) years unless sooner removed by a majority vote of the trustees. The assistant librarians and all persons employed in carrying out the functions and activities of the society in the library and museum shall be appointed solely with reference to their fitness for their particular duties.

History: En. Sec. 6, Ch. 134, L. 1949.

Collateral References

States 53.

81 C.J.S. States § 70.

44-507. Duties of librarian and assistant librarians. It is the duty of the librarian and of the assistant librarians:

1. To be in attendance in the quarters of the library and museum from 9:00 o'clock A.M. to 5:00 o'clock P.M. during each day of the year except Sundays and holidays designated as legal holidays.

2. To purchase, under the direction of the trustees, all books, maps, engravings, charts, relics and museum exhibits, paintings, furniture and supplies for the library and the museum.

3. To number and stamp all books, maps, papers and pamphlets belonging to the library and to keep a catalogue thereof in accordance with modern systematic cataloging in historical libraries.

4. To have bound all books, pamphlets and papers when directed thereto by the trustees.

5. To keep a register of all books and all other property belonging to or in the library and museum, the additions made each year and the cost thereof.

6. To keep a register of all books or other properties taken from the library or museum under express authority of the trustees.

7. To establish and maintain a system of domestic and foreign exchange of books, maps or other publications and to obtain from the secretary of state such numbers of all state publications as may be needed to supply the demands of the exchange system established.

8. To accept and receive, in the name of the society, any and all gifts, donations, bequests and legacies that may be made to the society; and in this connection, upon receipt of moneys by donation, gift, bequests or legacies, to deposit the same forthwith in the state treasury to the credit of the historical society fund. The librarian is authorized to refuse to accept any gifts or movable articles which are not fit for acquisition.

The assistant librarians shall perform such duties as may be prescribed by the librarian under the direction of the trustees and shall serve in any department of the society.

History: En. Sec. 7, Ch. 134, L. 1949.

Collateral References

States⇨73.

81 C.J.S. States § 66.

44-508. Bond of librarian and assistant librarians. The librarian and the assistant librarian must each execute an official bond, in the penal sum of five thousand dollars (\$5,000) as respects the librarian and in the penal sum of one thousand dollars (\$1,000.00) as respects the assistant librarians, conditioned as the board of trustees may order, which bonds shall be approved by the governor and deposited with the secretary of state.

History: En. Sec. 8, Ch. 134, L. 1949.

Collateral References

States⇨48.

81 C.J.S. States § 76.

44-509. Salary of librarian and assistant librarians. The annual salary of the librarian and of each assistant librarian shall be fixed by the board of trustees and shall be payable, in monthly installments, out of the historical society fund in the state treasury.

History: En. Sec. 9, Ch. 134, L. 1949.

Collateral References

States⇨61.

81 C.J.S. States § 91.

44-510. Historical society fund. There is hereby established the historical society fund which shall consist of (1) all moneys appropriated by the legislative assembly to such fund (2) all gifts, donations, legacies and bequests of moneys of the society or to the state of Montana for the use and benefit of the society and (3) all money income from any other source.

History: En. Sec. 10, Ch. 134, L. 1949.

Collateral References

States⇨127.

81 C.J.S. States § 158.

44-511. Seal of society. The society shall continue to use the official seal heretofore authorized by law and adopted by the society, for the purpose of authenticating the acts of the society and for all other purposes for which the use of a seal by the society may be deemed proper. The design of the seal shall be substantially as follows: A central group representing a covered immigrant wagon drawn by two yoke of oxen, showing prairie in the foreground, mountains in the background and directly beneath it the figures "1865." Said seal shall be two inches in diameter and surrounded by the words, "Historical Society of Montana. Seal."

History: En. Sec. 11, Ch. 134, L. 1949.

44-512. Quarters for society. The collections of the society and its offices shall continue to be maintained in the capitol building at Helena. The state board of examiners of the state of Montana, and said board as, ex officio, state furnishing board, shall secure for the society its offices, library and museum, adequate and commodious quarters for all of its activities in the veterans and pioneers' memorial building, hereafter to be erected and shall decorate, fit and furnish such quarters in harmony and in dignity with the historical purposes of the society, and all furniture and fittings for storage and use of books and for museum exhibitions, hereafter acquired, shall be, in design and function, adapted to the efficient operation and administration of the library and museum.

History: En. Sec. 12, Ch. 134, L. 1949.

Collateral References

States↔82.

81 C.J.S. States § 102.

44-513. Publications of society—sale. The society may open and maintain subscription books for subscriptions to its printed proceedings, pamphlets and papers and may sell the same at cost of production to the society plus a charge of one dollar (\$1.00) for all publications costing five dollars (\$5.00) or more per volume and of twenty-five cents (25c) for all publications costing less than five dollars (\$5.00) per volume. The society shall arrange or secure contracts to cover the costs of its publications and subscribers shall pay in advance for the same on execution of written orders of purchase addressed to the society.

History: En. Sec. 13, Ch. 134, L. 1949.

Collateral References

States↔82.

81 C.J.S. States § 102.

44-514. Transportation of books—payment of charges. The librarian is authorized to pay reasonable freight, express, and mail charges upon books or other articles sent to the library by the general, state, or foreign governments, or private parties, taking proper vouchers therefor, and upon presentation of such vouchers to the board of examiners and the allowance thereof, the same must be paid out of the state treasury from the particular historical society fund.

History: En. Sec. 14, Ch. 134, L. 1949.

44-515. Presentation, approval and payment of claims. All other claims, including claims for salaries and expenses of operation, acquisitions, purchases of books, etc., shall be prepared by the claimant, submitted to the librarian for verification and approval and by the librarian approved, and thereafter submitted to the state board of examiners for approval by it, and on approval of the claim by the state board of examiners and delivery thereof to the state auditor, the state auditor shall draw and issue his warrant on the historical society fund in payment of the claim.

History: En. Sec. 15, Ch. 134, L. 1949.

TITLE 45

LIENS

- Chapter 1. Liens in general, definitions, creation and effect, 45-101 to 45-116.
2. Priority of liens, 45-201 to 45-203.
 3. Redemption from liens—extinction, 45-301 to 45-308.
 4. Loggers' liens, 45-401 to 45-421.
 5. Mechanics' liens, 45-501 to 45-512.
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 7. Crop liens for seed, grain and hail insurance, 45-701 to 45-707.
 8. Threshermen's liens, 45-801 to 45-809.
 9. Farm laborers' liens, 45-901 to 45-911.
 10. Laborers' and materialmen's liens on oil and gas wells and pipe lines, 45-1001 to 45-1003.
 11. Miscellaneous liens, 45-1101 to 45-1118.
 12. Liens of physicians, nurses and hospitals in personal injury claims, 45-1201 to 45-1205.
 13. Stoppage in transit, 45-1301 to 45-1305.
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CHAPTER 1

LIENS IN GENERAL, DEFINITIONS, CREATION AND EFFECT

- Section 45-101. Lien defined.
- 45-102. Liens, general or special.
- 45-103. General lien defined.
- 45-104. Special lien defined.
- 45-105. Prior liens.
- 45-106. Contracts subject to provisions of this chapter.
- 45-107. Lien—how created.
- 45-108. No lien for claim not due.
- 45-109. Lien on future interest.
- 45-110. Lien may be created by contract.
- 45-111. Lien, or contract for lien, transfers no title.
- 45-112. Certain contracts void.
- 45-113. Creation of lien does not imply personal obligation.
- 45-114. Extent of lien.
- 45-115. Creditor may enforce obligation.
- 45-116. Holder of lien not entitled to compensation.

45-101. (8219) Lien defined. A lien is a charge imposed in some mode other than by a transfer in trust upon specific property, by which it is made security for the performance of an act.

History: En. Sec. 3730, Civ. C. 1895; re-en. Sec. 5704, Rev. C. 1907; re-en. Sec. 8219, R. C. M. 1921. Cal. Civ. C. Sec. 2872. Based on Field Civ. C. Sec. 1582.

Cross-References

Attorney's liens, sec. 93-2120.
Carrier's liens, secs. 8-609, 8-811.
Food locker operator, lien, sec. 69-2813.
Hotel liens, secs. 34-103 to 34-111.
Judgment liens, secs. 93-5708, 94-7819.
Warehousemen's liens, secs. 88-128 to 88-135.

Operation and Effect

A conditional sale, not an absolute sale with retention of lien, is not in effect a mortgage and void as to innocent third parties, though never acknowledged and recorded with an affidavit. *Bennett Bros. Co. v. Fitchett*, 24 M 457, 467, 62 P 780.

References

Barth v. Ely, 85 M 310, 278 P 1002;
State et al. v. Board of Commissioners et al., 89 M 37, 79, 296 P 1.

Collateral ReferencesLiens \hookrightarrow 1.

53 C.J.S. Liens § 1.

33 Am. Jur. 419, Liens, § 2.

45-102. (8220) Liens, general or special. Liens are either general or special.

History: En. Sec. 3731, Civ. C. 1895; re-en. Sec. 5705, Rev. C. 1907; re-en. Sec. 8220, R. C. M. 1921. Cal. Civ. C. Sec. 2873. Field Civ. C. Sec. 1583.

Collateral ReferencesLiens \hookrightarrow 1.

53 C.J.S. Liens § 1.

33 Am. Jur. 421, Liens, § 5.

45-103. (8221) General lien defined. A general lien is one which the holder thereof is entitled to enforce as a security for the performance of all the obligations, or all of a particular class of obligations, which exist in his favor against the owner of the property.

History: En. Sec. 3732, Civ. C. 1895; re-en. Sec. 5706, Rev. C. 1907; re-en. Sec. 8221, R. C. M. 1921. Cal. Civ. C. Sec. 2874. Field Civ. C. Sec. 1584.

45-104. (8222) Special lien defined. A special lien is one which the holder thereof can enforce only as security for the performance of a particular act or obligation, and of such obligations as may be incidental thereto.

History: En. Sec. 3733, Civ. C. 1895; re-en. Sec. 5707, Rev. C. 1907; re-en. Sec. 8222, R. C. M. 1921. Cal. Civ. C. Sec. 2875. Field Civ. C. Sec. 1585.

45-105. (8223) Prior liens. Where the holder of a special lien is compelled to satisfy a prior lien for his own protection, he may enforce payment of the amount so paid by him, as a part of the claim for which his own lien exists.

History: En. Sec. 3734, Civ. C. 1895; re-en. Sec. 5708, Rev. C. 1907; re-en. Sec. 8223, R. C. M. 1921. Cal. Civ. C. Sec. 2876.

Collateral ReferencesLiens \hookrightarrow 10.

53 C.J.S. Liens § 9.

45-106. (8224) Contracts subject to provisions of this chapter. Contracts of mortgage or pledge are subject to all the provisions of this chapter.

History: En. Sec. 3735, Civ. C. 1895; re-en. Sec. 5709, Rev. C. 1907; re-en. Sec. 8224, R. C. M. 1921. Cal. Civ. C. Sec. 2877. Field Civ. C. Sec. 1586.

70 M 146, 152, 225 P 123; Vitt v. Rogers et al., 81 M 120, 128, 262 P 164; Barth v. Ely, 85 M 310, 317, 278 P 1002; Hogevoil v. Hogevoil, 117 M 528, 533, 162 P 2d 218; Montana Valley Land Co. v. Bestul, 126 M 426, 253 P 2d 325, 328.

References

Cited or applied as section 5709, Revised Codes, in State ex rel. Schatz v. District Court, 40 M 173, 176, 105 P 554; Berkin v. Healy, 52 M 398, 402, 158 P 1020; Hackney v. Birely, 67 M 155, 158, 215 P 642; Morrison v. Farmers' etc. State Bank,

Collateral ReferencesMortgages \hookrightarrow 1; Pledges \hookrightarrow 1.

59 C.J.S. Mortgages § 1; 72 C.J.S. Pledges § 2.

45-107. (8225) Lien—how created. A lien is created:

1. By contract of the parties; or,
2. By operation of law.

History: En. Sec. 3740, Civ. C. 1895; re-en. Sec. 5710, Rev. C. 1907; re-en. Sec. 8225, R. C. M. 1921. Cal. Civ. C. Sec. 2881. Field Civ. C. Sec. 1587.

Collateral ReferencesLiens \hookrightarrow 3-6.

53 C.J.S. Liens § 2.

33 Am. Jur. 421, Liens, §§ 6 et seq.

References

In re Stevenson, 87 M 486, 494, 289 P 566.

45-108. (8226) No lien for claim not due. No lien arises by mere operation of law until the time at which the act to be secured thereby ought to be performed.

History: En. Sec. 3741, Civ. C. 1895; 8226, R. C. M. 1921. Cal. Civ. C. Sec. 2882. re-en. Sec. 5711, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1588.

45-109. (8227) Lien on future interest. An agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing, to the extent of such interest.

History: En. Sec. 3742, Civ. C. 1895; re-en. Sec. 5712, Rev. C. 1907; re-en. Sec. 8227, R. C. M. 1921. Cal. Civ. C. Sec. 2883. Field Civ. C. Sec. 1589.

Subsequently Acquired Property Mortgageable

While, independently of statute, one cannot sell or mortgage personal property not in existence, or in which he has no present interest, property which has a potential existence may be mortgaged or hypothecated. *Isbell v. Slette*, 52 M 156, 160, 155 P 503.

Id. Annual crops have a potential existence even before they are planted, and the owner, or one rightfully in possession, of land has a mortgageable interest in the crops thereafter to be planted thereon, the lien of such mortgage not attaching until they are planted, and being limited to the interest which the mortgagor has.

Id. A mortgage on crops yet to be planted is, in effect, nothing more than an executory contract that may become executed when the crops are planted and the lien attaches, but which may be de-

feated if, for any reason, the mortgagor violates good faith and fails or refuses to plant the crops.

While a mortgagor of personal property may include in the mortgage property thereafter to be acquired by him such after-acquired property must be described so accurately that third persons consulting the record may be put upon notice as to what is intended to be mortgaged, and if not so described as to enable the sheriff to identify such property, the mortgage as to it is void as against such third persons. *Hackney v. Birely*, 67 M 155, 158, 215 P 542.

Subsequently to be acquired personal property may be mortgaged, provided it is such as is capable of delivery, and such as may be taken possession of by the mortgagee upon its acquisition by the mortgagor. *Security State Bank v. Mariette*, 69 M 536, 539, 223 P 114.

Collateral References

Liens ⇨ 11.
53 C.J.S. Liens § 7.

45-110. (8228) Lien may be created by contract. A lien may be created by contract, to take immediate effect, as security for the performance of obligations not then in existence.

History: En. Sec. 3743, Civ. C. 1895; re-en. Sec. 5713, Rev. C. 1907; re-en. Sec. 8228, R. C. M. 1921. Cal. Civ. C. Sec. 2884. Field Civ. C. Sec. 1590.

Collateral References

Liens ⇨ 3, 4.
53 C.J.S. Liens § 2.

45-111. (8229) Lien, or contract for lien, transfers no title. Notwithstanding an agreement to the contrary, a lien, or a contract for a lien, transfers no title to the property subject to the lien.

History: En. Sec. 3750, Civ. C. 1895; re-en. Sec. 5714, Rev. C. 1907; re-en. Sec. 8229, R. C. M. 1921. Cal. Civ. C. Sec. 2888. Field Civ. C. Sec. 1591.

Operation and Effect

A chattel mortgage creates a lien only, and, therefore, does not pass title from the mortgagor to the mortgagee. *Bennett Bros. Co. v. Fitchett*, 24 M 457, 467, 62 P 780; *Mueller v. Renkes*, 31 M 100, 103,

77 P 512; *Demers v. Graham*, 36 M 402, 404, 93 P 268.

A chattel mortgage upon cows, in which no mention was made of their increase, did not cover their calves, in gestation at the time of the execution of the mortgage, but born prior to foreclosure. *Demers v. Graham*, 36 M 402, 404, 93 P 268.

A mortgage does not transfer any title to the property mortgaged; it is merely a lien fixed upon the property to secure the

performance of an act or obligation, and therefore when it ceases to be a lien it ceases to be a mortgage. *Morrison v. Farmers' etc. State Bank*, 70 M 146, 152, 225 P 123.

References

Hogevoll v. Hogevoll, 117 M 528, 533,

45-112. (8230) Certain contracts void. All contracts for the forfeiture of property subject to a lien, in satisfaction of the obligation secured thereby, and all contracts in restraint of the right of redemption from a lien, are void.

History: En. Sec. 3751, Civ. C. 1895; re-en. Sec. 5715, Rev. C. 1907; re-en. Sec. 8230, R. C. M. 1921. Cal. Civ. C. Sec. 2889. Based on Field Civ. C. Sec. 1592.

Operation and Effect

Where, under a contract of sale of property, whether real or personal, cancellation of which, with forfeiture of an advance payment, was sought because of breach by the vendee in failing to make a deferred payment, the legal title remained in the vendor though possession was delivered to the vendee. *Cook-Reynolds v. Chipman*, 47 M 289, 298, 133 P 694.

The "right of redemption," all contracts in restraint of which are, under the statute, void, is a misapplication of terms as used in this section, equity of redemption being intended. *Banking Corp. of Montana v. Hein*, 52 M 238, 240, 156 P 1085.

Held, that the clause in a real estate mortgage by which the mortgagor on foreclosure waives any claim of homestead and all right of possession of the mortgaged premises during the period of redemption is not invalid under this section,

45-113. (8231) Creation of lien does not imply personal obligation. The creation of a lien does not itself imply that any person is bound to perform the act for which the lien is a security.

History: En. Sec. 3752, Civ. C. 1895; re-en. Sec. 5716, Rev. C. 1907; re-en. Sec. 8231, R. C. M. 1921. Cal. Civ. C. Sec. 2890. Field Civ. C. Sec. 1593.

45-114. (8232) Extent of lien. The existence of a lien upon property does not of itself entitle the person in whose favor it exists to a lien upon the same property for the performance of any other obligation than that which the lien originally secured.

History: En. Sec. 3753, Civ. C. 1895; re-en. Sec. 5717, Rev. C. 1907; re-en. Sec. 8232, R. C. M. 1921. Cal. Civ. C. Sec. 2891. Field Civ. C. Sec. 1594.

45-115. (8233) Creditor may enforce obligation. The existence of a lien, as security for the performance of an obligation, does not affect the right of the creditor to enforce the obligation without regard to the lien.

162 P 2d 218; *City of Cut Bank v. Clapper Motor Co.*, 120 M 274, 182 P 2d 474, 475.

Collateral References

Liens—1.

53 C.J.S. Liens § 1.

providing that "all contracts in restraint of the right of redemption from a lien are void," the right of redemption remaining unaffected by the foreclosure sale. *United States Bldg. etc. Assn. v. Stevens*, 93 M 11, 14, 17 P 2d 62.

The rule stated in this section does not apply to transactions after the execution of the mortgage respecting the title to the mortgaged premises. A mortgagor may sell and convey all his right and interest in the mortgaged premises to the mortgagee, where the transaction is fair, honest and without fraud, and where no unconscionable advantage has been taken of his position by the mortgagee. *Donohoe v. Landoe*, 126 M 351, 251 P 2d 560, 565.

References

Cited or applied as section 5715, Revised Codes, in *Dunne v. Yund*, 52 M 24, 32, 155 P 273; *Doggett v. Johnson*, 82 M 338, 343, 267 P 292; *United States B. & L. Assn. v. Burns*, 90 M 402, 420, 4 P 2d 703.

Collateral References

Liens—18½, 23.

53 C.J.S. Liens §§ 21, 23.

Operation and Effect

The purchaser of mortgaged real estate does not thereby become personally liable for the payment of the indebtedness described in the mortgage. *Mueller v. Renkes*, 31 M 100, 103, 77 P 512.

History: En. Sec. 3754, Civ. C. 1895; re-en. Sec. 5718, Rev. C. 1907; re-en. Sec. 8233, R. C. M. 1921. Field Civ. C. Sec. 1595.

Operation and Effect

Held, that section 93-6001, declaring that there is but one action for the recovery of a debt or the enforcement of any right secured by mortgage, prohibits any other action than that provided by statute for the foreclosure of the mortgage, that the creditor cannot waive the mortgage and sue on the debt, and that this section, providing that the existence of a lien as security for the performance of an obligation does not affect the right of the creditor to enforce the obligation without regard to the lien, has reference to liens other than mortgage liens. Barth v. Ely, 85 M 310, 317 et seq., 278 P 1002.

Id. While this section appeared in the Civil Code, and section 93-6001 in the

Code of Civil Procedure, R. C. M. 1921, both referring to the right of creditors to enforce obligations secured by lien, they must be deemed to have been passed at the same moment of time (12-210, 12-211), and it must be presumed that it was intended that both should be operative and each should govern as to the title in which it is found, and courts must construe them together and reconcile them, if possible.

References

Cited or applied as section 3754, Civil Code, in Brophy v. Downey, 26 M 252, 261, 67 P 312; Vande Veegaete v. Vande Veegaete, 75 M 52, 57, 243 P 1082.

Collateral References

Liens \hookrightarrow 1.

53 C.J.S. Liens § 1.

45-116. (8234) Holder of lien not entitled to compensation. One who holds property by virtue of a lien thereon is not entitled to compensation from the owner thereof for any trouble or expense which he incurs respecting it, except to the same extent as a borrower, under sections 47-109 and 47-110.

History: En. Sec. 3755, Civ. C. 1895; re-en. Sec. 5719, Rev. C. 1907; re-en. Sec.

8234, R. C. M. 1921. Cal. Civ. C. Sec. 2892. Field Civ. C. Sec. 1596.

CHAPTER 2

PRIORITY OF LIENS

Section 45-201. Priority of liens.

45-202. Priority of mortgage for price.

45-203. Order of resort to different funds.

45-201. (8235) Priority of liens. Other things being equal, different liens upon the same property have priority according to the time of their creation.

History: En. Sec. 3770, Civ. C. 1895; re-en. Sec. 5720, Rev. C. 1907; re-en. Sec. 8235, R. C. M. 1921. Cal. Civ. C. Sec. 2897. Based on Field Civ. C. Sec. 1597.

Operation and Effect

A grantee of property under a deed absolute on its face but in fact a mortgage reconveyed the property by deed to the grantors (husband and wife) upon payment of the debt secured thereby, and presented it for record five minutes before a second grantee of the same grantors presented his, also given as security for a loan. Prior thereto a creditor of the wife had attached her interest in the

premises and secured judgment which had been duly docketed. Held, that immediately upon the filing for record of the first deed, the grantors were reinvested with the legal title and the judgment lien of the creditor at once attached to the interest of the wife therein, and was therefore prior and superior to the claim of the second grantee under decree of foreclosure of his mortgage deed. Isom v. Larson, 78 M 395, 401, 255 P 1049.

Collateral References

Liens \hookrightarrow 12.

53 C.J.S. Liens § 10.

33 Am. Jur. 436, Liens, §§ 33-37.

45-202. (8236) Priority of mortgage for price. Except as otherwise provided by law, a mortgage given for the price of real property, at the

time of its conveyance, has priority over all other liens created against the purchaser, subject to the operation of the recording laws.

History: En. Sec. 3771, Civ. C. 1895; re-en. Sec. 5721, Rev. C. 1907; re-en. Sec. 8236, R. C. M. 1921. Cal. Civ. C. Sec. 2898.

59 C.J.S. Mortgages § 231.
36 Am. Jur. 805, Mortgages, § 229.

Operation and Effect

One who advances money for the purchase price of property acquires an interest therein superior to the lien claims for the price of the construction of buildings thereon even though work on the buildings was commenced prior to such advancement. *Soliri v. Fasso*, 56 M 400, 411, 185 P 322.

After-acquired title of mortgagor as inuring to the benefit of mortgagee under purchase money mortgage. 25 ALR 92.

Priority as between holders of different notes or obligations secured by the same mortgage. 50 ALR 543.

Priority as between mechanic's lien and purchase-money mortgage. 72 ALR 1516.

Purchase-money mortgage as within provision of statute defeating or postponing lien of unrecorded or unfiled mortgage. 137 ALR 571.

Collateral References

Mortgages⇒158.

45-203. (8237) Order of resort to different funds. Where one has a lien upon several things, and other persons have subordinate liens upon, or interests in, some but not all of the same things, the person having the prior lien, if he can do so without risk of loss to himself, or of injustice to other persons, must resort to the property in the following order, on the demand of any party interested:

1. To the things upon which he has an exclusive lien;
2. To the things which are subject to the fewest subordinate liens;
3. In like manner inversely to the number of subordinate liens upon the same thing; and,
4. When several things are within one of the foregoing classes, and subject to the same number of liens, resort must be had:

First—To the things which have not been transferred since the prior lien was created;

Second—To the things which have been so transferred without a valuable consideration; and,

Third—To the things which have been so transferred for a valuable consideration in the inverse order of the transfer.

History: En. Sec. 3772, Civ. C. 1895; re-en. Sec. 5722, Rev. C. 1907; re-en. Sec. 8237, R. C. M. 1921. Cal. Civ. C. Sec. 2899. Based on Field Civ. C. Sec. 1599.

Code, in *Vincent v. Vineyard*, 24 M 207, 218, 61 P 131.

Collateral References

Marshaling Assets and Securities⇒1, 2.
55 C.J.S. Marshaling Assets and Securities § 2.

References

Cited or applied as section 3772, Civil

CHAPTER 3

REDEMPTION FROM LIENS—EXTINCTION

- Section 45-301. Right to redeem.
45-302. Rights of inferior lienor.
45-303. Redemption from lien—how made.
45-304. Lien deemed accessory to the act whose performance it secures.
45-305. Extinction by sale or conversion.
45-306. Lien extinguished by lapse of time under statute of limitations.
45-307. Effect of partial performance.
45-308. When restoration extinguishes lien.

45-301. (8238) Right to redeem. Every person, having an interest in property subject to a lien, has a right to redeem it from the lien, at any time after the claim is due, and before his right of redemption is foreclosed.

History: En. Sec. 3780, Civ. C. 1895; re-en. Sec. 5723, Rev. C. 1907; re-en. Sec. 8238, R. C. M. 1921. Cal. Civ. C. Sec. 2903.

Existence of Equity of Redemption in Assignee

Where the holder of a third mortgage failed to exercise his statutory right to redeem the property from foreclosure sale had on the first mortgage within the statutory time which expired before he assigned his mortgage, he lost such right, but his equity of redemption remained which passed to his assignee and which he could exercise in order to protect him from loss. *Parcells v. Nelson*, 103 M 412, 418, 63 P 2d 131.

Operation and Effect

Where no proceedings were ever instituted for foreclosure of a mortgage, the mortgagor, in bringing an action to redeem four years after the mortgagee went into possession, was not guilty of such laches as to deprive him of the right to relief. *Grogan v. Valley Trading Co.*, 30 M 229, 236, 76 P 211.

Under the statute a person interested in property subject to a lien has a right of redemption at any time after the claim

is due and before that right is foreclosed; but this has no application to a case where an absolute deed is, long after its delivery, and after the death of the grantee and the settlement and distribution of his estate, claimed for the first time to have been a mortgage. *Riley v. Blacker*, 51 M 364, 371, 152 P 758.

Id. While in the case of a confessed or ascertained mortgage the rule obtains as declared by this section, it is not controlling in a suit in which it is sought to establish by oral evidence that a deed absolute in form is in fact a mortgage, but in such an action the defense of laches may be interposed.

References

Cited or applied as section 5723, Revised Codes, in *State ex rel. Schatz v. District Court*, 40 M 173, 176, 105 P 554; *Banking Corp. of Montana v. Hein*, 52 M 238, 240, 156 P 1085; *Harrington v. Butte & Superior Copper Co.*, 52 M 263, 278, 157 P 181; *Doggett v. Johnson*, 82 M 338, 343, 267 P 292.

Collateral References

Liens ⇨ 23.
53 C.J.S. *Liens* § 23.

45-302. (8239) Rights of inferior lienor. One who has a lien inferior to another, upon the same property, has a right:

1. To redeem the property in the same manner as its owner might from the superior lien; and,

2. To be subrogated to all the benefits of the superior lien, when necessary for the protection of his interests, upon satisfying the claim secured thereby.

History: En. Sec. 3781, Civ. C. 1895; re-en. Sec. 5724, Rev. C. 1907; re-en. Sec. 8239, R. C. M. 1921. Cal. Civ. C. Sec. 2904. Field Civ. C. Sec. 1601.

Operation and Effect

Where the holder of a third mortgage failed to exercise his statutory right to redeem the property from a foreclosure sale had on the first mortgage within the statutory time which expired before he

assigned his mortgage, he lost such right, but his equity of redemption remained which passed to his assignee and which he could exercise to protect him from loss. *Parcells v. Nelson*, 103 M 412, 418, 63 P 2d 131.

References

Cited or applied as section 5724, Revised Codes, in *Soliri v. Fasso*, 56 M 400, 412, 185 P 322.

45-303. (8240) Redemption from lien—how made. Redemption from a lien is made by performing, or offering to perform, the act for the performance of which it is a security, and paying, or offering to pay, the damages, if any, to which the holder of the lien is entitled for delay.

History: En. Sec. 3782, Civ. C. 1895; re-en. Sec. 5725, Rev. C. 1907; re-en. Sec. 8240, R. C. M. 1921. Cal. Civ. C. Sec. 2905. Field Civ. C. Sec. 1602.

References

Cited or applied as section 5725, Revised Codes, in *Banking Corp. of Montana v. Hein*, 52 M 238, 240, 156 P 1085.

45-304. (8241) Lien deemed accessory to the act whose performance it secures. A lien is to be deemed accessory to the act for the performance of which it is a security, whether any person is bound for such performance or not, and is extinguishable in like manner with any other accessory obligation.

History: En. Sec. 3790, Civ. C. 1895; re-en. Sec. 5726, Rev. C. 1907; re-en. Sec. 8241, R. C. M. 1921. Cal. Civ. C. Sec. 2909.

Co. et al., 71 M 486, 492, 230 P 588; Oregon Mortgage Co., Ltd. v. Kunneke et al., 76 M 117, 125, 245 P 539.

References

Cited or applied as section 3790, Civil Code, in Mueller v. Renkes, 31 M 100, 103, 77 P 512; Thompson v. Twodot Fertilizer

Collateral References

Liens—16.
53 C.J.S. Liens § 17.

45-305. (8242) Extinction by sale or conversion. The sale of any property on which there is a lien, in satisfaction of the claim secured thereby, or in case of personal property, its wrongful conversion by the person holding the lien, extinguishes the lien thereon.

History: En. Sec. 3791, Civ. C. 1895; re-en. Sec. 5727, Rev. C. 1907; re-en. Sec. 8242, R. C. M. 1921. Cal. Civ. C. Sec. 2910. Field Civ. C. Sec. 1604.

ing the purpose of it, leaves the record equivocal in meaning, and persons taking the title from the mortgagee are bound at their peril to ascertain by inquiry whether the conveyance was intended as a final adjustment of the rights of the parties.

By the satisfaction of the judgment in this manner under a valid decree, the lien of the mortgage was as fully extinguished as it would have been by payment of the indebtedness by the mortgagor. Oregon Mortgage Co., Ltd. v. Kunneke et al., 76 M 117, 127, 245 P 539.

Collateral References

33 Am. Jur. 434, Liens, § 30.

Right to require security as condition of canceling lien of record or of recording payment. 2 ALR 2d 1064.

What constitutes a "public sale." 4 ALR 2d 575.

Operation and Effect

Upon the face of it, the meaning of this section seems to be that, in order to be effective to extinguish the lien of the mortgage, a sale by the mortgagor to the mortgagee must be for that purpose, and that the evidence of the sale—the conveyance—must disclose the fact. The sale must be "in satisfaction of the claim secured" by the lien. Dubbels v. Thompson, 49 M 550, 555, 143 P 986.

Id. It would seem to have been the purpose of the legislature in enacting this section to leave open to inquiry the status of the mortgage lien in every case in which the evidence of the sale does not express upon its face the intention of it. Upon this assumption, a deed from the mortgagor to the mortgagee, not express-

45-306. (8243) Lien extinguished by lapse of time under statute of limitations. A lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, (Title 93) an action can be brought upon the principal obligation.

History: En. Sec. 3792, Civ. C. 1895; re-en. Sec. 5728, Rev. C. 1907; re-en. Sec. 8243, R. C. M. 1921. Cal. Civ. C. Sec. 2911. Field Civ. C. Sec. 1605.

not extend the life of the debt, and to that extent amends this section, which provides that a lien is extinguished by the lapse of time within which an action can be brought upon the principal obligation; hence where the debt dies, the mortgage dies with it. Jones v. Hall et al., 90 M 69, 76, 300 P 232; Humbird et al. v. Arnet et al., 99 M 499, 44 P 2d 756.

Operation and Effect

This section is made directly applicable to mortgages by section 45-106. Berkin v. Healy, 52 M 398, 402, 158 P 1020.

Id. While, in the absence of legislation

Cross-Reference

Statute of limitations, sec. 93-2601 et seq.

Implied Amendment

Held, that section 52-206, limiting the validity of a mortgage, unless renewed, to eight years after maturity of the debt which it was given to secure, affects merely the lien of the mortgage and does

declaring a different rule, the lien of a mortgage on real property is not extinguished by the lapse of the period fixed by the statute within which an action to enforce payment of the debt may be brought and prosecuted to a successful termination, such lien is extinguished by the provisions of this section.

When the debt is barred the lien to secure it is extinguished. *Montana Valley Land Co. v. Bestul*, 126 M 426, 253 P 2d 325, 328.

References

Cited or applied as section 5728, Revised Codes, in *Cullen v. Reed*, 220 Fed

356, 357; *Strong v. Butte C. & B. Copper Corp.*, 54 M 584, 586, 172 P 1033; *Morrison v. Farmers' etc. State Bank*, 70 M 146, 152 et seq., 225 P 123; *O. M. Corwin Co. v. Brainard et al.*, 80 M 318, 323, 260 P 706; *Vitt v. Rogers et al.*, 81 M 120, 128, 262 P 164; *Hastings et al. v. Wise et al.*, 91 M 430, 433, 8 P 2d 636; *Reed v. Richardson et al.*, 94 M 34, 42 et seq., 20 P 2d 1054; *Hogevoll v. Hogevoll*, 117 M 528, 535, 162 P 2d 218.

Collateral References

Limitation of Actions—167.

53 C.J.S. Limitation of Actions § 8.

45-307. (8244) Effect of partial performance. The partial performance of an act secured by a lien does not extinguish the lien upon any part of the property subject thereto, even if it is devisable.

History: En. Sec. 3793, Civ. C. 1895; 8244, R. C. M. 1921. Cal. Civ. C. Sec. 2912. re-en. Sec. 5729, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1606.

45-308. (8245) When restoration extinguishes lien. The voluntary restoration of property to its owner by the holder of a lien thereon, dependent upon possession, extinguishes the lien as to such property, unless otherwise agreed by the parties, and extinguishes it, notwithstanding any such agreement, as to creditors of the owner and persons subsequently acquiring a title to the property, or a lien thereon, in good faith, and for a good consideration.

History: En. Sec. 3794, Civ. C. 1895; 8245, R. C. M. 1921. Cal. Civ. C. Sec. 2913. re-en. Sec. 5730, Rev. C. 1907; re-en. Sec. Based on Field Civ. C. Sec. 1607.

CHAPTER 4

LOGGERS' LIENS

- Section 45-401. Who entitled to lien.
 45-402. Same—lien on lumber.
 45-403. Lien of landowner.
 45-404. Priority of liens.
 45-405. Extent of lien.
 45-406. Same.
 45-407. Recording claim of lien.
 45-408. Same.
 45-409. Duties of county recorder.
 45-410. Duration of lien.
 45-411. Jurisdiction of court and procedure.
 45-412. Same.
 45-413. Immaterial defects in claim.
 45-414. Bona fide purchasers.
 45-415. Parties.
 45-416. Judgment and sale.
 45-417. Sale of property.
 45-418. Penalty for destroying means of identification of property.
 45-419. Lien for driving logs.
 45-420. Foreclosure.
 45-421. Release from lien.

45-401. (8318) Who entitled to lien. Every person performing labor upon, or who shall assist in obtaining or securing sawlogs, piling, railroad

ties, cord-wood, or other timber, has a lien upon the same and upon all other sawlogs, piling, railroad ties, cord-wood, or other timber which, at the time of the filing of the claim or lien hereinafter provided, belonged to the person or corporation for whom the labor was performed, for the work or labor done upon or in obtaining or securing the particular sawlogs, piling, railroad ties, cord-wood, or other timber in said claim or lien described, whether such work or labor was done at the instance of the owner of the same or his agent, or a contractor or subcontractor, or any person in behalf of such owner or his agent, or a contractor or subcontractor. The cook in a logging-camp shall be regarded as a person who assists in obtaining or securing any of the timber herein mentioned.

History: En. Sec. 1, p. 126, L. 1899; re-en. Sec. 5819, Rev. C. 1907; amd. Sec. 1, Ch. 60, L. 1909; re-en. Sec. 8318, R. C. M. 1921. Cal. Civ. C. Sec. 3065.

Operation and Effect

The loggers' lien legislation was enacted to create an equity in favor of three classes of persons, to-wit: (1) Those who are employed to obtain or secure rough timber and transport it to the mill for manufacture; (2) those who are employed to assist in the manufacture of it into lumber in any form; and (3) those who own the land from which the timber is taken. Lane v. Lane Potter Lumber Co., 40 M 541, 546, 107 P 898.

This section, giving liens to persons performing labor in logging operations, creates a right where none existed before, and the requirements as to the steps necessary to secure them must be strictly pursued. Lane v. Lane Potter Lumber Co., 40 M 541, 547, 107 P 898.

45-402. (8319) Same—lien on lumber. Every person performing work or labor, or assisting in manufacturing sawlogs and other timber into lumber and shingles, has a lien upon such lumber while the same remains at the mill where it was manufactured, or in the possession or under the control of the manufacturer, whether such work or labor was done at the instance of the owner of such logs or his agent, or any contractor or subcontractor of such owner. The term lumber, as used in this act, shall be held and be construed to mean all logs or other timber sawed or split for use, including beams, joists, planks, boards, shingles, laths, staves, hoops, and every article of whatsoever nature or description manufactured from sawlogs or other timber.

History: En. Sec. 2, p. 127, L. 1899; re-en. Sec. 5820, Rev. C. 1907; re-en. Sec. 8319, R. C. M. 1921.

Operation and Effect

The use of the words in this section, "whether such work or labor was done at the instance of the owner of the same or his agent," implies that the employment may be made only by the owner or one employed by him as agent. One who occu-

The statute relative to mechanics' liens is materially different from that concerning loggers' liens, and cases upon the former are inapplicable to the latter. Lane v. Lane Potter Lumber Co., 40 M 541, 550, 107 P 898.

References

Cited or applied as section 5819, Revised Codes, in Lane v. Lane Potter Lumber Co., 40 M 541, 547, 107 P 898; In re Stevenson, 87 M 486, 289 P 566.

Collateral References

Logs and Logging—27.

54 C.J.S. Logs and Logging § 65.

34 Am. Jur. 558, Logs and Timber, §§ 101-111.

Provisions of statutes or bonds to secure payment for work or labor as including use of laborer's own team, automobile, or other equipment. 71 ALR 1136.

pies toward the owner merely the relation of contractor is not his agent for any purpose, unless by the terms of the contract authority is given him to act as such. Lane v. Lane Potter Lumber Co., 40 M 541, 551, 107 P 898.

The statute (this section) granting a lien on lumber to one who assisted in manufacturing it from logs creates a new right, and therefore the claimant must show that he is within the class for whose

benefit it was enacted. *Billings v. Mis-soula W. P. Sash Co.*, 88 M 322, 332, 292 P 714.

Id. Held, that one who hauled lumber from a sawmill, the owner of which manufactured it under contract with the owner of the logs, to a railroad spur (some twelve miles distant from the mill), where he delivered it on board cars for shipment to the log owner or piled it in yards, may not be said to have furnished word or

labor in assisting in the manufacture of the lumber within the meaning of this section, and therefore was not entitled to a lien on the lumber on failure of the sawmill owner to pay for the hauling.

References

In re *Stevenson*, 87 M 486, 289 P 566;
Caird Engineering Works v. Seven-Up Gold Mining Co., 111 M 471, 492, 111 P 2d 1267.

45-403. (8320) Lien of landowner. Any person who shall permit another to go upon his timberland and cut thereon sawlogs, piling, railroad ties, cord-wood, or other timber has a lien upon the same for the price agreed to be paid for such privilege, or for the price such privilege would be reasonably worth in case there was no express agreement fixing the price.

History: En. Sec. 3, p. 127, L. 1899; re-en. Sec. 5821, Rev. C. 1907; re-en. Sec. 8320, R. C. M. 1921.

References

Cited or applied as section 5821, Revised

Codes, in *Lane v. Lane Potter Lumber Co.*, 40 M 541, 546, 107 P 898.

Collateral References

Logs and Logging Ⓒ3(13).
54 C.J.S. Logs and Logging § 22.

45-404. (8321) Priority of liens. The liens provided for in this chapter are preferred liens and prior to any other liens, and no sale or transfer of any sawlogs, piling, railroad ties, cord-wood, or other timber or manufactured lumber or shingles shall divest the lien thereon as herein provided, and as between liens provided for in this act those for work and labor shall be preferred; provided, that as between liens for work and labor claimed by several laborers on the same logs or lot of logs, the claims for work and labor done or performed on the identical logs proceeded against to the extent that said logs can be identified shall be preferred as against the general claims of liens for work and labor recognized and provided for in this act.

History: En. Sec. 4, p. 127, L. 1899; re-en. Sec. 5822, Rev. C. 1907; re-en. Sec. 8321, R. C. M. 1921.

Collateral References

Logs and Logging Ⓒ3(13), 30.
54 C.J.S. Logs and Logging §§ 22, 73.
Generally, see 33 Am. Jur. 436, Liens, §§ 33-37.

45-405. (8322) Extent of lien. The person rendering the service or doing the work or labor named in sections 45-401 and 45-402 is only entitled to the liens as provided herein for services, work, or labor for the period of three calendar months, or any part thereof next preceding the filing of the claim, as provided in section 45-408.

History: En. Sec. 5, p. 128, L. 1899; re-en. Sec. 5823, Rev. C. 1907; re-en. Sec. 8322, R. C. M. 1921.

Collateral References

Logs and Logging Ⓒ29.
54 C.J.S. Logs and Logging § 72.

45-406. (8323) Same. The person granting the privilege mentioned in section 45-403 is only entitled to the lien as provided therein for sawlogs, piling, railroad ties, cord-wood, or other timber cut during the three months next preceding the filing of the claim, as herein provided in the next succeeding section.

History: En. Sec. 6, p. 128, L. 1899;
re-en. Sec. 5824, Rev. C. 1907; re-en. Sec.
8323, R. C. M. 1921.

Collateral References

Logs and Logging 3(13).
54 C.J.S. Logs and Logging § 22.

45-407. (8324) Recording claim of lien. Every person, within thirty days after the close of the rendition of the services, or after the close of the work or labor mentioned in the preceding sections, claiming the benefit hereof, must file for record with the county in which such sawlogs, piling, railroad ties, cord-wood, or other timber were cut, or in which such lumber or shingles were manufactured, a claim containing a statement of his demand and the amount thereof, after deducting as nearly as possible all just credits and offsets, with the name of the person by whom he was employed, with a statement of the terms and conditions of his contract, if any, and in case there is no express contract, the claim shall state what such service, work, or labor is reasonably worth; and it shall also contain a description of the property to be charged with a lien sufficient for identification with reasonable certainty, which claim must be verified by the oath of himself or some other person to the effect that the affiant believes the same to be true, which claim shall be substantially in the following form:

....., Claimant, vs.

Notice is hereby given that of county, state of Montana, claims a lien upon a of being about in quantity, which were cut or manufactured in county, state of Montana, are marked thus, and are now lying in a for labor performed upon and assistance rendered in said; that the name of the owner or reputed owner is; that employed said to perform such labor and render such assistance upon the following terms and conditions, to-wit: The said agreed to pay the said for such labor and assistance; that said contract has been faithfully performed and fully complied with on the part of said, who performed labor upon and assisted in said for a period of; that said labor and assistance were so performed and rendered upon said between the day of and the day of, and the rendition of said service was closed on the day of, and thirty days have not elapsed since that time; that the amount of claimant's demand for said services is; that no part thereof has been paid except, and there is now due and remaining unpaid thereon, after deducting all just credits and offsets, the sum of, in which amount he claims a lien upon said; that said also claims a lien on all said now owned by said of said county, to secure payment for the work and labor performed in obtaining or securing the said logs, piling, railroad ties, cord-wood, or other timber, lumber or shingles herein described.

....., Claimant.

State of Montana, }
 County of } ss.

....., being first duly sworn, on oath says that he is named in the foregoing claim, has heard the same read, and knows the contents thereof, and believes the same to be true.

Subscribed and sworn to before me this day of

History: En. Sec. 7, p. 128, L. 1899;
 re-en. Sec. 5825, Rev. C. 1907; re-en. Sec.
 8324, R. C. M. 1921.

Collateral References
 Logs and Logging 28.
 54 C.J.S. Logs and Logging § 70.

45-408. (8325) Same. Every person mentioned in section 45-403 claiming the benefit must file for record with the county clerk of the county in which such sawlogs, piling, railroad ties, cord-wood, or other timber were cut, a claim in substance the same as provided in the next preceding section of this act, and verified as therein provided.

History: En. Sec. 8, p. 129, L. 1899;
 re-en. Sec. 5826, Rev. C. 1907; re-en. Sec.
 8325, R. C. M. 1921.

Collateral References
 Logs and Logging 3(13).
 54 C.J.S. Logs and Logging § 22.

45-409. (8326) Duties of county recorder. The county clerk must file any claim presented under the provisions of this act, indorse thereon the time of receiving the same, and keep the same in his office for the inspection of all persons, and shall enter in a book, properly ruled and kept for such purpose, the names of all the parties, such names to be alphabetically arranged, the amount of the lien, and the time of filing the same.

History: En. Sec. 9, p. 129, L. 1899;
 re-en. Sec. 5827, Rev. C. 1907; re-en. Sec.
 8326, R. C. M. 1921.

45-410. (8327) Duration of lien. No lien provided for in this act binds any sawlogs, piling, railroad ties, cord-wood, or other timber, or lumber and shingles for a longer period than eight calendar months after the claim as herein provided has been filed, unless a civil action be commenced in a proper court, within that time, to enforce the same; provided, however, that in case such civil action so commenced should for any cause, other than the merits, be nonsuited or dismissed, then the lien shall continue for the term of one calendar month, if the said eight months have expired to permit the commencement of another action thereon, which shall be as effective in prolonging the lien as if it had been entered during the term of eight months hereinbefore stated.

History: En. Sec. 10, p. 129, L. 1899;
 re-en. Sec. 5828, Rev. C. 1907; re-en. Sec.
 8327, R. C. M. 1921.

45-411. (8328) Jurisdiction of court and procedure. The liens provided for in this act shall be enforced by a civil action in the district court of the county wherein the lien was filed, and shall be governed by the laws regulating the proceedings in civil actions touching the mode and manner of trial, and the proceedings and laws to secure property, so as to hold it for the satisfaction of any lien that may be against it.

History: En. Sec. 11, p. 130, L. 1899; re-en. Sec. 5829, Rev. C. 1907; re-en. Sec. 8328, R. C. M. 1921.

Operation and Effect

Where plaintiff's complaint in an action to foreclose a loggers' lien, under this section, alleged all the facts necessary to recover for his services performed in sawing the lumber under an express contract, he was properly allowed to waive his lien and proceed against the defendant for a personal judgment for the amount claimed to be due under the contract. *Logan v. Billings & Northern Ry. Co.*, 40 M 467, 470, 107 P 415.

Id. Though plaintiff had in his complaint alleged a common liability of all of defendants joined in the action, whereas the evidence disclosed a contract with only one of them, he was, nevertheless, under sections 93-4702 and 93-4703, entitled to judgment against him who was shown to be liable, though the proof failed as to the others.

References

In re Stevenson, 87 M 486, 289 P 566.

Collateral References

Logs and Logging ~~3~~(13), 33(3).

54 C.J.S. Logs and Logging §§ 22, 78.

45-412. (8329) Same. Any person who shall bring a civil action to enforce the lien provided for, any person having a lien as provided for, or who shall be made a party to any such civil action, has the right to demand that such lien be enforced against the whole or any part of the sawlogs, piling, railroad ties, cord-wood, or other timber or manufactured lumber or shingles upon which he has performed labor, or which he has assisted in securing or obtaining, or which he has cut on his timber land during the three months next preceding the filing of his lien, for all his labor upon or for all his assistance in obtaining or securing said sawlogs, piling, railroad ties, cord-wood, or other timber, or in manufacturing said lumber into shingles during the whole or any part of the three months mentioned in section 45-407, or for timber cut during the whole or any part of the three months above mentioned. And where proceedings are commenced against any lot of sawlogs, piling, railroad ties, cord-wood, or other timber or lumber or shingles, as herein provided, and some of the lienors claim liens against these specific sawlogs, piling, railroad ties, cord-wood, or other timber or lumber or shingles proceeded against, and others against the same generally, to secure their claim for work and labor, the priority of the liens shall be determined as hereinbefore provided.

History: En. Sec. 12, p. 130, L. 1899; re-en. Sec. 5830, Rev. C. 1907; re-en. Sec. 8329, R. C. M. 1921.

45-413. (8330) Immaterial defects in claim. No mistake or error in the statement of the demand, or of the amount of credits and offsets allowed, or of the balance asserted to be due to claimant, nor in the description of the property against which the claim is filed, shall invalidate the lien, unless the court finds that such mistake or error in the statement of the demand credits and offsets, or of the balance due, was made with intent to defraud, or the court shall find that an innocent third party without notice, actual or constructive, has, since the claim was filed, become a bona fide owner of the property subject to the lien, and that the notice of claim was so deficient that it did not put the party upon further inquiry in any manner.

History: En. Sec. 13, p. 130, L. 1899; re-en. Sec. 5831, Rev. C. 1907; re-en. Sec. 8330, R. C. M. 1921.

45-414. (8331) Bona fide purchasers. It shall be conclusively presumed by the court, that a party purchasing the property subject to the lien within

the thirty days given herein to claimants wherein to file their liens, is not an innocent third party, nor that he has become a bona fide owner of the property subject to the lien, unless it shall appear that he has paid full value for the said property, and has seen that the purchase-money of the said property has been applied to the payment of such bona fide claims as are entitled to liens upon the same property under the provisions of this act, according to the priorities herein established.

History: En. Sec. 14, p. 131, L. 1899;
re-en. Sec. 5832, Rev. C. 1907; re-en. Sec.
8331, R. C. M. 1921.

45-415. (8332) Parties. Any number of persons claiming liens under this act may join in the affidavit in section 45-412 provided, and may join in the same action, and when separate actions are commenced, the court may consolidate them. The court shall also allow as parts of the costs the money paid for filing, making, and recording the claim, and a reasonable attorney's fee for each person claiming a lien.

History: En. Sec. 15, p. 131, L. 1899;
re-en. Sec. 5833, Rev. C. 1907; re-en. Sec.
8332, R. C. M. 1921.

45-416. (8333) Judgment and sale. In each civil action judgment must be rendered in favor of each person having a lien for the amount due to him, and the court or judge thereof shall order any property subject to the lien herein provided for to be sold by the sheriff of the proper county in the same manner that personal property is sold on execution, and the court or judge shall apportion the proceeds of such sale to the payment of each judgment, according to the priorities established in this act pro rata in its class, according to the amount of such judgment.

History: En. Sec. 16, p. 131, L. 1899;
re-en. Sec. 5834, Rev. C. 1907; re-en. Sec.
8333, R. C. M. 1921.

Collateral References

Logs and Logging—3(13), 33(11, 12).
54 C.J.S. Logs and Logging §§ 22, 86.

45-417. (8334) Sale of property. The court or judge may order any property subject to a lien as in this act provided to be sold by the sheriff as personal property is sold on execution, either before or at the time judgment is rendered, as provided in the section next preceding, and the proceeds of such sale must be paid into court to be applied as in said section directed.

History: En. Sec. 17, p. 132, L. 1899;
re-en. Sec. 5835, Rev. C. 1907; re-en. Sec.
8334, R. C. M. 1921.

45-418. (8335) Penalty for destroying means of identification of property. Any person who shall eloin, injure, or destroy, or who shall render difficult, uncertain, or impossible of identification any sawlogs, piling, railroad ties, cord-wood, shingles, or other timber upon which there is a lien as herein provided, without the express consent of the person entitled to such lien, shall be liable to a lienholder for the damages to the amount secured by his lien, and it being shown to the court in a civil action to enforce said lien, it shall be the duty of the court to enter a personal judgment for the amount in such action against the said person, provided he be a party to such action or the damages may be recovered by a civil action against such person.

History: En. Sec. 18, p. 132, L. 1899; re-en. Sec. 5836, Rev. C. 1907; re-en. Sec. 8335, R. C. M. 1921. Codes, in Lane v. Lane Potter Lumber Co., 40 M 541, 546, 107 P 898.

References

Cited or applied as section 5836, Revised

Collateral References

Logs and Logging—3(13), 36.
54 C.J.S. Logs and Logging §§ 22, 89.

45-419. (8336) Lien for driving logs. Any person who shall desire to float to market or place of manufacture any logs or timber in any of the streams of this state, and who shall be hindered or obstructed in so doing by the logs or timber of another, or any person whose logs or timber in any of the waters of this state are so intermixed with the logs or timber of another that the same cannot be conveniently separated for the purpose of being floated to the market or place of manufacture, may drive all logs or timber with which his own are or may be obstructed or intermixed toward such market or place of manufacture, to some point where the same can be conveniently separated from his own, and shall be entitled to a reasonable compensation therefor from the owner of such logs or timber; and upon the filing in the office of the county clerk and recorder of the county where such logs may be, within thirty days after the completion of such driving of any such logs or timber, a statement setting forth when and where the same were driven, the amount of his claim therefor, and verified by his oath or affidavit, such person shall have and retain a lien upon such logs or timber for the amount of such claim from the time of filing the same, and may have and maintain a civil action for the amount of such claim, or for the enforcement of such lien, against the owner of such logs or timber; provided, that a failure to commence such action within sixty days after the filing of such claim shall operate as a discharge of said lien.

History: En. Sec. 3946, Civ. C. 1895; re-en. Sec. 5816, Rev. C. 1907; re-en. Sec. 8336, R. C. M. 1921.

Collateral References

34 Am. Jur. 558, Logs and Timber, §§ 101-111.

45-420. (8337) Foreclosure. A lien upon any logs or timber, as provided in the preceding section, may be foreclosed in the district court of the county in which the same is filed, and the decree for the enforcement thereof shall provide for the sale of said logs or timber, or so much thereof as may be necessary to satisfy said lien and costs, and the said sale shall be conducted by the sheriff in the manner provided by law for the sale of personal property under execution.

History: En. Sec. 3947, Civ. C. 1895; re-en. Sec. 5817, Rev. C. 1907; re-en. Sec. 8337, R. C. M. 1921.

Collateral References

Logs and Logging—33.
54 C.J.S. Logs and Logging § 77.

Cross-Reference

Attorney's fees on foreclosure, sec. 93-8614.

45-421. (8338) Release from lien. Any person, upon whose logs or timber any lien is filed or claimed, under the provisions of the foregoing sections, may release such logs or timber from such lien and regain and take possession thereof by furnishing and undertaking in double the amount of the claim, executed by two sufficient sureties, to be approved by the clerk and recorder in whose office the lien is filed, and conditioned that such person do pay all damages and costs that may be awarded against him in any

action to foreclose such lien or enforce such claim. Such undertaking shall be filed in the office of the clerk and recorder in whose office the lien is filed, and such clerk and recorder shall thereupon give to the person filing the same a certificate stating that such undertaking has been filed and approved.

History: En. Sec. 3948, Civ. C. 1895;
re-en. Sec. 5818, Rev. C. 1907; re-en. Sec.
8338, R. C. M. 1921.

CHAPTER 5

MECHANICS' LIENS

- Section 45-501. Who entitled to lien.
45-502. How lien perfected.
45-503. Duty of county clerk.
45-504. What property affected.
45-505. Leasehold interest—how affected.
45-506. Priority of lien over mortgage or other liens.
45-507. Practice provisions applicable.
45-508. Same relative to new trials.
45-509. All persons interested may be made parties.
45-510. Limitation of actions.
45-511. Who deemed owners.
45-512. Satisfaction of lien.

45-501. (8339) Who entitled to lien. Every mechanic, miner, machinist, architect, foreman, engineer, builder, lumberman, artisan, workman, laborer, and any other person, performing any work and labor upon, or furnishing any material, machinery or fixture for, any building, structure, bridge, flume, canal, ditch, aqueduct, mining claim, coal mine, quartz lode, tunnel, city or town lot, farm, ranch, fence, railroad, telegraph, telephone, electric light, gas, or water works or plant, or any improvements, upon complying with the provisions of this chapter, for his work or labor done, or material, machinery or fixtures furnished, has a lien upon the property upon which the work or labor is done or material is furnished.

History: En. Sec. 1, p. 332, Bannack Stat.; amd. Sec. 1, p. 509, Cod. Stat. 1871; re-en. Sec. 820, 5th Div. Rev. Stat. 1879; amd. Sec. 1370, 5th Div. Comp. Stat. 1887; amd. Sec. 2130, C. Civ. Proc. 1895; re-en. Sec. 7290, Rev. C. 1907; re-en. Sec. 8339, R. C. M. 1921; amd. Sec. 1, Ch. 23, L. 1925. Cal. C. Civ. Proc. Sec. 1183.

NOTE.—Some of the opinions on the cases annotated below this section do not cite this section nor any particular section of the Montana Codes, but relate to the subject of mechanics' liens and appear here under the first section for convenience.

Abandoned Improvements — Frequent Changes in Plans

The abandonment of an improvement before its completion without fault of the contractor does not abrogate the right of the latter, laborers and materialmen to liens for the value of the work done and

the materials furnished; in such case the improvement is deemed completed, so far as the rights of the lienors are concerned; where the owner frequently makes changes in the plans, causing delay and necessitating additional work, materials and expense and permits the contractor to continue after expiration of the time fixed for completion, he waives the original date as if the extended time had been originally fixed in the contract. *Smith v. Gunniss*, 115 M 362, 377, 144 P 2d 186.

"Architectural Services," Sampling Ore, etc.

"Architectural services," rendered by a foreign engineering company, consisting of technical work in the sampling of ore, metallurgical tests, preparation of mining plant specifications, making blue prints, etc., used in the construction of a quartz mill as well as supervising its construction, and an item for placing orders for machinery to enable the mining company

to obtain wholesale prices thereon, held lienable. *Caird Engineering Works v. Seven-up Gold Mining Co., Inc.*, 111 M 471, 489, 111 P 2d 1267.

Assignment to Trustee for Collection

Various laborers filed lien claims for wages due them from a mining company, and the money to pay their claims was furnished by certain persons, whereupon the laborers assigned their claims and liens to one of such persons as trustee. Held, that the trustee had the right to enforce the lien held by him for the benefit of those who paid off the laborers' claims. *Caird Engineering Works v. Seven-up Gold Mining Co., Inc.*, 111 M 471, 503, 111 P 2d 1267.

Burden of Proof and Essential Prerequisites of Proof

The burden is on a lien claimant to establish his lien, and to support this burden he must show not only that he furnished the materials, but also that they were used for the enhancement of the property to which he claims he has a right to resort as security for the debt thus created. In the absence of this showing, his equity does not arise. *Missoula Mercantile Co. v. O'Donnell*, 24 M 65, 72, 60 P 594, 991; *Rogers-Templeton Lumber Co. v. Welch*, 56 M 321, 328, 184 P 838.

Claimant Not Barred by Right to Agister's Lien

The fact that an engineering company furnishing tools, machinery and labor in repairing them could have asserted an agister's lien under section 45-1106, did not deprive it of the right to assert a mechanic's lien, any more so than does the surrender of the right to a vendor's lien under section 45-1104, deprive the seller of the right to assert a materialman's lien. *Caird Engineering Works v. Seven-up Gold Mining Co., Inc.*, 111 M 471, 489, 111 P 2d 1267.

Enhancement of Mining Claim Unnecessary to Entitle One to Labor Lien

Where a mechanic's lien is for labor performed on a mining claim, as distinguished from that performed on a building or structure, there need be no enhancement of the property in order to entitle claimant to a lien. *Caird Engineering Works v. Seven-up Gold Mining Co., Inc.*, 111 M 471, 502, 111 P 2d 1267.

Extent of Lien

The lien given by this section attaches primarily to the structure in the erection of which the labor or materials were used, and extends only incidentally to the land upon which it is situated. *Stritzel-Spa-*

berg Lumber Co. v. Edwards, 50 M 49, 52, 144 P 722.

Failure of Contractor to Pay Laborers and Materialmen—Owner Liable Direct to Claimants

The fact that a plaintiff building contractor did not pay claims of certain materialmen furnishing labor and materials in the remodeling of a residence could not result in relieving the owner of liability under the contract; the contractor having made no claim for the items furnished in his lien foreclosure action, the owner was liable direct to such claimants and no prejudice resulted to the owner from the contractor's failure to pay the claims. Had plaintiff paid them, then he would simply have added the amounts of such payments to his own claim and lien plus ten per cent. for plaintiff's services and supervision. *Smith v. Gunniss*, 115 M 362, 382, 144 P 2d 186.

"Fixtures"

Machines, motors and other electrical equipment placed upon movable platform were not fixtures so as to make them lienable. *Cascade Elec. Co. v. Associated Creditors, Inc.*, 124 M 370, 224 P 2d 146, 150.

Inclusion of Articles Not Used in Building

The fact that a notice or claim of lien may include some items which are lienable and others which are not, or the fact that the claim was made for a larger amount than the claimant shows himself entitled to, will not vitiate or destroy the lien for the amount actually due the claimant, in the absence of a fraudulent intent; inclusion of materials in a contractor's lien claim not used in the dwelling remodeled, held, not to prejudice the owner where the judgment of the court provided for a proper reduction for such items. *Smith v. Gunniss*, 115 M 362, 380, 383, 144 P 2d 186.

Independent Contractor May Claim Mechanic's Lien

An independent contractor may, under this section, claim a mechanic's lien, whether he hires servants to do the actual work or not. *Caird Engineering Works v. Seven-up Gold Mining Co., Inc.*, 111 M 471, 497, 111 P 2d 1267.

Lien Cannot be Denied Because it Would Necessitate Removal of Building

The lien on a building cannot be denied because of the fact that some injury may result to the realty from the removal of the building. The statute contemplates removal, whether injury does or does not

result. *Stritzel-Spaberg Lumber Co. v. Edwards*, 50 M 49, 55, 144 P 722.

Lien for Furnishing Tools and Machinery or Labor Thereon Extends to Entire Unit

By virtue of section 67-210, mining tools and machinery are deemed affixed to the mine, hence in effect they constitute "machinery or fixtures for" mining claims under this section, entitling one who furnishes the same or performs labor thereon to a lien, which extends to all improvements and structures operated as a unit in the common enterprise. *Caird Engineering Works v. Seven-up Gold Mining Co., Inc.*, 111 M 471, 489, 111 P 2d 1267.

Material Entering Into the Construction

A cover for a stovepipe flue, opening into the chimney from the interior of a building, and removable when such flue was to be used, was not material entering into the construction of the building, nor a fixture, and such building was not subject to a lien therefor. *Missoula Mercantile Co. v. O'Donnell*, 24 M 65, 71, 60 P 594, 991.

Materialman Not Bound by Contractor's Agreement, Nor to Deal Directly With Owner

The right to a materialman's lien may not be taken away by implication, and the materialman's knowledge that the contractor agreed in writing to turn the building over free from encumbrances does not affect his right to a lien on the ground that he waived it, where he did not assent to be bound by such contract; and where he did not deal directly with the owner, but dealt with her sons as lessees and she gave her consent and ratified what was done by making a substantial payment, he was entitled to a lien to secure the balance. *Morin Lumber Co. v. Person*, 110 M 114, 116, 99 P 2d 206.

Nature of Act

Though the mechanics' lien law is remedial in character, its requirements must be complied with. *Black v. Appolonio*, 1 M 342, 346; *Richards v. Lewisohn Bros.*, 19 M 128, 133, 47 P 645; *Missoula Mercantile Co. v. O'Donnell*, 24 M 65, 79, 60 P 594, 991; *Cook v. Gallatin Railroad Co.*, 28 M 340, 356, 73 P 131.

The manner of perfecting a mechanics' lien consists of various steps, which are purely statutory, and, while the statute is in some respects remedial in its nature, and thus far should be construed liberally, it creates a new right, and the statutory proceedings by which this new right is perfected and enforced must be strictly followed. *McGlauffin v. Wormser*, 28 M

177, 181, 72 P 428; *Western Iron Works v. Montana P. & P. Co.*, 30 M 550, 558, 77 P 413; *Neuman v. Grant*, 36 M 77, 81, 92 P 43; *Lane v. Lane Potter Lumber Co., Ltd.*, 40 M 541, 547, 107 P 898; *Mills v. Olsen*, 43 M 129, 133, 115 P 33; *Ivanhoff v. Teale*, 47 M 115, 118, 130 P 972; *Crane & Ordway Co. v. Baatz*, 53 M 438, 444, 164 P 533.

The fountain-head of all mechanics' liens in this state is this section; by it mining claims and railroads are, as possible subjects for such liens, in pari materia. *Dean v. Stewart*, 49 M 506, 515, 143 P 966.

Insofar as the granting of a materialman's or mechanic's lien is concerned, the statute is remedial in character and must be liberally construed. *Rogers-Templeton Lumber Co. v. Welch*, 56 M 321, 329, 184 P 838.

Necessary Parties to Action

In a proceeding to foreclose a mechanic's lien instituted by an oil well driller under this section and section 45-1001, asserted against a leasehold interest, neither the lessor nor, in the case of an assigned lease, the assignor, is a necessary party. *Sunburst Oil & Refining Co. v. Callendar*, 84 M 178, 188, 274 P 834.

Non-Lienable Articles

Illuminating oil, mica grease, lubricating oil, and gasoline for fuel used in a mining plant did not enhance the value nor become a part of the machinery, and hence were not lienable within this section. *A. M. Holter Hardware Co. v. Ontario Min. Co.*, 24 M 198, 200, 61 P 8.

Operation in General

A subcontractor has a direct lien for the reasonable value of his labor and materials. *Merrigan v. English*, 9 M 113, 122, 22 P 454. See also *Wortman v. Kleinschmidt*, 12 M 316, 345, 30 P 280; *Duignan v. Montana Club*, 16 M 189, 190, 40 P 294; *Eccleston v. Hetting*, 17 M 88, 89, 42 P 105.

The history of the mechanics' lien law is given in detail in *Merrigan v. English*, 9 M 113, 22 P 454. *Lane v. Lane Potter Lumber Co.*, 40 M 541, 551, 107 P 898.

The mechanics' lien statute is materially different from that concerning loggers' liens, and cases upon the former are inapplicable to the latter. *Lane v. Lane Potter Lumber Co.*, 40 M 541, 550, 107 P 898.

One who does work or labor upon, or furnishes material for, a mining claim is entitled to a mechanics' lien thereon on the claim. *McIntyre v. MacGinnis*, 41 M 87, 95, 108 P 353.

"Person" Includes Corporation

A corporation is considered a "person"

within the meaning of the mechanic's and materialmen's lien law, and as such may claim a lien under this section. *Caird Engineering Works v. Seven-up Gold Mining Co., Inc.*, 111 M 471, 496, 111 P 2d 1267.

Prior Understanding Not Required to File Lien

Contention that in order for a lien to attach there must have been an understanding between a materialman and the purchaser of materials that they were being furnished upon the credit of the particular building or the lien claimant will be held to have relied upon the credit of the buyer, may not be sustained. *Caird Engineering Works v. Seven-up Gold Mining Co., Inc.*, 111 M 471, 488, 111 P 2d 1267.

"Structures"

Held, under the rule of *noscitur a sociis*, that a threshing-machine is not a "structure" within the meaning of this section, providing for mechanics' and materialmen's liens on any "building, structure, flume," etc., but that a structure to be lienable must, at the time labor is performed upon or materials are used in connection with its creation, improvement or repair upon it, be attached to land. *Barnes v. Montana Lumber etc. Co.*, 67 M 481, 485 et seq., 216 P 335.

A platform without foundation, walls or roof except for a wall on one side to serve as an instrument panel and so constructed so that it could be moved if the location did not prove satisfactory was not a structure within the meaning of this section. *Cascade Elec. Co. v. Associated Creditors, Inc.*, 124 M 370, 224 P 2d 146, 149.

To Render the Owner of Realty Liable the Lien Must Rest Upon a Contract Debt

To render the owner of realty liable to a materialmen's lien, the lien must rest upon a contract debt incurred either directly or indirectly, unless he chooses to ratify what was done or in some manner estops himself from questioning the lien; the mere fact that the material furnished enhances the value of the property being insufficient to establish liability. *Dewey Lumber Co. v. McQuirk et al.*, 96 M 294, 298, 30 P 2d 475.

What Creates Lien—Type of Contract Immaterial

The right of a mechanic or materialman to a lien on property upon which he has supplied work, labor or materials is not dependent upon whether the construction contract with the owner is written, oral, express or implied; it is not the contract which creates the lien under this section, but the use of the materials furnished and

the work and labor expended that give rise to the lien. *Smith v. Gunniss*, 115 M 362, 376, 144 P 2d 186.

When Trucker Entitled to Lien, and When Not

A trucker who hauled lumber and other materials for use in the erection of a building on a mining claim is entitled to a lien for the costs of delivery thereof, but not for hauling groceries and other supplies which are consumed in mining operations, nor for the hauling of concentrates to a smelter. The fact that hauling building materials gives him a carrier's lien under section 8-609, and an agister's lien under section 45-1106, does not bar him from asserting a lien under the mechanic's lien law. *Caird Engineering Works v. Seven-up Gold Mining Co., Inc.*, 111 M 471, 491, 494, 111 P 2d 1267.

References

Cited or applied as section 2130, Code of Civil Procedure, in *A. M. Holter Hardware Co. v. Ontario Min. Co.*, 24 M 198, 200, 61 P 8; *Bouchers v. Powers*, 29 M 342, 344, 74 P 942; *Western Iron Works v. Montana P. & P. Co.*, 30 M 550, 556, 77 P 413; as section 7290, Revised Codes, in *Deschamps v. Loisel*, 50 M 565, 573, 148 P 335; *Gary Hay & Grain Co., Inc. v. Carlson*, 79 M 111, 132, 255 P 722; *Continental Supply Co. v. White et al.*, 92 M 254, 263, 12 P 2d 569; *Arnold et al. v. Genzberger et al.*, 96 M 358, 364, 31 P 2d 396.

Collateral References

Mechanics' Liens—1.
57 C.J.S. *Mechanics' Liens* §§ 20, 86.
36 Am. Jur. 44, *Mechanics' Liens*, §§ 48 et seq.

Enforceability of a mechanic's lien against the property of a married woman for work performed or materials furnished under a contract made with her husband. 4 ALR 1025.

Validity and effect of provision in contract against mechanic's lien. 13 ALR 1065.

Priority as between lien for repairs and right of seller under conditional contract. 20 ALR 249; 30 ALR 1227 and 104 ALR 267.

Freight charges on material as within mechanic's lien statute giving lien for labor or materials, or within contractor's bonds securing such claim. 30 ALR 466.

Right of conditional seller of chattels attached to realty to claim lien on the realty. 58 ALR 1121.

Mechanics' liens for services of persons supervising construction of building, architects, etc. 60 ALR 1257.

What amounts to waiver of right to mechanic's lien. 65 ALR 282.

Provisions of statutes or bonds to secure payment for work or labor as including use of laborer's own team, automobile, or other equipment. 71 ALR 1136.

Right of one who pays or advances money, or assumes obligation to pay laborer or materialman, to mechanic's lien or priority. 74 ALR 522.

Time when contractor commenced work or time when labor or materials for which lien is claimed was furnished as date of mechanic's lien. 83 ALR 925.

Construction, application, and effect of

provision of mechanic's lien statute as to quantity or area of land around improvements which may be subjected to the lien. 84 ALR 123.

Rights and remedies under liens statute of one performing work only part of which is of a lienable character. 149 ALR 682.

Formal requisites of notice of intention to claim mechanic's lien. 158 ALR 682.

Right to mechanic's lien as for "labor" or "work," in case of preparatory or fabricating work done on materials intended for use and used in particular building or structure. 25 ALR 2d 1370.

45-502. (8340) How lien perfected. Every person wishing to avail himself of the benefits of this chapter must file with the county clerk of the county in which the property or premises mentioned in the preceding section is situated, and within ninety days after the material or machinery aforesaid has been furnished, or the work or labor performed, a just and true account of the amount due him, after allowing all credits, and containing a correct description of the property to be charged with such lien, verified by affidavit, but any error or mistake in the account or description does not affect the validity of the lien, if the property can be identified by the description; which paper containing the account, description, and affidavit is deemed the lien, and when there is an open account between the parties for labor, material, or machinery, such lien may be filed within ninety days after the date of the last item in such account, and include all items and charges contained therein, for material or machinery furnished for, or work performed on, the property on which the lien is claimed.

History: Ap. p. Sec. 6, p. 333, Bannack Stat.; amd. Sec. 6, p. 510, Cod. Stat. 1871; amd. Sec. 1, p. 84, L. 1874; re-en. Sec. 825, 5th Div. Rev. Stat. 1879; amd. Sec. 1371, 5th Div. Comp. Stat. 1887; amd. Sec. 1, p. 71, Ex. L. 1887; amd. Sec. 2131, C. Civ. Proc. 1895; en. Sec. 1, p. 162, L. 1901; re-en. Sec. 7291, Rev. C. 1907; re-en. Sec. 8340, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1187.

Actions—Real Party in Interest Rule

Where a materialman, by cross-complaint in a mortgage foreclosure suit, asked for foreclosure of a lien on a dwelling included in the mortgage, and evidence showed the materials were furnished by a co-partnership; as against the contention that the action should have been brought by his surviving partner under section 91-3205, defendant having died since commencement of the action and his administrator substituted, held, that the real party in interest rule does not apply in such proceeding where nobody but lienor could claim under the lien, the reason for the rule being to protect an adversary from another suit on the same cause by a different party. Federal Land Bank of Spokane v. Green, 108 M 56, 90 P 2d 489.

Claimant Entitled to Interest

A materialman, who secured judgment for the enforcement of his lien, was entitled to interest under section 17-204, on the entire amount thereof notwithstanding he had overstated the amount, where the correct amount was readily ascertainable by consulting the owner, and there was no offer of payment so as to stop the running of interest under sections 58-423 and 58-427. Federal Land Bank of Spokane v. Green, 108 M 56, 66, 90 P 2d 489.

Complaint

In suit on mechanic's lien in which a copy of the verified claim of lien was made part of the complaint, it was not necessary that the claim contain an itemized statement of the materials or labor furnished and if defendant desired such a statement he could request it under section 93-3804. Cole v. Hunt, 123 M 256, 211 P 2d 417, 419.

Description of Property

A notice of lien which describes the property as lot 14 in a certain block and city plat cannot sustain a lien for materials used in the erection of a building on lot 13, as such description, being neither uncertain, defective, or ambiguous,

cannot be aided or explained by oral evidence, and is therefore not within a statute providing that any error or mistake in the description shall not affect the validity of the lien, provided the property may be identified by such description. *Goodrich Lumber Co. v. Davie*, 13 M 76, 82, 32 P 282.

The "property" to be identified is the building or improvement on which the lien is given, and hence a specific description of the "land" is not required. *Western Iron Works v. Montana P. & P. Co.*, 30 M 550, 556, 77 P 413. See also *Stritzel-Spaberg Lumber Co. v. Edwards*, 50 M 49, 54, 144 P 722.

A notice of lien for clearing land must contain such a description of the land sought to be charged that it can be identified; if it is impossible to identify the land from such notice, the lien is invalid. *Ivanhoff v. Teale*, 47 M 115, 118, 130 P 972.

The notice of lien for material and labor furnished in the construction of a railway roadbed is sufficient, notwithstanding errors of description therein, if the property can be identified by the description given. *Dean v. Stewart*, 49 M 506, 514, 143 P 966.

Id. Where, from a notice of lien for materials and labor furnished in the construction of a railway roadbed, it could be ascertained that the property sought to be charged with a lien was a particular portion of the roadbed in a certain county belonging to the therein named railway company, and located "on miles 46 and 47 of the survey" of said railway company, near a given place, the notice was sufficiently specific to meet the requirements of this section.

The purpose of requiring the lien to be filed and an abstract thereof made of record is to impart notice to the owner and to subsequent purchasers or lienholders; and in order that the purpose may be served, it is necessary that the description in the lien be sufficient to apprise interested parties just what property is sought to be charged, although there may be error or mistake in the description of the property, if the property can be identified by the description given. *Johnson v. Erickson*, 56 M 550, 554, 185 P 1116.

Id. Where property was described in a mechanics' lien as "that certain frame store building erected upon lot 23, block 8, in the L. E. Newton second addition to the town of Fairview," there being more than one L. E. Newton second addition, the description is insufficient, and the lien invalid.

The validity of a mechanics' lien must be tested by the description contained in it, and it is only in case of ambiguity that it may be explained and the property

identified by oral evidence. *Interstate Lumber Co. v. Magill-Nevin Plumbing & Heating Co.*, 57 M 334, 188 P 144.

Where title to the land on which a building was constructed with material furnished by plaintiff is not in the lienee, the lien extends to the building only, and in such a case any error or mistake in the description of the land in the notice of the lien does not affect the validity of the lien if the "property," i. e., the building, can be identified. See case as to what is a sufficient description. *Midland C. & L. Co. v. Ferguson et al.*, 61 M 402, 405, 202 P 389.

Courts are reluctant to set aside mechanics' liens merely because of a loose description of the property, and the general rule is that if there be a substantial compliance with the statutory provisions and there appears enough in the description to enable one familiar with the locality to identify the property upon which the lien is claimed, it is sufficient, and under that rule, held, that a lien filed by an oil-well driller in pursuance of section 45-1001, as amended by chapter 152, Laws of 1923, and this section, was sufficient. *Callender v. Crossfield Oil Syndicate*, 84 M 263, 268, 275 P 273.

Contention that the complaint in an action to foreclose an oil-well materialmen's lien under chapter 152, Laws of 1923 (45-1001 and 45-1003), as well as the notice of lien, were insufficient as to description of the property and of the owner of it, held of no merit, this section made applicable by the chapter, requiring no more than a description by which the property may be identified and making no provision for a description of the owner. *Continental Supply Co. v. White et al.*, 92 M 254, 261, 12 P 2d 569.

Where a lien recited that materialman furnished lumber and building material "for that certain frame building erected upon the certain lot, piece or parcel of land hereinafter described," then gave the legal subdivisions, made the list of materials a part of the lien, the list containing items not usable in a dwelling but also a kitchen cabinet, oak flooring, varnish, etc. suitable only for the dwelling, as against the contention that it insufficiently described the dwelling on which the lien was claimed because there were other frame buildings on the land, held, that the validity of the lien was not affected, because one familiar with the land could point out the building. *Federal Land Bank of Spokane v. Green*, 108 M 56, 62, 90 P 2d 489.

Where a mechanic's lien was claimed on only one quartz mill on a certain claim and on a three-room house on another claim, and there were two other mills and

two other three-room houses in the mining district, a description of the particular mill and house, held sufficient where persons familiar with the locality could point out the particular structures as corresponding with the description, aided by testimony of the age and dilapidated condition of the other buildings, and where the items that went into the mill in question were traced into the proper mill. *Caird Engineering Works v. Seven-up Gold Mining Co., Inc.*, 111 M 471, 479, 481, 111 P 2d 1267.

Id. Where a lien claimant described the property covered as certain mines, buildings, quartz mill, etc., on named claims without describing the structures themselves, the lien must be confined to the property situated upon the claims named and cannot be held to embrace, for instance, a mill located on a claim not named.

Where only construction on land was a platform without walls or roof except for a wall on one side to serve as an instrument panel, notice of lien which stated that it was for work in electrical wiring of "certain Fish Meal Plant building" was defective since there was no building on the land. *Cascade Elec. Co. v. Associated Creditors, Inc.*, 124 M 370, 224 P 2d 146, 149.

Effect of Failure to File Lien Within Ninety Days After Material is Furnished

In an action to foreclose a materialmen's lien on a grain elevator for machinery furnished for its equipment, evidence held to show that there was a completed sale of it more than ninety days prior to the day on which the claim of lien was filed, and that the contention of plaintiff that it was the intention of the parties that title should not pass until it had been shown that the machinery operated successfully after a thirty days' trial cannot be sustained. *Richardson G. S. Co. v. Valier Elevator Co.*, 67 M 227, 232 et seq., 215 P 237.

Effect of Overstatement of Amount

Under this section, providing that one claiming a mechanics' lien must file a just and true account of the amount due him, but adding that "any error or mistake in the account" does not affect the lien, held, that in the absence of fraud alleged and proved, the bare overstatement of the amount due lienor in the lien filed (the total amount claimed having been \$2,111, whereas on the trial to foreclose the lien plaintiff conceded that but \$1,444 was due) did not, in view of the facts, invalidate the lien. *Eskestrand v. Wunder*, 94 M 57, 63, 20 P 2d 622.

Name of Debtor

Notice of lien which named as the

debtor the "Montana Fish Meal Company" when the debtor was actually the "Montana Fish Meal and Oil Corporation" was defective. *Cascade Elec. Co. v. Associated Creditors, Inc.*, 124 M 370, 224 P 2d 146, 149.

Name of Owner Sought to Be Charged

A notice of a mechanics' lien claim which instead of setting forth the name of the owner of the property sought to be charged, stated that the lienor was the owner, was fatally defective. *Interstate Lumber Co. v. Magill-Nevin Plumbing & Heating Co.*, 57 M 334, 188 P 144.

One Contract for Erection of Buildings Operated as One Unit

Where materials were furnished and labor performed under one contract for the erection of several buildings, one lien may attach to all buildings where the entire property was operated as a unit and for a common purpose, regardless of the fact that none of the materials or labor may have gone into some of the structures, and it is not necessary that the lands on which the buildings were erected be contiguous. *Caird Engineering Works v. Seven-up Gold Mining Co., Inc.*, 111 M 471, 487, 111 P 2d 1267.

Property of Reservoir Company Rendering Public Service Not Subject to Lien

Where ownership of 804 out of 1000 shares of stock of reservoir corporation was in irrigation district so that government of corporation was virtually transferred to irrigation district organized under Montana laws, and corporation furnished all water used by landowners of district, service performed by corporation through the district to landholders was a "public service" and amounted to "dedication" of necessary facilities used to supply such service as a public use, and facilities were not liable to lien of construction company employed by corporation to enlarge the reservoir, and property of reservoir company was not subject to execution. *Ackroyd v. Winston Bros. Co.*, 113 F 2d 657, 659 (reversing 27 F Supp 503).

Purpose to Notify Subsequent Purchasers and Encumbrancers

The purpose of the statutory requirement relating to a description of the property covered by a lien is to notify all parties dealing therewith, i. e. subsequent purchasers or encumbrancers, that a lien is claimed upon it; hence where there were no subsequent purchasers or encumbrancers who could have been misled by an alleged defective description, that fact may be taken into consideration in determining its sufficiency. *Caird Engineering*

Works v. Seven-up Gold Mining Co., Inc., 111 M 471, 480, 111 P 2d 1267.

The requirements of this section and section 45-503 are merely to impart notice to the owner and to subsequent purchasers or lien-holders that the lien attaches to a certain described piece of property. *Cole v. Hunt*, 123 M 256, 211 P 2d 417, 419.

Question of Continuous Open Account One of Fact

The intent of the legislature in enacting this section was to provide for the filing of a lien, wherever there is an open account, within 90 days after the date of the last item furnished, and under it the question whether there was a continuous open account is one of fact for the court to determine, and its finding if supported by the evidence, must stand. *Caird Engineering Works v. Seven-up Gold Mining Co., Inc.*, 111 M 471, 486, 111 P 2d 1267.

Separation of Items Not Lienable Where Possible

That a part of items claimed under a mechanic's or materialman's lien may not be lienable is no reason for condemning the lien as a whole, where it is possible to make a separation of what is and what is not lienable. *Caird Engineering Works v. Seven-up Gold Mining Co., Inc.*, 111 M 471, 493, 111 P 2d 1267.

Sufficiency of Statement as to Work Done and Amount

One desiring to file a mechanics' lien need not classify the character of work done, or set out the items of it in the account filed with the notice; all that is required is an honest statement from which it may be understood what amount is claimed. *Black v. Appolonio*, 1 M 342, 346; *Smith v. Sherman Min. Co.*, 12 M 524, 528, 31 P 72; *McIntyre v. MacGinnis*, 41 M 87, 98, 108 P 353.

A mechanics' lien statement which shows the dates when the work was commenced and completed, the total number of days' work performed, and the amount due therefor, is a sufficient account under a statute providing that there shall be filed by the party claiming a lien "a just and true account of the amount due or owing after allowing all credits," without stating the items of which the account consists, or the nature of the work. *Smith v. Sherman Min. Co.*, 12 M 524, 527; 31 P 72.

A verified account attached to a mechanics' lien statement, reciting certain items of charges, including labor and material, for excavating a cistern, constituted a substantial compliance with this section. *Neuman v. Grant*, 36 M 77, 81, 92 P 43.

Though a claimant's notice of lien fails to state under oath that it contains "a just and true account of the amount due him after allowing all credits," it is sufficient where it sets forth the contract between the parties, the amount of work done, and the materials furnished, in considerable detail; where it gives the total amount of credits or moneys paid thereon, and states the balance claimed to be due; where it states "that items are correct"; where it is signed by the claimant, and where it bears a jurat, reciting that it was subscribed and sworn to before a designated notary public. *Mills v. Olsen*, 43 M 129, 133, 115 P 33.

A mechanics' lien was not void merely because the paper was in form an affidavit, with an itemized statement attached, instead of consisting of a statement of the account and a description of the property, followed by an affidavit. The method pursued was in substantial compliance with the requirements of this section, and therefore sufficient. *Wertz v. Lamb*, 43 M 477, 482, 117 P 89.

It is not necessary that the particular items of the account be set out in the paper constituting the lien. *Cole v. Hunt*, 123 M 256, 211 P 2d 417, 419.

Verification

A verification, attached to a mechanics' lien and executed by the president of a corporation in its behalf, stating "that the matters and things therein stated are true, to the best of his knowledge, information, and belief," is not an affidavit and insufficient for the purpose intended. *Western Plumbing Co. v. Fried*, 33 M 7, 9, 81 P 394.

A writing attached to an intended mechanics' lien, which contained no jurat or other evidence to show that the claimant made oath before a person authorized to administer oaths, and which did not assume to verify either the description of the property affected or the account, did not constitute such an affidavit as is required by this section. *Crane & Ordway Co. v. Baatz*, 53 M 438, 444, 164 P 533.

Id. The affidavit to the notice of a mechanics' or materialmen's lien claim is essential, and must go to both the account and the description; both the account and the description must be verified as the statute requires; otherwise, the affidavit is insufficient; a mere acknowledgment of the execution of the notice is not an affidavit.

Id. No set form or order is required for the component parts of a mechanics' lien, so long as they all appear; but it must be observed that the "account" mentioned in the statute does not include the description, and both are separate and distinct matters from the affidavit, which must verify each one of them.

Where the statements in an affidavit made under this section are in full accord with its requirements, and evince a faithful adherence to all its commands, it is sufficient, though obviously made on information and belief by the assistant secretary of the plaintiff corporation. *Rogers-Templeton Lumber Co. v. Welch*, 56 M 321, 324, 184 P 838.

The requirement of this section, that a mechanics' lien must be verified as a "just and true account of the amount due, after allowing all credits," etc., held to have been met by a certification that the notice of lien and statement of account was true; that the statement contained a full and true amount due the lienor, etc., after allowing all credits and offsets, signed by one of two partners and sworn to before a notary public. *Leigland v. Rundle L. & A. Co.*, 64 M 154, 208 P 1075.

Held, that a verification to a mechanics' lien to the effect that affiant, after deposing directly and positively that he had read the claim for lien and knew its contents, that the matters and things therein stated were true "as he verily believes," was a sufficient compliance with the provisions of this section, and not void as having been made on information and belief. *Gregg v. Sigurdson et al.*, 67 M 272, 275, 215 P 663.

Id. Where the sufficiency of the affidavit attached to a mechanics' lien is questioned, one of the tests is whether perjury is assignable upon it; if so, it is sufficient.

What Must Be Shown to Foreclose Lien

In an action to enforce a mechanics' lien, allegations showing compliance with sections similar in substance to the above are jurisdictional, and when denied must be proven as alleged, in order to authorize decree of foreclosure. *McGlauffin v. Wormser*, 28 M 177, 181, 72 P 428.

Under the rule that it is sufficient if the statute giving the right to a mechanics' lien be complied with substantially by the lien claimant, a notice of lien which stated that a certain sum was due the lienor "after allowing just credits and offsets," instead of using the words of the statute, "after allowing all credits," is sufficient. *Wertz v. Lamb*, 43 M 477, 481, 117 P 89.

Id. In an action to foreclose a mechanics' lien, the plaintiff must allege and prove that he has complied with the requirements of this section; but, if the lien is sufficient, a reference to it in the complaint to which it is attached is likewise sufficient for the purpose of showing compliance with the statutory provisions.

In an action to foreclose a materialmen's lien, the plaintiff must prove, not only that the materials were furnished, but also that they were used in the construction

of the building sought to be charged. *Pittsburgh P. G. Co. v. Culbertson Hotel Co.*, 62 M 605, 609, 205 P 957.

When Fire Does Not Destroy Subject of Lien

As against the contention that a part of the lien of a lumber company must fall because it is based upon the furnishing of materials a part of which were used in construction of a building which was later destroyed by fire, and that it cannot be ascertained from the account how much of the materials was used in the buildings destroyed, and the entire lien must fall, held, that a different rule applies where all of the buildings constitute in legal effect but one structure operated as a unit in a mining enterprise, its lien on the remaining structures being unaffected by the destruction of the one. *Caird Engineering Works v. Seven-up Gold Mining Co., Inc.*, 111 M 471, 490, 111 P 2d 1267.

When Material is "Furnished"

Where machinery was shipped from New York on June 6, and reached its destination in this state on June 18, and a claim therefor filed September 14, it was held that, although the material had been "furnished," the claim for a lien was not filed in time to comply with the law. *McEwen v. Union Bank & Trust Co.*, 35 M 470, 474, 90 P 359.

Where an order for machinery to be shipped f. o. b. their place of shipment is accepted by the seller and they are so shipped "net 30 days 2%-10," the bill of lading or invoice being sent to the buyer, the sale is complete as of the day of shipment and the machinery is "furnished" within the meaning of the mechanics' lien statute (this section), requiring the filing of claim of liens within ninety days after the material or machinery has been furnished. *Richardson G. S. Co. v. Valier Elevator Co.*, 67 M 227, 232 et seq., 215 P 237.

References

Cited or applied as section 2131, Code of Civil Procedure, before amendment, in *Big Blackfoot v. Blue Bird Min. Co.*, 19 M 454, 460, 48 P 778; *Cook v. Gallatin R. R. Co.*, 28 M 340, 355, 72 P 678; *Williard et al. v. Federal Surety Co.*, 91 M 465, 472, 8 P 2d 633; *Fisk Tire Co. v. Lanstrum et al.*, 96 M 279, 281, 30 P 2d 84; *Blose v. Havre Oil & Gas Co.*, 96 M 450, 460, 31 P 2d 738; *Smith v. Gunniss*, 115 M 362, 376, 144 P 2d 186.

Collateral References

Mechanics' Liens ⇨ 116.
57 C.J.S. *Mechanics' Liens* § 119.

36 Am. Jur. 90, Mechanics' Liens, §§ 123 et seq.

Sufficiency of notice, claim, or statement of mechanic's lien with respect to nature of work. 27 ALR 2d 1169.

45-503. (8341) Duty of county clerk. The county clerk must indorse upon every lien the day of its filing, and make an abstract thereof in a book by him to be kept for that purpose, and properly indexed, containing the date of the filing, the name of the person holding the lien, the amount thereof, the name of the person against whose property the lien is filed, and the description of the property to be charged with same.

History: En. Sec. 7, p. 333, Bannack Stat.; re-en. Sec. 7, p. 510, Cod. Stat. 1871; amd. Sec. 2, p. 84, L. 1874; re-en. Sec. 826, 5th Div. Rev. Stat. 1879; re-en. Sec. 1373, 5th Div. Comp. Stat. 1887; amd. Sec. 2132, C. Civ. Proc. 1895; re-en. Sec. 7292, Rev. C. 1907; re-en. Sec. 8341, R. C. M. 1921.

Cross-Reference

See Note to sec. 45-501.

Name of Person Against Whose Property the Lien is Filed

A recorded lien claim for materials furnished in the construction of a building, which fails to state the name of the owner or person whose interest is sought to be charged, is fatally defective. *Missoula Mercantile Co. v. O'Donnell*, 24 M 65, 73, 60 P 594, 991.

The mention of the record owner in the lien claim is not sufficient when he is not the person for whose use or benefit the property, building, or improvement is constructed, repaired, or altered. *Missoula Mercantile Co. v. O'Donnell*, 24 M 65, 78, 60 P 594, 991; *Blose v. Havre Oil & Gas Co.*, 96 M 450, 460, 31 P 2d 738.

The filing of a notice of lien on the property of the Yellowstone Park Railway Company and the Yellowstone Park Railroad Company will not warrant intervention in a mechanics' lien foreclosure against the Gallatin Railroad Company, though the complaint in intervention alleges, on information and belief, that the corporations are substantially the same. Merely a money demand in a mechanics' lien foreclosure will not warrant intervention therein, though plaintiffs consent thereto. *Cook v. Gallatin R. R. Co.*, 28 M 340, 356, 72 P 678.

References

Cited or applied as section 7292, Revised Codes, in *Merges v. Altenbrand*, 45 M 355, 364, 123 P 21; *Johnson v. Erickson*, 56 M 550, 553, 185 P 1116; *Continental Supply Co. v. White et al.*, 92 M 254, 260, 12 P 2d 569; *Cole v. Hunt*, 123 M 256, 211 P 2d 417, 419.

Collateral References

Mechanics' Liens § 155.
57 C.J.S. *Mechanics' Liens* § 145.

45-504. (8342) What property affected. The lien given extends to the lot or land upon which any such building, improvement, or structure is situated, to the extent of one acre, if outside of any town or city, or if within any town or city, then to the extent of the whole lot or lots upon which the same is situated, if the land belonged to the person who caused said building to be constructed, altered, or repaired; but if such person owned less than a fee-simple estate in such land, then only his interest therein is subject to such lien; all liens for any work or labor done or materials furnished upon the same premises, which shall be filed within thirty days after the filing of the first lien on such premises, shall entitle the holders thereof to share equally pro rata, according to the amount of their respective liens, in the proceeds arising from the sale of such premises upon the foreclosure of such liens. If, after the expiration of thirty days, other liens are filed against such premises, then all liens filed within sixty days after the filing of such subsequent lien are liens of the second class, and share pro rata in any proceeds arising from the sale of the said premises which may remain after all liens of the first class have been paid. The liens for work or labor done, or material furnished, as specified in this chapter, shall be prior to and have precedence over any mortgage,

encumbrance, or other lien made subsequent to the commencement of work on any contract for the erection of such building, structure, or other improvement.

History: Ap. p. Secs. 8 and 9, p. 334, Bannack Stat.; re-en. Secs. 8 and 9, p. 511, Cod. Stat. 1871; amd. Secs. 1 and 2, p. 238, L. 1877; re-en. Sec. 827, 5th Div. Rev. Stat. 1879; amd. Sec. 1374, 5th Div. Comp. Stat. 1887; amd. Sec. 2, p. 71, Ex. L. 1887; en. Sec. 2133, C. Civ. Proc. 1895; re-en. Sec. 7293, Rev. C. 1907; re-en. Sec. 8342, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1185.

Estoppel, by Merger of Interests, to Assert Claim Under Assignment of Lien as Superior to Mortgage

Where a vendor agreed with vendee to pay off vendee's mortgagee for a loan with which vendee erected a filling station on the property after taking possession, in consideration for return of the property, but, having failed to do so, a mechanic's lien was placed upon the new structure, which lien was acquired by the vendor by assignment, held, in an action by vendor to foreclose the lien, against vendee and mortgagee who sought to foreclose the mortgage as superior, that the interests were merged in the vendor, estopping him to assert a claim in the mechanic's lien paramount to the mortgage lien. *Downing v. Crippen*, 114 M 436, 442, 138 P 2d 575.

Extent of Lien

While a mechanic's or materialman's lien extends primarily to the building, if the land upon which it is erected "belongs" to (this section), i. e., is the property of, the person who causes the building to be constructed, the lien extends also to the land; but if the owner of the building loses title to the land, or if it is encumbered when work commences under the building contract, then the lien attaches to the building only. *Louis v. Theatatorium Co. et al.*, 69 M 50, 55 et seq., 222 P 1062.

The acre of ground to which a lien on a dwelling located outside a city or town extends, may properly be described as an acre of land of which the dwelling constitutes the geographical center, in the absence of a statutory requirement of a more particular description. *Federal Land Bank of Spokane v. Green*, 108 M 56, 64, 90 P 2d 489.

Mortgage Does Not Reduce Owner's Interest to Less Than Fee Simple

Since a mortgage is merely security and creates no interest or estate in land, the existence of a mortgage on land on which was situated a building subject to a materialman's lien did not reduce the owner's interest in the land to less than

fee simple estate within the meaning of this section. A mortgage is simply security for the performance of an act under section 52-101. *Federal Land Bank of Spokane v. Green*, 108 M 56, 64, 90 P 2d 489.

Not Applicable to Mining Claims

The provision of this section, limiting the operation of a mechanic's lien, does not apply to mining claims. A lien upon such property extends to the whole claim. *Smith v. Sherman Min. Co.*, 12 M 524, 529, 31 P 72; *McIntyre v. MacGinnis*, 41 M 87, 96, 108 P 353; *Dean v. Stewart*, 49 M 506, 515, 143 P 966. See also *Big Blackfoot v. Blue Bird Min. Co.*, 19 M 454, 458, 48 P 778.

Operation and Effect

Where after commencement of the construction of a dwelling situated on farm land, work was suspended for about a year though the structure was only partially completed but habitable by the family of the owner, and between the time of suspension of work and resumption thereof a mortgage was placed on the property, the lien of the materialman who furnished the materials to finish the dwelling related back to the commencement of construction and was superior to the mortgage lien. *Federal Land Bank of Spokane v. Green*, 108 M 56, 65, 90 P 2d 489.

Precedence of Lien Over Subsequent Mortgage

Where a mortgage was executed subsequent to the furnishing of materials and labor, for which a lien was claimed on the mortgaged property, the mortgagee, by purchase of the property on foreclosure of the mortgage, did not become a bona fide purchaser, but was substituted only to the rights of the mortgagor, and took the property subject to the mechanic's lien. *Western Iron Works v. Montana P. & P. Co.*, 30 M 550, 561, 77 P 413.

Under this section, giving a mechanic's or materialman's lien precedence over any mortgage made subsequent to "commencement of work" on the building or structure in question, the lien relates back to the date on which work was commenced, whether commenced by the lien claimant or another, and temporary cessation of work on the building will not prevent the operation of the statute where there has been no change of design nor evidence of an intention to abandon prosecution of the work. *Federal Land Bank of Spokane v. Green*, 108 M 56, 65, 90 P 2d 489.

Right to Remove Building on Lien Foreclosure

Where land is mortgaged at the time of the erection of a building or other improvement thereon, a mechanic's or materialman's lien attaches only to the building or improvement, and on lien foreclosure sale the purchaser has the right to remove the structure from the land. *Interstate Lumber Co. v. Rider et al.*, 93 M 489, 492 et seq., 19 P 2d 644.

What May be Removed from Premises When Lienor Loses Title

The lien of a mechanic for material or labor furnished at the request of a lessee who afterwards forfeited his lease embraces only such improvements as the lessee himself might have removed during his lease, and does not include a doorway cut between two buildings, paper-hanging, or other improvements which cannot be removed without injury to the freehold. *Stenberg v. Liennemann*, 20 M 457, 460, 52 P 84.

When Owner of Realty Liable

To render the owner of realty liable to a materialman's lien, the lien must rest upon a contract debt incurred either directly or indirectly, unless he chooses to ratify what was done or in some manner estops himself from questioning the lien;

the mere fact that the material furnished enhances the value of the property being insufficient to establish liability. *Dewey Lumber Co. v. McQuirk et al.*, 96 M 294, 298, 30 P 2d 475.

References

Cited or applied as section 2133, Code of Civil Procedure, in *Missoula Mercantile Co. v. O'Donnell*, 24 M 65, 77, 60 P 594, 991; as section 7293, Revised Codes, in *Stritzel-Spaberg Lumber Co. v. Edwards*, 50 M 49, 52, 144 P 722; *Midland C. & L. Co. v. Ferguson et al.*, 61 M 402, 405, 202 P 389; *Continental Supply Co. v. White et al.*, 92 M 254, 259 et seq., 12 P 2d 569; *Arnold et al. v. Genzberger et al.*, 96 M 358, 385, 31 P 2d 396; *Caird Engineering Works v. Seven-up Gold Mining Co., Inc.*, 111 M 471, 495, 111 P 2d 1267.

Collateral References

Mechanics' Liens §180.
57 C.J.S. *Mechanics' Liens* §184.
36 Am. Jur. 27, *Mechanics' Liens*, §§ 15 et seq.

Construction, application, and effect of provision of mechanic's lien statute as to property or area of land around improvements which may be subjected to the lien. 84 ALR 123.

45-505. (8343) Leasehold interest—how affected. When the interest in the land, building, structure, or other improvement is a leasehold interest, the forfeiture of such lease does not forfeit or impair such liens so far as concerns the buildings, structures, and improvements put thereon by the persons charged with such lien, but the same may be sold to satisfy said lien, and may be removed within twenty days after the sale thereof by the purchaser.

History: En. Sec. 9, p. 334, *Bannack Stat.*; re-en. Sec. 9, p. 511, *Cod. Stat.* 1871; re-en. Sec. 828, 5th Div. Rev. Stat. 1879; re-en. Sec. 1375, 5th Div. Comp. Stat. 1887; amd. Sec. 2134, C. Civ. Proc. 1895; re-en. Sec. 7294, Rev. C. 1907; re-en. Sec. 8343, R. C. M. 1921.

Effect of Forfeiture of Lease of Oil Well

The forfeiture of the contract between defendant and the syndicate would terminate the rights of plaintiff and intervener in and to the leasehold, and the oil wells, fixtures, etc., except "the material and supplies so furnished" by plaintiff in drilling well No. 4, or the material furnished by intervener. *Callender v. Crossfield Oil Syndicate*, 84 M 263, 274, 275 P 273.

Extent of Lien

A heating plant and connecting pipes installed in a green-house constructed by

a mechanics' lien claimant were fixtures and subject to removal as a part of the structure caused to be erected by a lessee of the land, the lien under this section extending in such a case to the entire building and improvements added by the lessee to the lessor's land. *Bartholomew v. James et al.*, 76 M 359, 246 P 771.

Liens Maintainable for Services and Materials Furnished to Former Holders of Leases

Where a mining company before incorporation agreed to, and did thereafter take over certain leases held by others, it will not be heard to object to the allowance of liens based upon materials furnished to, or services rendered for, the holders of the leases prior to the time they were taken over by it. *Caird Engineering Works v. Seven-up Gold Mining Co., Inc.*, 111 M 471, 501, 111 P 2d 1267.

Men Working in Mine or Quartz Mill on Property Held Under Lease Entitled to Lien

Contention that those working in a mine or quartz mill on property held under a lease, may not claim a lien upon the company's buildings, machinery and other equipment on which they performed no labor, held not tenable under this section and sections 45-504 and 45-505, regardless of whether their labor enhanced the value of the property and even though the lease provided that the premises and improvements should revert to the lessor in case of default by the lessee, the statute giving them a right to a lien being paramount to the conditions of the lease. *Caird Engineering Works v. Seven-up Gold Mining Co., Inc.*, 111 M 471, 494, 111 P 2d 1267.

Right of Lienor to Remove Fixtures

The provision of a statute that, where the interest owned in land by the proprietor of a building to which a lien has attached is only a leasehold, the building may be sold and removed, is paramount to the provision of a mining lease to the effect that all improvements placed on the premises by the lessee should become the property of the lessor as soon as placed on the mine and remain a part thereof, and such lease will be presumed to have been made in contemplation of the statute.

Montana L. & M. Co. v. Mining Co., 15 M 20, 25, 37 P 897.

Where the vendee of a dwelling-house under a conditional contract of sale made extensive improvements which became an integral part of the structure and could not be removed without practically destroying the house itself, the provision of this section authorizing their sale and removal by the holder of a materialmen's lien, upon default of the conditional buyer, does not apply. *Dewey Lumber Co. v. McQuirk et al.*, 96 M 294, 298 et seq., 30 P 2d 475.

References

Cited or applied as section 2134, Code of Civil Procedure, in *Stenberg v. Lienenmann*, 20 M 457, 460, 52 P 84; *Missoula Mercantile Co. v. O'Donnell*, 24 M 65, 77, 60 P 594, 991; as section 7294, Revised Codes, in *Stritzel-Spaberg Lumber Co. v. Edwards*, 50 M 49, 54, 144 P 722; *Midland C. & L. Co. v. Ferguson et al.*, 61 M 402, 405, 202 P 389; *Louis v. Theatorium Co. et al.*, 69 M 50, 56, 222 P 1062; *Williard et al. v. Federal Surety Co.*, 91 M 465, 472, 8 P 2d 633.

Collateral References

Mechanics' Liens 191.
57 C.J.S. *Mechanics' Liens* § 191.
36 Am. Jur. 36, *Mechanics' Liens*, § 31.

45-506. (8344) Priority of lien over mortgage or other liens. The liens attach to the buildings, structures, or improvements for which they were furnished or the work was done in preference to any prior lien, encumbrance, or mortgage upon the land upon which said buildings, structures, or improvements are erected; and any person enforcing such lien may sell the same under execution, and the purchaser may remove the property sold within a reasonable time thereafter.

History: En. Sec. 10, p. 334, *Bannack Stat.*; re-en. Sec. 10, p. 511, *Cod. Stat.* 1871; amd. Sec. 3, p. 238, *L.* 1877; amd. Sec. 829, 5th Div. Rev. Stat. 1879; amd. Sec. 1376, 5th Div. Comp. Stat. 1887; amd. Sec. 2135, *C. Civ. Proc.* 1895; re-en. Sec. 7295, Rev. C. 1907; re-en. Sec. 8344, *R. C.* M. 1921. *Cal. C. Civ. Proc. Sec.* 1186.

Lien Preferred to Prior Mortgage on Land

This provision subjects the improvements to the claim of the lienor to secure payment for the labor or material used in the erection of the improvement, by right superior to that of the prior mortgagee. *Opera House Co. v. Maguire*, 14 M 558, 562, 37 P 607; *Johnson v. Puritan Min. Co.*, 19 M 30, 40, 47 P 337.

A purchaser, who is in possession of premises under a sale upon the foreclosure of his lien, is entitled, as against the holder of a mortgage having priority to

his lien as to the land, to remain in possession of the premises until the foreclosure of the mortgage, without losing his right to remove the buildings. *Opera House Co. v. Maguire*, 14 M 558, 562, 37 P 607.

The lien of a mechanic as to the improvement is superior to a prior mortgage on the land, but as to the land itself the prior mortgage maintains precedence, and where a lien claimant has not erected a building or placed such an improvement upon a mining claim as is susceptible of severance or removal, his lien must yield to a prior mortgage upon the premises. *Johnson v. Puritan Min. Co.*, 19 M 30, 39, 47 P 337.

Right to Remove Buildings

Where the judgment in a materialmen's foreclosure proceeding establishes the lien on the building alone, separate from the land, and orders it sold, the purchaser

thereof has a right to remove it within the time allowed by this section. *Wyman v. Hall et al.*, 84 M 571, 577, 276 P 644.

Where land is mortgaged at the time of the erection of a building or other improvement thereon, a mechanics' or materialmen's lien attaches only to the building or improvement, and on lien foreclosure sale the purchaser has the right to remove the structure from the land. *Interstate Lumber Co. v. Rider et al.*, 93 M 489, 492 et seq., 19 P 2d 644.

Waiver of Forfeiture of Right

While failure of the purchaser of a building at a lien foreclosure sale to remove it from the land within a reasonable time will operate as a waiver of forfeiture of the right, the question of waiver or forfeiture cannot be considered unless pleaded. *Midland C. & L. Co. v. Ferguson et al.*, 61 M 402, 407, 202 P 389.

45-507. (8345) Practice provisions applicable. Except as otherwise provided in this chapter, the provisions of the Code of Civil Procedure (Title 93) are applicable to and constitute the rules of practice in the proceedings mentioned in this chapter.

History: En. Sec. 2136, C. Civ. Proc. 1895; re-en. Sec. 7296, Rev. C. 1907; re-en. Sec. 8345, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1198.

References

Continental Supply Co. v. White et al., 92 M 254, 268, 12 P 2d 569.

45-508. (8346) Same relative to new trials. The provisions of the Code of Civil Procedure (Title 93) relative to new trials and appeals, except insofar as they are inconsistent with the provisions of this chapter, apply to the proceedings mentioned in this chapter.

History: En. Sec. 2137, C. Civ. Proc. 1895; re-en. Sec. 7297, Rev. C. 1907; re-en. Sec. 8346, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1199.

References

Cited or applied as section 2135, Code of Civil Procedure, in *Missoula Mercantile Co. v. O'Donnell*, 24 M 65, 77, 60 P 594, 991; as section 7295, Revised Codes, in *Stritzel-Spaberg Lumber Co. v. Edwards*, 50 M 49, 54, 144 P 722; *Louis v. Theatorium Co. et al.*, 69 M 50, 55 et seq., 222 P 1062; *Higby v. Hooper*, 124 M 331, 221 P 2d 1043, 1046.

Collateral References

Mechanics' Liens ⇨ 198.
57 C.J.S. *Mechanics' Liens* § 197.

Priority as between lien for repairs and right of seller under conditional contract. 20 ALR 249; 30 ALR 1227 and 104 ALR 267.

Priority as between artisans' lien and chattel mortgage. 32 ALR 1005 and 88 ALR 1185.

Collateral References

Mechanics' Liens ⇨ 3.
57 C.J.S. *Mechanics' Liens* § 3.

45-509. (8347) All persons interested may be made parties. All persons interested in the matter in controversy, or in property charged with the lien, or having liens thereon, may be made parties.

History: En. Sec. 2138, C. Civ. Proc. 1895; re-en. Sec. 7298, Rev. C. 1907; re-en. Sec. 8347, R. C. M. 1921.

Operation and Effect

The naming of persons in the complaint to enforce the lien does not make them parties unless they are within the rule defining necessary parties. *Missoula Mercantile Co. v. O'Donnell*, 24 M 65, 74, 60 P 594, 991.

An execution creditor of an oil-well operator who on judicial sale had bought

casing furnished by plaintiff lienholder after the lien claim had been filed was a proper party defendant in the action to foreclose the lien. *Continental Supply Co. v. White et al.*, 92 M 254, 260, 12 P 2d 569.

In a suit seeking to enforce or establish the validity of a mechanic's lien, the owner or person whose interest is sought to be charged is a necessary party to the action. *Cascade Elec. Co. v. Associated Creditors, Inc.*, 124 M 370, 224 P 2d 146, 149.

Collateral References

Mechanics' Liens—255.

57 C.J.S. Mechanics' Liens § 278.

36 Am. Jur. 156, Mechanics' Liens, §§ 245 et seq.

45-510. (8348) Limitation of actions. All actions under this chapter must be commenced within two years from the date of the filing of the lien.

History: En. Sec. 2139, C. Civ. Proc. 1895; re-en. Sec. 7299, Rev. C. 1907; amd. Sec. 1, Ch. 127, L. 1921; re-en. Sec. 8348, R. C. M. 1921.

Collateral References

Mechanics' Liens—260.

57 C.J.S. Mechanics' Liens § 282.

36 Am. Jur. 153, Mechanics' Liens, §§ 241 et seq.

What amounts to bringing of suit within limited time required by mechanic's lien statute. 75 ALR 695.

Time limitation in mechanic's lien statute as a limitation of the right or only of the remedy. 139 ALR 903.

Personal judgment as essential to enforcement of mechanic's lien. 147 ALR 1099.

Rights and remedies under lien statute of one performing work only part of which is of a lienable character. 149 ALR 682.

45-511. (8349) Who deemed owners. Every person, including guardians of minors, married women, and any company, association, or corporation not tenants or lessees, for whose use, benefit, or enjoyment any property, building, structure, or improvement mentioned in this chapter is constructed, repaired, or altered, is deemed the owner thereof for the purposes of this chapter.

History: En. Sec. 1387, 5th Div. Comp. Stat. 1887; amd. Sec. 3, p. 72, Ex. L. 1887; amd. Sec. 2140, C. Civ. Proc. 1895; re-en. Sec. 7300, Rev. C. 1907; re-en. Sec. 8349, R. C. M. 1921.

Improvements at Request of Owner's Agent

Where the owner of a building permitted a brother of her attorney-in-fact to rent it to the occupant, to make arrangements with plaintiff (in a suit to foreclose a mechanic's lien) relative to certain improvements thereon, to collect the rent and indorse checks given in payment of rent, etc. he was at least the ostensible agent of the owner in causing plaintiff to perform the work on the building for which he filed the lien. *Doney v. Ellison*, 103 M 591, 597, 64 P 2d 348.

Operation and Effect

The interests of the owners of a mine held not subject to a lien for labor and materials procured by a tenant in his operations on the mine. *Block v. Murray*, 12 M 545, 548, 31 P 550. See *Montana L. & M. Co. v. Mining Co.*, 15 M 20, 23, 37 P 897, and *Pelton v. Minah Con. Min. Co.*, 11 M 281, 28 P 310.

Under the statutes of this state, the name of the "owner" required to be mentioned in the lien claim is the name of the owner of the interest to be affected by, or charged with, the lien, and the

mention of the record owner is not sufficient when he is not the person for whose use or benefit the property, building, or improvement is constructed, repaired or altered. *Missoula Mercantile Co. v. O'Donnell*, 24 M 65, 78, 60 P 594, 991.

One purchasing real property under a conditional sale contract providing that in case of default in the matter of payment of taxes or assessments against the property or in any of the deferred payments, the vendor could declare the contract at an end and retain all payments theretofore made, was not an "owner" within the meaning of the mechanics' or materialmen's lien act. *Dewey Lumber Co. v. McQuirk et al.*, 96 M 294, 301, 30 P 2d 475.

Ownership Defect Cured Attaching Lien to Complaint

Alleged insufficiency of the complaint, in a suit to foreclose a mechanic's lien, for indefiniteness as to the ownership of the property on which the work was done, held cured where the pleader attached to and made a part of the complaint a copy of the lien setting forth the name of the record owner. *Doney v. Ellison*, 103 M 591, 595, 64 P 2d 348.

Collateral References

Mechanics' Liens—189.

57 C.J.S. Mechanics' Liens § 191.

45-512. (8350) Satisfaction of lien. Whenever any indebtedness which is a lien upon any such real estate, structure, building, or other improve-

ment is paid and satisfied, it is the duty of the creditors to acknowledge satisfaction thereof as in case of a mortgage; and if any creditor fail to acknowledge satisfaction, as aforesaid, he is liable to any person injured by such failure to the amount of such injury and the costs of action.

History: En. Sec. 841, 5th Div. Rev. Stat. 1879; re-en. Sec. 1385, 5th Div. Comp. Stat. 1887; amd. Sec. 2141, C. Civ. Proc. 1895; re-en. Sec. 7301, Rev. C. 1907; re-en. Sec. 8350, R. C. M. 1921.

vised Codes, in *Lane v. Lane Potter Lumber Co.*, 40 M 541, 551, 107 P 898.

Collateral References

Mechanics' Liens §§ 242, 243.
57 C.J.S. *Mechanics' Liens* §§ 240, 246.

References

Cited or applied as section 7301, Re-

CHAPTER 6

LIENS FOR SALARIES AND WAGES

- Section 45-601. Preferred creditors when assignment of property is made.
45-602. Allowance of attorney's fees.
45-603. Priority of wages in case of death of employer.
45-604. Same, in cases of execution or attachment.
45-605. Service of notice.
45-606. Proceeding if claim disputed.
45-607. Original action cannot be dismissed.
45-608. Certain encumbrances—when not affected.

45-601. (8351) Preferred creditors when assignment of property is made. In all assignments of property made by any person to trustees or assignees on account of the inability of the person, at the time of the assignment, to pay his debts, or in proceedings of insolvency, the wages of the miners, mechanics, salesmen, servants, clerks, or the laborers employed by such person, to the amount actually owed, and for services rendered within four (4) months previously, are preferred claims, and must be paid by such trustees or assignees before any other creditor or creditors of the assignor.

History: Ap. p. Sec. 2050, 5th Div. Comp. Stat. 1887; amd. Sec. 2150, C. Civ. Proc. 1895; re-en. Sec. 7302, Rev. C. 1907; re-en. Sec. 8351, R. C. M. 1921; amd. Sec. 1, Ch. 109, L. 1943. Cal. C. Civ. Proc. Sec. 1204.

ing the wages of an employee of the assignor a preferred claim where the services were rendered within sixty days immediately preceding such assignment. *Marshall v. Livingston Nat. Bank*, 11 M 351, 361, 28 P 312.

Operation and Effect

It is no objection to a complaint in an action by a laborer to enforce his claim that it alleges an assignment to a creditor directly for his sole benefit, and not as a trustee or for the benefit of creditors. *Flanders v. Murphy*, 10 M 398, 400, 25 P 1052; *Marshall v. Livingston Nat. Bank*, 11 M 351, 364, 28 P 312.

Where the effect of an instrument conveying personal property is a transfer of a debtor's property to a creditor, with power to make an immediate sale of the same and render the overplus, after satisfying the debt therein described, to the debtor, which debt is made to be due at once, the transaction, though under the name and in the form of a chattel mortgage, will be regarded as an assignment and within the operation of a statute mak-

Where there is no evidence in the record, and the findings of the court bring the plaintiff within the operation of the statute known as the "Wageworkers' Law," a judgment for plaintiff against an assignee for the benefit of creditors will be affirmed on the authority of *Flanders v. Murphy*, 10 M 398, 25 P 1052, and *Marshall v. Livingston Nat. Bank*, 11 M 351, 28 P 312. *Knatz v. Wise*, 16 M 555, 557, 41 P 710.

After a wage-earner has once established his right to preference payment for wages earned within the period of sixty days immediately preceding a levy upon the property of his employer, by giving the notice provided for by the *Wageworkers' Law* (secs. 45-601 to 45-608), he may assign his claim; the assignment carries with it the lien as an incident, and the assignee is therefore entitled to bring

suit thereon. *Thompson v. Twodot Fertilizer Co. et al.*, 71 M 486, 490 et seq., 230 P 588.

References

McBride v. School District No. 2, 88 M 110, 117, 290 P 252.

Collateral References

Assignments for Benefit of Creditors 308(2); Insolvency 119(1).

45-602. (8352) Allowance of attorney's fees. In an action to establish a claim for salary or wages under the provisions of this chapter, the court must allow as costs a reasonable attorney's fee to each claimant who establishes his claim, or to the defendant if such claim be not established.

History: En. Sec. 1, Ch. 17, L. 1915; re-en. Sec. 8352, R. C. M. 1921.

Collateral References

Assignments for Benefit of Creditors 318; Insolvency 188.

45-603. (8353) Priority of wages in case of death of employer. In case of the death of any employer, the wages of each miner, mechanic, salesman, clerk, servant, and laborer for services rendered within four (4) months next preceding the death of the employer, in the amount actually owed, rank in priority next after the funeral expenses, expenses of the last sickness, the charges and expenses of administering upon the estate, and the allowance to the widow and infant children, and must be paid before other claims against the estate of the deceased person.

History: En. Sec. 2051, 5th Div. Comp. Stat. 1887; re-en. Sec. 2151, C. Civ. Proc. 1895; re-en. Sec. 7303, Rev. C. 1907; re-en. Sec. 8353, R. C. M. 1921; amd. Sec. 2, Ch. 109, L. 1943. Cal. C. Civ. Proc. Sec. 1205.

References

In re *Stevenson*, 87 M 486, 494, 289 P 566.

45-604. (8354) Same, in cases of execution or attachment. In case of executions, attachments, and writs of similar nature, issued against any person, except for claims for labor done, any miners, mechanics, salesmen, servants, clerks, or laborers, who have claims against the defendant for labor done, may give notice of their claims and the amount thereof, sworn to by the person making the claim, to the parties plaintiff and defendant to the action in which such execution, attachment, or other writ has been issued, and upon the officer executing the same. Service of notice herein required may be made upon the officer charged with the execution of such writ in one or more cases that may be pending against such person, who shall forthwith serve such notice and claim, by copy, upon the said parties, plaintiff and defendant, if found in the county where such action is pending, or upon their respective attorneys employed in such case or cases pending.

History: En. Sec. 2052, 5th Div. Comp. Stat. 1887; re-en. Sec. 2152, C. Civ. Proc. 1895; re-en. Sec. 7304, Rev. C. 1907; re-en.

6 C.J.S. Assignments for Benefit of Creditors § 330; 44 C.J.S. Insolvency § 14. 4 Am. Jur. 424, Assignment for Benefit of Creditors, § 162; 28 Am. Jur. 796, Insolvency, § 49; 35 Am. Jur. 505, Master and Servant, § 74.

Contract provisions for deduction of union dues from wages of employees and their payment to union as within statute prohibiting or regulating assignment of future earnings or wages. 14 ALR 2d 177.

6 C.J.S. Assignments for Benefit of Creditors § 339; 44 C.J.S. Insolvency § 19.

Collateral References

Executors and Administrators 261. 34 C.J.S. Executors and Administrators § 461.

Sec. 8354, R. C. M. 1921. Cal. C. Civ. Proc. Sec. 1206.

Operation and Effect

Claimant should establish the whole of his claim, though he can be declared entitled to a lien for only so much of it as accrued within sixty days next preceding the levy of the writ, not exceeding two hundred dollars. *Shea v. Regan*, 29 M 308, 314, 74 P 737.

Id. An action by a claimant to establish his claim for services, insofar as it

seeks to establish and foreclose a lien on the debtor's attached property, is a proceeding equitable in its nature, and not within the jurisdiction of a justice of the peace.

Collateral References

Master and Servant ⇐ 82(3).

56 C.J.S. Master and Servant § 147.

45-605. (8355) Service of notice. The officer serving said notice and claim shall forthwith, after such service of the same, make return thereof, showing such service, where and how made. Service may be made in any case at any time before the actual sale of the property levied upon in such pending action, and unless such claim is disputed by the debtor or a creditor or party plaintiff, such officer must pay such person out of the proceeds of the sale the amount he is entitled to receive for services rendered within the four (4) months next preceding the levy of the writ, not exceeding the amount actually owed. If any or all of the claims so presented, and claiming preference under this chapter, are disputed by either the debtor or a creditor, the person presenting the same must commence an action within ten (10) days after notice of such dispute is served upon such claimant, as provided for in the next section, for the recovery thereof; and the officer must retain possession of so much of the proceeds of the sale as may be necessary to satisfy such claim and costs until the final determination of such action; and in case judgment be had, the costs are a preferred claim, which may include a reasonable attorney's fee.

History: En. Sec. 2052, 5th Div. Comp. Stat. 1887; amd. Sec. 2153, C. Civ. Proc. 1895; re-en. Sec. 7305, Rev. C. 1907; re-en. Sec. 8355, R. C. M. 1921; amd. Sec. 3, Ch. 109, L. 1943.

Operation and Effect

Where the claimant commences an action to establish a disputed claim, neither the sheriff holding the attached property nor the attaching creditor is a necessary or proper party to such action, though the latter may, if he deem it advisable, intervene. *Shea v. Regan*, 29 M 308, 314, 74 P 737.

Id. Where a claimant fails to commence an action against his debtor within ten days after the date of the notice that his claim was disputed, he waives his right to a lien.

References

Thompson v. Twodot Fertilizer Co. et al., 71 M 486, 491, 230 P 588.

Collateral References

Master and Servant ⇐ 82(5).

56 C.J.S. Master and Servant § 149.

45-606. (8356) Proceeding if claim disputed. The debtor or creditor intending to dispute any claim presented under the provisions of the last section shall, within ten (10) days after receiving notice of such claim, serve upon the claimant and officer holding such execution, attachment, or other writ, a statement in writing, verified by the oath of the debtor or person disputing such claim for services, setting forth that no part of said claim, not exceeding a sum specified, is justly due from the debtor to the claimant for services rendered within the four (4) months next preceding the levy of the execution, attachment, or other writ, as the case may be. If the claimant bring suit on a claim which is disputed in part only, and fail to recover a sum exceeding that which was admitted to be due, he shall not recover costs, but costs shall be adjudged against him; and where such

claimant fails to bring suit upon his claim, which is disputed in part only, he shall be deemed to have waived that portion of his claim disputed.

History: En. Sec. 2053, 5th Div. Comp. Stat. 1887; re-en. Sec. 2154, C. Civ. Proc. 1895; re-en. Sec. 7306, Rev. C. 1907; re-en. Sec. 8356, R. C. M. 1921; amd. Sec. 4, Ch. 109, L. 1943. Cal. C. Civ. Proc. Sec. 1207.

References

Cited or applied as section 2154, Code of Civil Procedure, in *Shea v. Regan*, 29 M 308, 313, 74 P 737; *Thompson v. Twodot Fertilizer Co. et al.*, 71 M 486, 491, 230 P 588.

45-607. (8357) Original action cannot be dismissed. Persons having the preferred claims mentioned in this chapter are entitled to a lien upon the property attached or levied upon, and if said claims are not disputed, or if a judgment is recovered for the same, the officer must pay such claims out of the property, and the original action cannot be dismissed without the consent of the owners of such preferred claims.

History: En. Sec. 2155, C. Civ. Proc. 1895; re-en. Sec. 7307, Rev. C. 1907; re-en. Sec. 8357, R. C. M. 1921.

Fertilizer Co. et al., 71 M 486, 491, 230 P 588.

References

Cited or applied as section 2155, Code of Civil Procedure, in *Shea v. Regan*, 29 M 308, 313, 74 P 737; *Thompson v. Twodot*

Collateral References

Dismissal and Nonsuit \Rightarrow 20; Master and Servant \Rightarrow 82(5).

27 C.J.S. Dismissal and Nonsuit § 28; 56 C.J.S. Master and Servant § 149.

45-608. (8358) Certain encumbrances—when not affected. Nothing in this chapter shall be construed so as to affect any lien, encumbrance, or mortgage held by any creditor of such employer prior to said four (4) months.

History: En. Sec. 2054, 5th Div. Comp. Stat. 1887; re-en. Sec. 2156, C. Civ. Proc. 1895; re-en. Sec. 7308, Rev. C. 1907; re-en. Sec. 8358, R. C. M. 1921; amd. Sec. 5, Ch. 109, L. 1943.

Collateral References

Master and Servant \Rightarrow 82(3).
56 C.J.S. Master and Servant § 147.

CHAPTER 7

CROP LIENS FOR SEED, GRAIN AND HAIL INSURANCE

- Section 45-701. Lien upon crops for seed or for funds to purchase seed.
45-702. Filing statement of lien in office of county clerk and recorder.
45-703. Priority of lien.
45-704. Acknowledgment of satisfaction of lien.
45-705. Hail insurance lien on crop.
45-706. Same—filing notice of lien.
45-707. Satisfaction of lien.

45-701. (8359) Lien upon crops for seed or for funds to purchase seed. Any person, company, association, or corporation, who shall furnish to another seed to be sown or planted, or funds or means with which to purchase such seed to be sown or planted, or to be used in the production or cultivation of a crop or crops on the lands owned or contracted to be purchased, used, leased, occupied, or rented by him, or held under government entry, shall, upon filing the statement provided for in the next section, have a lien not exceeding the purchase price of seven hundred bushels upon the crop produced from the seed or grain so furnished, or any part thereof, and, upon the seed or grain threshed from such crop, to secure the payment of the amount or the value of the seed or grain so furnished, or the funds or means advanced to purchase the same.

History: En. Sec. 1, Ch. 23, L. 1915; amd. Sec. 1, Ch. 15, Ex. L. 1918; re-en. Sec. 8359, R. C. M. 1921.

Cross-Reference

State's lien on crops, secs. 81-418, 81-917, 81-1010.

Equity's Jurisdiction on Legal Issues

In an action on a promissory note given in payment of premiums on hail insurance policies and secured by lien on crops, defendant not entitled to jury trial where he interposed counterclaim presenting issues at law; when equity takes jurisdiction, its power to decide is full and complete. *Merchants Fire Assurance Corporation of New York v. Watson*, 104 M 1, 13, 64 P 2d 617.

Suit in Equity Proper Remedy

Where a statute creating a lien does not provide a remedy for its enforcement, such as a lien to secure the payment of premiums on hail insurance policies, a

suit in equity is the proper remedy. *Merchants Fire Assurance Corporation of New York v. Watson*, 104 M 1, 13, 64 P 2d 617.

Verification

Held in view of this section providing that a corporation may perfect a seed lien, the statute, however, not specifying the manner in which the statement of lien shall be verified nor by whom in the event the claimant is a corporation, and in view of the fact that a corporation can only act through its officer, that an affidavit attached to such a lien claim signed First National Bank of Savage, by its president and cashier was sufficient. *Thedin et al. v. First Nat. Bank*, 67 M 65, 69, 214 P 956.

Collateral References

Agriculture 11.
3 C.J.S. *Agriculture* § 45.
2 Am. Jur. 404, *Agriculture*, § 10.

45-702. (8360) Filing statement of lien in office of county clerk and recorder. Any person who is entitled to a lien under this act shall, within thirty days after the seed or grain is furnished, or the funds, means, or moneys advanced therefor, file in the office of the county clerk and recorder of the county in which such seed or grain is to be planted or used, a statement in writing, verified under oath, showing the kind and quantity of the seed or grain furnished, its value, or the amount of the funds or money advanced to pay therefor, the name of the person or persons to whom furnished, and a description of the land and of each tract of land upon which the same is to be or has been planted, or sown, or used in the production of a crop or crops. Unless the person entitled to such lien shall file such statement within the time aforesaid, he shall be deemed to have waived the right thereto.

History: En. Sec. 2, Ch. 23, L. 1915; amd. Sec. 2, Ch. 15, Ex. L. 1918; re-en. Sec. 8360, R. C. M. 1921.

References

Thedin et al. v. First Nat. Bank, 67 M 65, 70, 214 P 956.

45-703. (8361) Priority of lien. The lien provided by this act shall, as to the crop covered thereby, have priority over all other liens and encumbrances thereon.

History: En. Sec. 3, Ch. 23, L. 1915; re-en. Sec. 3, Ch. 15, Ex. L. 1918; re-en. Sec. 8361, R. C. M. 1921.

Collateral References

2 Am. Jur. 401, *Agriculture*, § 7.

References

Thedin et al. v. First Nat. Bank, 67 M 65, 69, 214 P 956.

45-704. (8362) Acknowledgment of satisfaction of lien. Whenever the indebtedness which is a lien upon such grain or other crops is paid and satisfied, it is the duty of the lienor to acknowledge satisfaction thereof as in the case of a chattel mortgage, and to discharge the said lien of record;

and if any lienor fails to acknowledge satisfaction and discharge of said lien as aforesaid, he is liable to any person injured thereby in the amount of such injury and the costs of the action.

History: En. Sec. 4, Ch. 15, Ex. L. 1918;
re-en. Sec. 8362, R. C. M. 1921.

45-705. (8363) Hail insurance lien on crop. Any person, company, association, or corporation who shall furnish to another hail insurance for the purpose of protecting the said party's crop from damage by hail during the hail season of the then growing or seeded crop, whether the said crop or crops be on the land owned or contracted to be purchased, used, leased, occupied, or rented by the said insured or held under government entry, shall, upon filing the statement provided for in the next section, have a lien subject to any seed lien that may then or thereafter be placed on record against the said crop for the amount due the said person, company, association, or corporation furnishing the hail insurance from the said insured so protected, whether it be on a note given, open account, or assessment, due or to become due, for the current year's protection, upon the crop produced on the said land so protected or any part thereof, and upon the seed or grain threshed from such crop to secure the payment of the amount due or the assessment levied against the said insured for the said insurance provided.

History: En. Sec. 1, Ch. 223, L. 1921;
re-en. Sec. 8363, R. C. M. 1921.

Cross-Reference

State hail insurance, lien on crop, sec. 82-1510.

45-706. (8364) Same—filing notice of lien. Any person who is entitled to a lien under this act shall, within thirty days after the said insurance is issued, file in the office of the county clerk and recorder of the county in which the crop so insured is located a statement in writing verified under oath giving the description of the land upon which the crop is planted, together with the kind of crop insured; provided, that with a mutual company it may file a lien for the largest amount that may become due under its assessment power, and in the event that the amount assessed shall not be as large as the amount of the lien claimed, then the amount assessed and due shall be the amount the mutual insurance company shall be entitled to under its lien. Unless the person, company, association, or corporation entitled to such a lien shall file such statement within the time aforesaid, he or it shall be deemed to have waived the right thereto.

History: En. Sec. 2, Ch. 223, L. 1921;
re-en. Sec. 8364, R. C. M. 1921.

45-707. (8365) Satisfaction of lien. Whenever the indebtedness, which is a lien upon such grain or other crops, is paid or satisfied on or before November 1 of the then current year, it is the duty of the lienor to acknowledge satisfaction thereof, as in the case of a chattel mortgage, within twenty days after receiving payment, and to discharge the said lien of record, and if any lienor fails to acknowledge satisfaction and discharge of said lien as aforesaid he is liable to any person injured thereby in the amount of such injury and the costs of action. If any hail lien is not satisfied on or before the first day of March of the next succeeding year after the

insurance was carried on the crop, the same shall be deemed satisfied and released of record.

History: En. Sec. 3, Ch. 223, L. 1921;
re-en. Sec. 8365, R. C. M. 1921.

CHAPTER 8

THRESHERMEN'S LIENS

- Section 45-801. Liens of threshermen and owners of combine harvester and thresher upon grain or crops.
45-802. Claim of lien, when, where and how filed, service of notice.
45-803. Indorsement and abstract of lien by county clerk.
45-804. Priority of lien.
45-805. Limitations of actions to foreclose threshermen's liens.
45-806. Rules of practice.
45-807. Parties to action.
45-808. Owner defined.
45-809. Acknowledgment of satisfaction of lien—penalty.

45-801. (8366) Liens of threshermen and owners of combine harvester and thresher upon grain or crops. All threshermen owning or operating threshing machines, and all owners of combine harvesters and threshers, shall have a lien upon the grain and other crops threshed by said threshing machine or cut and threshed by said combine harvester and thresher, for and on account of the services rendered and the labor performed by them on said grain and crops, and which lien may be claimed by the owner of said grain for the reasonable value of such services, if same are performed by him, provided, however, that any such lien shall not exceed seven cents (7c) per bushel of grain threshed or when harvested and threshed by combine harvester and thresher it shall not exceed one dollar and fifty cents (\$1.50) per acre, except flax, clover seed, alfalfa seed, or other grass seeds, which shall be charged for at the prevailing price for that particular locality in which such grain or seed is threshed or combined; and, provided, notices are given and lien is filed within the time provided by this act.

History: En. Sec. 1, Ch. 25, L. 1915;
re-en. Sec. 8366, R. C. M. 1921; amd. Sec. 1, Ch. 20, L. 1929; amd. Sec. 1, Ch. 112, L. 1931; amd. Sec. 1, Ch. 124, L. 1933.

Operation and Effect

One claiming a thresherman's lien, under this section and the following section, must at least substantially follow the procedural steps by which the right to the lien is perfected, among them its initiation by filing a just and true account of the

amount due him for the services performed. *Great Falls F. M. Co. v. Rocky Mt. E. Co.*, 94 M 188, 193, 22 P 2d 303.

Collateral References

Agriculture \Leftrightarrow 11.
3 C.J.S. Agriculture § 53.
2 Am. Jur. 404, Agriculture, § 9.

Cropper's right to thresher's lien or lien for other work on share of owner. 35 ALR 450.

45-802. (8367) Claim of lien, when, where and how filed, service of notice. Every person intending to avail himself of the benefits of this act must file with the county clerk of the county in which said grain or other crops were grown, within ten days after the last service was rendered or labor performed in the threshing of said grain or other crops, or the cutting and harvesting and threshing by said combined harvester and thresher, a notice that within twenty days a lien, of not to exceed twelve cents per bushel for grain threshed or not to exceed two dollars per acre for grains

harvested and threshed with a combined harvester and thresher, except flax, clover seed, alfalfa seed, or other grass seeds, which shall be charged for at the prevailing price for that particular locality in which such grain or seed is threshed or combined, will be claimed, and within twenty days thereafter shall file with the county clerk and recorder of the county in which said grain or other crops were grown, a just and true account of the amount due him or them for such services or labor after allowing all just credits and offsets and containing a correct description of the grain or other crops to be charged with such lien, the price agreed upon for such threshing or cutting and harvesting, the name of the person, firm or corporation for whom such labor and services were performed, and a description of the lands as nearly as possible, upon which said grain or other crops were raised, and a description of the legal subdivision of land upon which said grain is stored, and if said grain is stored in an elevator, the locality of the said elevator, which statements of facts shall be verified by affidavit of the person claiming such lien, or his duly authorized agent or attorney, having knowledge of the facts; but any error or mistake in the account or description of the grain or other crops or of the property upon which it was raised, shall not invalidate such said lien.

If the grain or other crops so threshed, cut, harvested and threshed are being hauled from the machine or combine direct to the elevator or to any other purchaser, then the threshermen or owner of the combine desiring to claim such lien shall also serve written notices upon the elevatorman or other private purchaser, that he will claim and file a lien upon said grain or other crops for his services or labor performed in threshing, or combining and threshing the same.

History: En. Sec. 2, Ch. 25, L. 1915; amd. Sec. 1, Ch. 162, L. 1917; amd. Sec. 1, Ch. 71, L. 1921; re-en. Sec. 8367, R. C. M. 1921; amd. Sec. 2, Ch. 20, L. 1929; amd. Sec. 2, Ch. 112, L. 1931.

Operation and Effect

One claiming a threshermen's lien, under this section and the preceding section, must at least substantially follow the procedural steps by which the right to the lien is perfected, among them its initiation by filing a just and true account of the amount due him for the services performed. *Great Falls F. M. Co. v. Rocky Mt. E. Co.*, 94 M 188, 193 et seq., 22 P 2d 303.

Id. Where a thresherman served a no-

tice of claim of lien on a crop threshed by him, as required by this section, upon an elevator company, but never initiated his right to a lien by filing an account of the amount due him with the county clerk, he never acquired a lien, and the company in buying the wheat covered by a prior mortgage, and paying the amount claimed by the supposed holder of a threshermen's lien with the consent of the mortgagor, was without defense to the mortgagee's action in conversion.

Id. Held, that the contention that a threshermen's lien is created by the services and labor performed by him, and not by the filing of the account required by this section, is without merit.

45-803. (8368) Indorsement and abstract of lien by county clerk. The county clerk must indorse upon such lien the day of its filing, make an abstract thereof in a book kept by him for that purpose and properly indexed, containing the date of the filing, the name of the person claiming the lien, the amount thereof, the name of the person against whose property the lien is filed, and a description of the property to be charged with the same.

History: En. Sec. 3, Ch. 25, L. 1915; re-en. Sec. 8368, R. C. M. 1921.

45-804. (8369) Priority of lien. The lien for work or labor done or services rendered as specified in section 45-801 shall be prior to and have

precedence over any mortgage, encumbrance, or other lien upon said grain or other crops, except the lien for the seed furnished for the purpose of growing this particular crop.

History: En. Sec. 4, Ch. 25, L. 1915;
re-en. Sec. 8369, R. C. M. 1921.

Collateral References

2 Am. Jur. 401, Agriculture, § 7.

45-805. (8370) Limitations of actions to foreclose threshermen's liens. All actions for the foreclosure and enforcement of the lien herein provided for must be commenced within six months from the filing of the lien.

History: En. Sec. 5, Ch. 25, L. 1915;
re-en. Sec. 8370, R. C. M. 1921; amd. Sec.
1, Ch. 28, L. 1923.

45-806. (8371) Rules of practice. Except as otherwise provided, the provisions of the Code of Civil Procedure (Title 93) are applicable to and constitute the rules of practice for the enforcement and foreclosure of the lien herein provided for.

History: En. Sec. 6, Ch. 25, L. 1915;
re-en. Sec. 8371, R. C. M. 1921.

45-807. (8372) Parties to action. All persons interested in the matter in controversy or the property to be charged with the lien, or having liens thereon, may be made parties to an action for the foreclosure thereof.

History: En. Sec. 7, Ch. 25, L. 1915;
re-en. Sec. 8372, R. C. M. 1921.

45-808. (8373) Owner defined. Every person, including guardians or minors, married women, and any company, firm, association, or corporation for whose use or benefit the grain or other crops mentioned herein are threshed, or the services rendered or labor performed, is deemed the owner thereof for the purposes herein mentiond.

History: En. Sec. 8, Ch. 25, L. 1915;
re-en. Sec. 8373, R. C. M. 1921.

45-809. (8374) Acknowledgment of satisfaction of lien—penalty. Whenever the indebtedness which is a lien upon any such grain or other crops is paid and satisfied, it is the duty of the lienor to acknowledge satisfaction thereof as in case of a mortgage, and to discharge the said lien of record; and if any lienor fails to acknowledge satisfaction and discharge said lien as aforesaid, he is liable to any person injured thereby in the amount of such injury and the costs of action.

History: En. Sec. 9, Ch. 25, L. 1915;
re-en. Sec. 8374, R. C. M. 1921.

CHAPTER 9

FARM LABORERS' LIENS

- Section 45-901. Farm laborers' liens—who may have.
45-902. How lien obtained.
45-903. The duty of clerk and recorder—fee.
45-904. No priority among lien holders.
45-905. Notice to other lien holders.
45-906. Rules of practice.
45-907. New trials and appeals.
45-908. Parties.

- 45-909. Costs and attorney's fees allowed.
 45-910. Limitations of actions to foreclose liens.
 45-911. Acknowledgment of satisfaction of lien—penalty.

45-901. (8374.1) Farm laborers' liens—who may have. Any person who performs services for another in the capacity of a farm or ranch laborer shall have a lien on all crops of every kind grown, raised or harvested by the person for whom the services were performed during said time, as security for the payment of any wages due or owing to such persons for services so performed, and said lien shall have priority over all other liens, chattel mortgages or encumbrances excepting, however, feed sufficient for three (3) months for one horse, two (2) cows and their calves, four (4) hogs and fifty (50) domestic fowls, seed grain and threshers' liens; provided, that the wages for which a lien may be claimed shall not be in excess of one hundred dollars (\$100.00), nor for a period of time exceeding sixty (60) days next preceding the date of filing the said lien; provided further, that in case any such person without cause quits his employment before the expiration of the time for which he is employed, then he shall not be entitled to a lien as herein provided.

History: En. Sec. 1, Ch. 196, L. 1935.

Collateral References

- Agriculture 11.
 3 C.J.S. Agriculture § 45.
 2 Am. Jur. 402, Agriculture, § 8.

Cropper's right to thresher's lien or lien for other work on share of owner, 35 ALR 450.

Provisions of statutes or bonds to secure payment for work or labor as including use of laborer's own team, automobile, or other equipment. 71 ALR 1136.

45-902. (8374.2) How lien obtained. In order to acquire a lien, as specified in the preceding section, the person performing such services shall within thirty (30) days after the services are fully performed file in the office of the clerk and recorder in the county in which any of the real estate is situated on which any crop is grown, upon which a lien is claimed, a statement verified by affidavit of the person claiming such lien or his duly authorized agent or attorney having knowledge of the facts, setting forth the terms of employment, the name of the employer, the time when the services were commenced and when ended, the wages agreed upon, if any, and if not agreed upon then the reasonable value of the same, the terms of payment, if any, and a description of the real estate on which any crop is grown, or has been grown, or harvested, on which a lien is claimed, the amount paid him, if any, and the amount remaining unpaid, and that said laborer claims a lien for the same and the address to which notice shall be directed as hereinafter required by section 45-905.

History: En. Sec. 2, Ch. 196, L. 1935.

45-903. (8374.3) The duty of clerk and recorder—fee. It shall be the duty of the clerk and recorder to file and enter said verified statement, and he shall be entitled to a fee of fifty cents (50c) for filing the same.

History: En. Sec. 3, Ch. 196, L. 1935.

45-904. (8374.4) No priority among lien holders. If several persons have or obtain liens under the provisions of this act against property of the same employer, they shall have no priority among themselves but all

must be paid pro rata from the proceeds of any foreclosure sale according to the provisions of the following sections.

History: En. Sec. 4, Ch. 196, L. 1935.

45-905. (8374.5) Notice to other lien holders. Every person intending to foreclose a lien secured under the provisions of this act, must give a written notice to the owner, or the person against whom the lien is claimed, and all chattel mortgagees, encumbrancers, and all other lien holders who appear on record in the office of the county clerk and recorder that in not less than ten days from the date of said lien notice he will institute proceedings for the foreclosure of his lien, and all other labor lien holders to whom notice is given shall have the right to join in said foreclosure proceedings and be entitled to a pro rata share of the proceeds of the foreclosure sale, as hereinafter provided for; provided however, if the notified labor lien holders do not join in said proceedings, they shall not be entitled to share pro rata in the proceeds of said sale as aforesaid.

The lien notice required herein must be given by registered mail and directed to the last known address of the owner, or the person against whom the lien is claimed, and to the addresses of the chattel mortgagees, encumbrancers, and all other lien holders as their addresses appear of record. The return of the foreclosure sale must be accompanied by due proof of the giving of such notice as required to be given herein.

History: En. Sec. 5, Ch. 196, L. 1935.

45-906. (8374.6) Rules of practice. Except as otherwise provided in this act, the provisions of the Code of Civil Procedure (Title 93) are applicable to and constitute the rules of practice in the proceedings mentioned in this act.

History: En. Sec. 6, Ch. 196, L. 1935.

45-907. (8374.7) New trials and appeals. The provisions of the Code of Civil Procedure (Title 93) relative to new trials and appeals, except insofar as they are inconsistent with the provisions of this act, apply to the proceedings mentioned in this act.

History: En. Sec. 7, Ch. 196, L. 1935.

45-908. (8374.8) Parties. All persons interested in the matter in controversy, or in property charged with the lien, or having liens thereon may be made parties.

History: En. Sec. 8, Ch. 196, L. 1935.

45-909. (8374.9) Costs and attorney's fees allowed. In an action to foreclose a lien under this act the court must allow as costs the money paid for filing the lien, and reasonable attorney fees in the district court and supreme court, and such costs and attorney fees must be allowed to each claimant whose lien is established and such reasonable attorney fees must be allowed to the defendant against whose property a lien is filed, if such lien be not established.

History: En. Sec. 9, Ch. 196, L. 1935.

45-910. (8374.10) Limitations of actions to foreclose liens. All actions for the foreclosure and enforcement of the lien herein provided for must be commenced within ninety (90) days from the filing of the lien.

History: En. Sec. 10, Ch. 196, L. 1935.

45-911. (8374.11) Acknowledgment of satisfaction of lien — penalty. Whenever the indebtedness which is a lien upon any of such crops is paid and satisfied, it is the duty of the lienor to acknowledge satisfaction thereof as in case of a chattel mortgage, and to discharge the said lien of record; and if any lienor fails to acknowledge satisfaction and discharge said lien as aforesaid he is liable to any person injured thereby in the amount of such injury and costs of action.

History: En. Sec. 11, Ch. 196, L. 1935.

CHAPTER 10

LABORERS' AND MATERIALMEN'S LIENS ON OIL AND GAS WELLS AND PIPE LINES

Section 45-1001. Lien for labor and materials furnished for use of oil or gas wells or pipe lines.

45-1002. Lien for labor or supplies furnished for contractor.

45-1003. Manner of creating and enforcing liens.

45-1001. (8375) Lien for labor and materials furnished for use of oil or gas wells or pipe lines. Any person, corporation, or co-partnership who shall under contract, expressed or implied, with the owner of any leasehold for oil and gas purposes, or the owner of any gas pipe or oil pipe line, or with the trustee or agent of such owner, who shall perform labor or furnish material, machinery, and oil well supplies used in the digging, drilling, torpedoing, completing, operating, or repairing of any oil or gas well, or who shall furnish any oil well supplies, or perform any labor in constructing or putting together any of the machinery used in drilling, torpedoing, operating, completing or repairing any gas well, shall have a lien upon all of the right, title and interest of such owner in and to the whole of such leasehold or oil pipe line or gas pipe line, or lease for oil and gas purposes, the building, and appurtenances, and upon the material and supplies so furnished, and upon all of the right, title and interest of such owner in and to said oil and gas well for which they were furnished, and upon all of the right, title and interest of such owner in and to all other oil wells, fixtures, and appliances used in the operating for oil and gas purposes upon the leasehold for which said material and supplies were furnished and labor performed.

History: En. Sec. 1, Ch. 45, L. 1917; re-en. Sec. 8375, R. C. M. 1921; amd. Sec. 1, Ch. 152, L. 1923.

Complaint Showing That Casing Not Furnished by Lienor Immaterial

That complaint in an action to foreclose an oil-well materialmen's lien, brought under this section and section 45-1003, and special in character, affirmatively showed upon its face that certain casing on which the lien was claimed had not

been furnished by plaintiff, held immaterial, though perhaps fatal under the general materialmen's statute (sec. 45-504). *Continental Supply Co. v. White et al.*, 92 M 254, 259, 12 P 2d 569.

Contract on Which Mechanic's Lien Based May Be With Owner of Leasehold or Agent or Trustee

The contract for work or materials, express or implied, which under this section forms the basis for the lien thereby

created, may be with the owner of an oil and gas leasehold, or with his agent or trustee. *Blose v. Havre Oil & Gas Co.*, 96 M 450, 460 et seq., 31 P 2d 738.

Deficiency Judgment Proper

In an action to foreclose a lien for labor performed about an oil well sunk on leased land, granted by this section, the court may, in the event the sale of the property covered by the lien prove insufficient to pay the amount due plaintiff, with interest, costs and attorney's fee, provide for a deficiency judgment. *Hockman v. Sunhew Petroleum Corp.*, 92 M 174, 176 et seq., 11 P 2d 778.

Definition of "Owner"

The word "owner" as used in this section, in providing that a person performing labor for the owner of a leasehold for oil and gas purposes, shall have a lien upon the interest of such owner, does not mean the record owner, but does mean one who has an estate in the property which may be assigned or transferred, and therefore a notice of lien which named the transferee under an agreement of sale of a lease as the "owner" of a leasehold (the owner of an equitable interest) was not defective in not naming as owner the legal owner, only the equitable interest having been subject to the lien. *Callender v. Crossfield Oil Syndicate*, 84 M 263, 267, 271, 275 P 273.

Description of Property

Courts are reluctant to set aside mechanics' liens merely because of a loose description of the property, and the general rule is that if there be a substantial compliance with the statutory provisions and there appears enough in the description to enable one familiar with the locality to identify the property upon which the lien is claimed, it is sufficient, and under that rule, held, that a lien filed by an oil-well driller in pursuance of this section and section 45-502, was sufficient. *Callender v. Crossfield Oil Syndicate*, 84 M 263, 267, 271, 275 P 273.

Contention that the complaint in an action to foreclose an oil-well materialmen's lien under this section, as well as the notice of lien, were insufficient as to description of the property and of the owner of it, held of no merit, section 45-502, made applicable by this section, requiring no more than a description by which the property may be identified and making no provision for a description of the owner. *Continental Supply Co. v. White et al.*, 92 M 254, 259, 12 P 2d 569.

Effect of Clause in Lease from Federal Government

The clause in an oil and gas lease issued

by the federal government under which the lessee is prohibited from assigning or subletting it without the written consent of the Secretary of the Interior under penalty of forfeiture does not bar enforcement of a decree of foreclosure of a mechanics' lien granted by this section, on such leasehold; the resultant transfer being made by operation of law, the prohibition referred to has no application. *Hockman v. Sunhew Petroleum Corp.*, 92 M 174, 176 et seq., 11 P 2d 778.

How To Be Construed

Mechanics' and materialmen's lien laws (such as chapter 152, Laws of 1923 (45-1001 and 45-1003)), granting liens for labor and materials furnished to oil and gas leasehold owners), considering their purpose, which is to make secure payment of those who by their labor or materials enhance the value of the lienor's property, should be so construed, without violating the true signification of the language used, as to best promote their object and efficiency in all their parts. *Blose v. Havre Oil & Gas Co.*, 96 M 450, 460 et seq., 31 P 2d 738.

Liens Do Not Attach to Right, Title and Interest of Third Person

The lien granted by this section to one performing labor in drilling an oil well for the owner of a leasehold on oil and gas lands, attaches only to any right, title or interest of such owner; hence where casing for a well was furnished to the leaseholder by a third person under a contract that if the well should prove a nonproducer the casing should be salvaged and returned to its owner, the lien of the drillers of the well did not extend to the casing. *Cheadle v. Bardwell et al.*, 95 M 299, 308 et seq., 26 P 2d 336.

Name of Owner of Leasehold, Not Owner of Land, Must Appear in Lien

Under the oil- and gas-well lien statute (chapter 152, Laws of 1923), (45-1001 and 45-1003) relating to liens for labor and materials furnished to owners of leaseholds, the name of the owner of the leasehold, rather than the owner of the land, must appear in the lien claim. *Blose v. Havre Oil & Gas Co.*, 96 M 450, 460 et seq., 31 P 2d 738.

Parties to Foreclosure

In a proceeding to foreclose a mechanics' lien instituted by an oil-well driller under section 45-501, and this section, asserted against a leasehold interest, neither the lessor nor, in the case of an assigned lease, the assignor, is a necessary party. *Sunburst Oil & Refining Co. v. Callender*, 84 M 178, 188, 274 P 834.

Time Lien Attaches

Held, that the lien of one who furnishes material for the drilling of an oil well attaches, under this section, when he parts with his material on credit. *Continental Supply Co. v. White et al.*, 92 M 254, 259, 12 P 2d 569.

Where a mechanic for work performed on an oil and gas leasehold perfects his lien by compliance with the provisions of chapter 152, Laws of 1923 (45-1001 and 45-1003), it takes effect as of the date of the commencement of his work on the property charged. *Blose v. Havre Oil & Gas Co.*, 96 M 450, 460 et seq., 31 P 2d 738.

References

Williard et al. v. Federal Surety Co., 91 M 465, 471, 8 P 2d 633; *Continental*

Supply Co. v. Price et al., 126 M 363, 251 P 2d 553, 559.

Collateral References

Mines and Minerals § 112(2).

58 C.J.S. *Mines and Minerals* § 261.

36 Am. Jur. 11 et seq., *Mechanics' Liens*.

Validity and effect of provision in contract against mechanics' liens. 13 ALR 1065.

What amounts to waiver of right to mechanic's lien. 65 ALR 282.

Right of one who pays or advances money, or assumes obligation to pay laborer or materialman, to mechanic's lien or priority. 74 ALR 522.

Time when contractor commenced work or time when labor or materials for which lien is claimed was furnished as date of mechanic's lien. 83 ALR 925.

45-1002. (8376) Lien for labor or supplies furnished for contractor.

Any person, copartnership, or corporation who shall furnish such machinery or supplies to a subcontractor under a contractor, or any person who shall perform such labor under a subcontractor with a contractor, or who, as an artisan or day laborer in the employ of such contractor, who shall perform any such labor, may obtain a lien upon said leasehold for oil and gas purposes, or any gas pipe line or any oil pipe line from the same tank, and in the same manner and to the same extent as the original contractor for the amount due him for such labor, as provided in the preceding section.

History: En. Sec. 2, Ch. 45, L. 1917; re-en. Sec. 8376, R. C. M. 1921.

460 et seq., 31 P 2d 738; *Continental Supply Co. v. Price et al.*, 126 M 363, 251 P 2d 553, 559.

References

Blose v. Havre Oil & Gas Co., 96 M 450,

45-1003. (8377) Manner of creating and enforcing liens. The liens herein created shall be enforced in the same manner, and the notice of same shall be given in the same manner, and the materialman's statement, or the lien of any laborer herein mentioned, shall be filed in the same manner as now provided by the laws of Montana for materialmen's and mechanics' liens, except that the time within which such liens must be filed shall be six months instead of ninety days; and the method of procedure provided by the laws of the state of Montana for enforcing of materialmen's and mechanics' liens shall govern the enforcement thereof.

History: En. Sec. 3, Ch. 45, L. 1917; re-en. Sec. 8377, R. C. M. 1921; amd. Sec. 2, Ch. 152, L. 1923.

Cross-Reference

Attorney's fees on foreclosure, sec. 93-8614.

Reference

Continental Supply Co. v. Price et al., 126 M 363, 251 P 2d 553, 559.

References

Williard et al. v. Federal Surety Co., 91 M 465, 471, 8 P 2d 633; *Hockman v. Sunhew Petroleum Corp.*, 92 M 174, 181, 11 P 2d 778; *Continental Supply Co. v. White et al.*, 92 M 254, 261, 12 P 2d 569; *Blose v. Havre Oil & Gas Co.*, 96 M 450, 460 et seq., 31 P 2d 738.

CHAPTER 11

MISCELLANEOUS LIENS

- Section 45-1101. Lien of seller of real property.
 45-1102. When transfer of contract waives lien.
 45-1103. Extent of sellers' lien.
 45-1104. Lien of seller of personal property.
 45-1105. Purchasers' lien on real property.
 45-1106. Agisters' liens and liens for service—priority.
 45-1107. Mortgagee may take possession of property.
 45-1108. Procedure to enforce lien—sale.
 45-1109. Lien not lost by fraudulent taking of property.
 45-1110. Lien of factor.
 45-1111. Bankers' lien.
 45-1112. Shipmasters' lien.
 45-1113. Seamen's lien.
 45-1114. Officers' lien.
 45-1115. Judgment lien.
 45-1116 to 45-1118. Repealed.

45-1101. (8378) Lien of seller of real property. One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer.

History: En. Sec. 3930, Civ. C. 1895; re-en. Sec. 5800, Rev. C. 1907; re-en. Sec. 8378, R. C. M. 1921. Cal. Civ. C. Sec. 3046. Field Civ. C. Sec. 1691.

Operation and Effect

Where, under a contract of sale of property, whether real or personal, cancellation of which, with forfeiture of an advance payment, was sought because of breach by the vendee in failing to make a deferred payment, the legal title remained in the vendor though possession was delivered to the vendee, this section has no application, and therefore the provision of section 45-112 declaring void "contracts for the forfeiture of property subject to a lien," etc., has no pertinency. *Cook-Reynolds Co. v. Chipman*, 47 M 289, 298, 133 P 694.

This section, providing for a vendors' lien for so much of the purchase price of real property as remains unpaid and unsecured, has no application to an executory contract of sale under which the vendor retains title in himself until the purchase price is fully paid. *Smith v. Bunston*, 72 M 535, 539, 234 P 836.

45-1102. (8379) When transfer of contract waives lien. Where a buyer of real property gives to the seller a written contract for payment of all or part of the price, an absolute transfer of such contract by the seller waives his lien to the extent of the sum payable under the contract; but a transfer of such contract in trust to pay debts, and return the surplus, is not a waiver of the lien.

History: En. Sec. 3931, Civ. C. 1895; re-en. Sec. 5801, Rev. C. 1907; re-en. Sec. 8379, R. C. M. 1921. Cal. Civ. C. Sec. 3047. Based on Field Civ. C. Sec. 1692.

Where, in an action to foreclose a vendor's lien, to recover a balance due on the purchase price of land and quiet title thereto, defendant vendee gave to plaintiff vendor a quitclaim deed to the property after several years default in installments, interest and taxes, the vendor then leasing it to vendee with a provision that the property could be sold to vendee or anyone else, holding by the trial court that the contract had not been revived by the acts of the parties as claimed by plaintiff, affirmed, under rules relating to the conclusiveness of findings of district courts in equity cases. *Spratt v. Pfeifle*, 115 M 232, 233, 142 P 2d 563.

References

Cited or applied as section 5800, Revised Codes, in *Cook-Reynolds Co. v. Chipman*, 47 M 289, 298, 133 P 694.

Collateral References

Vendor and Purchaser—248.
 66 C.J. Vendor and Purchaser § 1075.
 55 Am. Jur. 852, Vendor and Purchaser, §§ 447 et seq.

Collateral References

Vendor and Purchaser—266(10).
 66 C.J. Vendor and Purchaser § 1163.

45-1103. (8380) Extent of sellers' lien. The liens defined in sections 45-1101 and 45-1105 are valid against every one claiming under the debtor, except a purchaser and encumbrancer in good faith and for value.

History: En. Sec. 3932, Civ. C. 1895; re-en. Sec. 5802, Rev. C. 1907; re-en. Sec. 8380, R. C. M. 1921. Cal. Civ. C. Sec. 3048. Field Civ. C. Sec. 1693.

Collateral References

Vendor and Purchaser 257.
66 C.J. Vendor and Purchaser § 1078.

45-1104. (8381) Lien of seller of personal property. One who sells personal property has a special lien thereon, dependent on possession, for its price, if it is in his possession when the price becomes payable, and may enforce his lien in like manner as if the property was pledged to him for the price.

History: En. Sec. 3933, Civ. C. 1895; re-en. Sec. 5803, Rev. C. 1907; re-en. Sec. 8381, R. C. M. 1921. Cal. Civ. C. Sec. 3049. Field Civ. C. Sec. 1694.

lien under this section does not deprive the seller of the right to assert a material-man's lien. Caird Engineering Works v. Seven-Up Gold Mining Co., Inc., 111 M 471, 490, 111 P 2d 1267.

Operation and Effect

Under an executory contract of sale of an automobile, possession being retained by the dealer, if the buyer does not make payment within the time fixed by the contract, the dealer may sell the machine in satisfaction of his lien in the manner provided by the statute for the foreclosure of a pledge. Evankovich v. Howard Pierce, Inc., 91 M 344, 452, 8 P 2d 653.

Surrender of the right to a vendor's

References

Cited or applied as section 5803, Revised Codes, in Welch v. Nichols, 41 M 435, 441, 110 P 89; Lehrkind v. McDonnell, 51 M 343, 350, 153 P 1012.

Collateral References

Sales 305.
78 C.J.S. Sales § 391.

45-1105. (8382) Purchasers' lien on real property. One who pays to the owner any part of the price of real property, under an agreement for the sale thereof, has a special lien upon the property, independent of possession, for such part of the amount paid as he may be entitled to recover back, in case of a failure of consideration.

History: En. Sec. 3934, Civ. C. 1895; re-en. Sec. 5804, Rev. C. 1907; re-en. Sec. 8382, R. C. M. 1921. Cal. Civ. C. Sec. 3050. Field Civ. C. Sec. 1695.

required to show that he had placed or offered to place defendant in the position in which he was at the time the contract was entered into. Hollensteiner v. Anderson, 78 M 122, 132, 252 P 796.

Operation and Effect

In an action to foreclose a vendee's lien on land independent of possession under this section the rules governing an action for the rescission of a contract do not obtain, and therefore plaintiff was not

Collateral References

Vendor and Purchaser 337.
66 C. J. Vendor and Purchaser § 1583.
55 Am. Jur. 941, Vendor and Purchaser, §§ 548 et seq.

45-1106. (8383) Agisters' liens and liens for service—priority. Every person who, while lawfully in possession of an article of personal property, renders any service to the owner or lawful claimant thereof by labor or skill employed for the making, repairing, protection, improvement, safe keeping, or carriage thereof, has a special lien thereon, dependent on possession, for the compensation, if any, which is due to him from the owner or lawful claimant for such service and for material, if any, furnished in connection therewith. A ranchman, farmer, agister, herder, hotel-keeper, livery, boarding, or feed stable-keeper, to whom any horses, mules, cattle, sheep, hogs, or other stock are intrusted, and there is a contract,

express or implied, for their keeping, feeding, herding, pasturing, or ranching, has a lien upon such stock for the amount due for keeping, feeding, herding, pasturing, or ranching the same, and is authorized to retain possession thereof until the sum due is paid. The lien hereby created shall not take precedence over the lien of prior chattel mortgages or other recorded liens on the property involved, unless within ten days from the time of receiving the property, the person desiring to assert a lien thereon shall give notice in writing to said mortgagee or other lienholder, stating his intention to assert a lien on said property, under the terms of this act, and stating the nature and approximate amount of the work, or feed, performed or furnished or intended to be performed or furnished therefor.

Such service may be made either by personal service or by mailing by registered mail a copy of said notice to the mortgagee or other lienholder at his last known postoffice address. Said service shall be deemed complete upon the deposit of the notice in the postoffice.

History: Similar early acts were Sec. 1, p. 331, Bannack Stat.; re-en. Sec. 29, p. 514, Cod. Stat. 1871; re-en. Sec. 848, 5th Div. Rev. Stat. 1879; re-en. Sec. 1394, 5th Div. Comp. Stat. 1887; amd. Sec. 3935, Civ. C. 1895.

En. Sec. 3935, Civ. C. 1895; re-en. Sec. 5805, Rev. C. 1907; amd. Sec. 1, Ch. 117, L. 1921; re-en. Sec. 8383, R. C. M. 1921. Cal. Civ. C. Sec. 3051. First paragraph based on Field Civ. C. Sec. 1696.

Inapplicable to Claim for Wages

Held, in an action in claim and delivery, that this section, according a lien to a ranchman, farmer or herder, for keeping, feeding or pasturing livestock, applies only to one intrusted with the care, custody and control of animals under a contract of bailment, and under it a lien is not given to an employee, or a herder, on the livestock of his employer for wages due for herding them. *Love v. Hecker et al.*, 67 M 497, 499 et seq., 215 P 1099.

Waiver of This Lien Does Not Preclude Mechanic's Lien

Fact that a machinery repair company did not assert a lien under this section, does not deprive it of the right to claim a mechanic's lien under section 45-501. *Caird Engineering Works v. Seven-Up Gold Mining Co., Inc.*, 111 M 471, 490, 111 P 2d 1267.

When Lien May Arise

Persons employed to drive cattle are not herders and, consequently, are not entitled to a herder's lien. Before a lien is created, there must be a delivery of possession and a contract for the keeping of the cattle for the purpose of feeding, herding, ranching or pasturing. *Underwood v. Birdsell*, 6 M 142, 145, 9 P 922. See *Vose v. Whitney*, 7 M 385, 390, 16 P 846.

Where cattle are taken into the possession of the sheriff by virtue of the terms of a chattel mortgage authorizing such possession in case of default, and plaintiff, by direction of a deputy of the sheriff, took charge of the cattle and fed and pastured them, during which time the debt secured by the mortgage was settled, the plaintiff has a lien on the cattle. *Vose v. Whitney*, 7 M 385, 390, 16 P 846.

An agister's lien being by this section to a ranchman or farmer to whose care livestock is intrusted, can arise only where the owner, or person in lawful possession, of the stock delivers it to the ranchman or farmer under a contract, express or implied, for that purpose. *Noel v. Cowan et al.*, 80 M 258, 260 P 116.

On the facts considered in an action for conversion of an automobile, against an operator of a garage in which defendant claimed to hold same for storage charges, it was held that defendant was entitled to a lien on said car and in retaining same to secure his lien for storage charges, he was not liable for wrongful conversion thereof. *Bethel v. Giebel*, 101 M 410, 416, 55 P 2d 1287.

Under this statute there must be a delivery of possession and a contract for the keeping before a lien is created. *Engle v. Pfister*, — M —, 257 P 2d 561, 563.

References

Continental Supply Co. v. White et al., 92 M 254, 268, 12 P 2d 569; *O'Connell v. Haggerton*, 126 M 442, 253 P 2d 578, 580.

Collateral References

Animals—26; *Bailment*—18.
3 C.J.S. *Animals* § 21; 8 C.J.S. *Bailments* § 35.
2 Am. Jur. 710, *Animals*, § 22.

45-1107. (8384) Mortgagee may take possession of property. Within ten days after the date of such mailing, or five days after such personal service, the mortgagee or other lien-holder, or his representative, shall have the right to take possession of said property upon payment of the amount of the lien then accrued. A failure on the part of such mortgagee or other lien-holder so to do shall constitute a waiver of the priority of such chattel mortgage or other lien.

History: En. Sec. 2, Ch. 117, L. 1921;
re-en. Sec. 8384, R. C. M. 1921. Cal. Civ. C.
Sec. 3052.

45-1108. (8385) Procedure to enforce lien—sale. If payment for such work, labor, feed, or services, or material furnished, is not made within thirty (30) days after the performance or furnishing of the same, the person entitled to a lien under the provisions of this section may enforce said lien in the following manner: He shall deliver to the sheriff or a constable of the county in which the property aforesaid is located a statement of the amount of his claim against said property, a description of the property, and the name of the owner thereof, or of the person at whose request the work, labor, or services were performed, or the materials furnished. Upon receipt of such statement, the sheriff or constable shall proceed to advertise and sell at public auction so much of the property covered by said lien as will satisfy same. Such sale shall be advertised, conducted, and held in the same manner as provided by law for the sale of mortgaged personal property by sheriffs. Such notice shall be given for not less than five (5) nor more than ten (10) days prior to the date of sale. The proceeds of the sale shall be applied by the sheriff to the discharge of the lien and the costs of the proceedings in selling the property and enforcing the lien, and the remainder, if any, or such part as is required to discharge the claims, shall be turned over by the sheriff to the holders, in the order of their precedence, of the chattel mortgages or other lien claimants of record against said property, and the balance of the proceeds shall be turned over to the owner of the property. Providing, however, that before making seizure of any property under the provisions of this section, the sheriff may require an indemnity bond from the lienor in not to exceed double the amount of the claim against said property, said bond and the surety or sureties thereon to be approved by said sheriff.

History: En. Sec. 3, Ch. 117, L. 1921;
re-en. Sec. 8385, R. C. M. 1921; amd. Sec.
1, Ch. 130, L. 1927.

References

Engle v. Pfister, — M —, 257 P 2d 561,
562.

45-1109. (8386) Lien not lost by fraudulent taking of property. The lien created by this act shall not be lost by reason of any forcible or fraudulent taking of the property from the possession of the person entitled to said lien, but in all such cases the person entitled to such lien shall be entitled to recover possession of the property by proper action instituted in court against any person in whose possession the property may be found.

History: En. Sec. 4, Ch. 117, L. 1921;
re-en. Sec. 8386, R. C. M. 1921.

45-1110. (8387) Lien of factor. A factor has a general lien, dependent on possession, for all that is due to him as such, upon all articles of commercial value that are intrusted to him by the same principal.

History: En. Sec. 3936, Civ. C. 1895;
re-en. Sec. 5806, Rev. C. 1907; re-en. Sec.
8387, R. C. M. 1921. Cal. Civ. C. Sec.
3053. Field Civ. C. Sec. 1697.

Collateral References

Factors↪47.
35 C.J.S. Factors § 45.
22 Am. Jur. 330, Factors §§ 43-46.

45-1111. (8388) Bankers' lien. A banker has a general lien, dependent on possession, upon all property in his hands belonging to a customer, for the balance due to him from such customer in the course of the business.

History: En. Sec. 3937, Civ. C. 1895;
re-en. Sec. 5807, Rev. C. 1907; re-en. Sec.
8388, R. C. M. 1921. Cal. Civ. C. Sec. 3054.
Field Civ. C. Sec. 1698.

Collateral References

Banks and Banking↪136 et seq.
9 C.J.S. Banks and Banking § 309.
7 Am. Jur. 451, Banks, §§ 623 et seq.

45-1112. (8389) Shipmasters' lien. The master of a ship has a general lien, independent of possession, upon the ship and freightage, for advances necessarily made or liabilities necessarily incurred by him for the benefit of the ship, but has no lien for his wages.

History: En. Sec. 3938, Civ. C. 1895;
re-en. Sec. 5808, Rev. C. 1907; re-en. Sec.
8389, R. C. M. 1921. Cal. Civ. C. Sec. 3055.
Field Civ. C. Sec. 1699.

Cross-Reference

Boats, liens against, secs. 93-6502, 93-6503.

Collateral References

Maritime Liens↪14, 25½.
55 C.J.S. Maritime Liens § 20.

45-1113. (8390) Seamen's lien. The mate and seamen of a ship have a general lien, independent of possession, upon the ship and freightage, for their wages, which is superior to every other lien.

History: En. Sec. 3939, Civ. C. 1895;
re-en. Sec. 5809, Rev. C. 1907; re-en. Sec.
8390, R. C. M. 1921. Cal. Civ. C. Sec. 3056.
Field Civ. C. Sec. 1700.

Collateral References

Seamen↪27.
79 C.J.S. Seamen § 140.

45-1114. (8391) Officers' lien. An officer who levies an attachment or execution upon personal property acquires a special lien, dependent on possession, upon such property, which authorizes him to hold it until the process is discharged or satisfied, or a judicial sale of the property is had.

History: En. Sec. 3940, Civ. C. 1895;
re-en. Sec. 5810, Rev. C. 1907; re-en. Sec.
8391, R. C. M. 1921. Cal. Civ. C. Sec. 3057.
Field Civ. C. Sec. 1701.

Collateral References

Attachment↪183; Execution↪116.
7 C.J.S. Attachment § 260; 33 C.J.S. Executions § 131.

45-1115. (8392) Judgment lien. The lien of a judgment is regulated by Title 93.

History: En. Sec. 3941, Civ. C. 1895;
re-en. Sec. 5811, Rev. C. 1907; re-en. Sec.
8392, R. C. M. 1921. Cal. Civ. C. Sec. 3058.
Field Civ. C. Sec. 1703.

Collateral References

Judgment↪753.
49 C.J.S. Judgments § 454.

45-1116 to 45-1118. (8393 to 8395) Repealed—Chapter 34, Laws of 1953.

Repeal

These sections relating to statements to be filed by stallion keeper, penalties for

false statements and liens for services of stallions, were repealed by Sec. 1, Ch. 34, Laws 1953, effective February 16, 1953.

CHAPTER 12

LIENS OF PHYSICIANS, NURSES AND HOSPITALS
IN PERSONAL INJURY CLAIMS

- Section 45-1201. Lien of physicians, nurses and hospitals on causes of action and claims for injuries or death.
 45-1202. Notice of claim of lien—service on party liable.
 45-1203. Same—when filed with clerk of court.
 45-1204. Failure to recognize claim—liability for.
 45-1205. Act not applicable when event covered by workmen's compensation act.

45-1201. (8395.1) Lien of physicians, nurses and hospitals on causes of action and claims for injuries or death. Whenever a physician, nurse or hospital shall render services in the treatment or care of any person injured through the fault or neglect of another, such physician, nurse or hospital shall have a lien for the value of such services upon the claim and cause of action for such injury, or death resulting therefrom, and upon any judgment recovered on account thereof, and upon all moneys paid in satisfaction of such judgment or in settlement of such claim or cause of action, upon giving notice and complying with the requirements of this act. Such lien, however, shall be subject to any attorney's lien provided for in section 93-2120. Provided, however, that no lien under this section shall exceed the provisions of the schedule of fees as adopted by the Montana State Medical Association.

History: En. Sec. 1, Ch. 57, L. 1931.

Collateral References

Physicians and Surgeons \S 21.

70 C.J.S. Physicians and Surgeons \S 68.

45-1202. (8395.2) Notice of claim of lien—service on party liable. Any physician, nurse or hospital claiming such lien shall serve a written notice upon the person or corporation against whom liability for such injury or death is asserted, stating therein the nature of the services and for whom and when rendered and the value thereof, and that a lien therefor is claimed as provided by this act.

History: En. Sec. 2, Ch. 57, L. 1931.

45-1203. (8395.3) Same—when filed with clerk of court. If an action is commenced to recover for such injury or death, a duplicate of such notice and claim of lien shall be filed in the office of the clerk of the court in which such action is pending, and such filing shall be notice to all parties to said action of such lien.

History: En. Sec. 3, Ch. 57, L. 1931.

45-1204. (8395.4) Failure to recognize claim—liability for. If any person or corporation, against whom a claim is made for damages for personal injury or death, after receiving notice of lien as herein provided, shall make payment to the claimant or claimants, on account of such injury or death, and the amount claimed by any physician, nurse, or hospital for services, as stated in the notice so given has not been paid, such person or corporation shall be liable to such physician, nurse or hospital for the reasonable value of such services.

History: En. Sec. 4, Ch. 57, L. 1931.

45-1205. (8395.5) Act not applicable when event covered by workmen's compensation act. This act shall not apply to any injury or death for which compensation is awarded, under or pursuant to the workmen's compensation law of Montana.

History: En. Sec. 5, Ch. 57, L. 1931.

CHAPTER 13

STOPPAGE IN TRANSIT

Section 45-1301. When consignor may stop goods.
 45-1302. What is insolvency of consignee.
 45-1303. Transit—when ended.
 45-1304. Stoppage—how effected.
 45-1305. Effect of stoppage.

45-1301. (8396) When consignor may stop goods. A seller or consignor of property, whose claim for its price or proceeds has not been extinguished, may, upon the insolvency of the buyer or consignee becoming known to him after parting with the property, stop it while on its transit to the buyer or consignee, and resume possession thereof.

History: En. Sec. 3970, Civ. C. 1895;
 re-en. Sec. 5837, Rev. C. 1907; re-en. Sec.
 8396, R. C. M. 1921. Cal. Civ. C. Sec. 3076.
 Field Civ. C. Sec. 1707.

Collateral References
 Sales \S 291.
 78 C.J.S. Sales \S 404.

45-1302. (8397) What is insolvency of consignee. A person is insolvent, within the meaning of the last section, when he ceases to pay his debts in the manner usual with persons of his business, or when he declares his inability or unwillingness to do so.

History: En. Sec. 3971, Civ. C. 1895;
 re-en. Sec. 5838, Rev. C. 1907; re-en. Sec.
 8397, R. C. M. 1921. Cal. Civ. C. Sec. 3077.
 Field Civ. C. Sec. 1708.

References
 Cited or applied as section 3971, Civil
 Code, in *Stadler v. First National Bank*,
 22 M 190, 219, 56 P 111.

45-1303. (8398) Transit—when ended. The transit of property is at an end when it comes into the possession of the consignee, or into that of his agent, unless such agent is employed merely to forward the property to the consignee.

History: En. Sec. 3972, Civ. C. 1895; 8398, R. C. M. 1921. Cal. Civ. C. Sec. 3078.
 re-en. Sec. 5839, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1709.

45-1304. (8399) Stoppage—how effected. Stoppage in transit can be effected only by notice to the carrier or depository of the property, or by taking actual possession thereof.

History: En. Sec. 3973, Civ. C. 1895; 8399, R. C. M. 1921. Cal. Civ. C. Sec. 3079.
 re-en. Sec. 5840, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1710.

45-1305. (8400) Effect of stoppage. Stoppage in transit does not, of itself, rescind a sale, but is a means of enforcing the lien of the seller.

History: En. Sec. 3974, Civ. C. 1895; 8400, R. C. M. 1921. Cal. Civ. C. Sec. 3080.
 re-en. Sec. 5841, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1711.

CHAPTER 14

CROP OR GRAIN LIEN FOR DUSTING OR SPRAYING

- Section 45-1401. Lien for crop dusting or spraying—who may have.
 45-1402. Claim of lien—when, where and how filed.
 45-1403. Endorsement and abstract of lien by county clerk.
 45-1404. Priority of lien.
 45-1405. Limitations of actions to foreclose liens.
 45-1406. Rules of practice.
 45-1407. New trials and appeals.
 45-1408. Parties.
 45-1409. Owner defined.
 45-1410. Acknowledgment of satisfaction and discharge of lien—penalty for failure.

45-1401. Lien for crop dusting or spraying—who may have. Any person, firm, corporation or copartnership who shall under contract, express or implied, perform labor or service, or furnish material in crop dusting or spraying grains or crops for the purpose of weed, disease or insect control for promoting the growth of such grains or crops shall have a lien upon all such grains or crops so crop dusted or sprayed, for and on account of the labor or service performed and material furnished, upon complying with the provisions of this act; provided, however, that any such lien shall not exceed one dollar and fifty cents (\$1.50) per acre for spraying or dusting wheat, and in the case of other grain or crops, such lien shall not exceed the prevailing price charged in the particular locality in which such grain or crops is sprayed or dusted.

History: En. Sec. 1, Ch. 205, L. 1953.

Collateral References

Liens↔8.

53 C.J.S. Liens § 5.

45-1402. Claim of lien—when, where and how filed. Any person, firm, corporation or copartnership who is entitled to a lien under this act shall, within ten (10) days after the last labor or service was performed or material furnished in crop dusting or spraying grains or crops file in the office of the county clerk and recorder of the county in which said grains or crops were grown, a just and true account of the amount due for such services, labor or material after allowing all proper credits and offsets and containing a description of the grain or crops to be charged with such lien, the price agreed upon for such labor or service or material, or if no price was agreed upon the reasonable value of the same, together with the name of the person, firm or corporation for whom such labor or services were performed or material furnished, and a description of the lands as nearly as possible, upon which said grains or crops were raised, which statements of fact shall be verified by affidavit of the person, firm, corporation or copartnership claiming such lien, or his, their or its duly authorized agent or attorney, having knowledge of the facts.

History: En. Sec. 2, Ch. 205, L. 1953.

Collateral References

Liens↔9.

53 C.J.S. Liens § 6.

45-1403. Endorsement and abstract of lien by county clerk. The county clerk must endorse upon such lien the day of its filing, make an abstract thereof in a book kept by him for that purpose and properly indexed, containing the date of the filing, the name of the person, firm, cor-

poration or copartnership claiming the lien, the amount thereof, the name of the person against whose property the lien is filed, and a description of the property to be charged with the same.

History: En. Sec. 3, Ch. 205, L. 1953.

45-1404. Priority of lien. The lien for labor or services performed or material furnished as specified in this act shall be prior to and have precedence over any mortgage, encumbrance, or other lien upon said grain or crops, except the lien for seed, hail insurance, threshing, labor and warehouse services furnished for the purpose of growing or handling the particular grain or crops.

History: En. Sec. 4, Ch. 205, L. 1953.

Collateral References

Liens ⇄ 12.

53 C.J.S. Liens § 10.

45-1405. Limitations of actions to foreclose liens. All actions for the foreclosure and enforcement of the lien herein provided for must be commenced within one (1) year from the day of the filing of the lien.

History: En. Sec. 5, Ch. 205, L. 1953.

45-1406. Rules of practice. Except as otherwise provided, the provisions of the code of civil procedure (Title 93) are applicable to and constitute the rules of practice for the enforcement and foreclosure of the lien herein provided for.

History: En. Sec. 6, Ch. 205, L. 1953.

45-1407. New trials and appeals. The provisions of the code of civil procedure (Title 93) relative to new trials and appeals, except insofar as they are inconsistent with the provisions of this act, apply to the proceedings mentioned in this act.

History: En. Sec. 7, Ch. 205, L. 1953.

45-1408. Parties. All persons interested in the matter in controversy or the property to be charged with the lien, or having liens thereon, shall be made parties to an action for the foreclosure thereof.

History: En. Sec. 8, Ch. 205, L. 1953.

45-1409. Owner defined. Every person, including guardians or minors, and any company, firm, association or corporation for whose use or benefit the grain or other crops mentioned herein are dusted or sprayed, or the services or labor performed, or material furnished, is deemed the owner thereof for the purposes herein mentioned.

History: En. Sec. 9, Ch. 205, L. 1953.

45-1410. Acknowledgment of satisfaction and discharge of lien—penalty for failure. Whenever the indebtedness which is a lien upon any such grain or crops is paid and satisfied, it is the duty of the lienor to acknowledge satisfaction thereof as in case of a mortgage, and to discharge the said lien of record; and if any lienor fails to acknowledge satisfaction and discharge said lien as aforesaid, he is liable to any person injured thereby in the amount of such injury and the costs of action.

History: En. Sec. 10, Ch. 205, L. 1953.

Collateral References

Liens ⇄ 16.

53 C.J.S. Liens § 17.

TITLE 46

LIVESTOCK

- Chapter 1. Livestock industry—regulation by livestock commission, 46-101 to 46-107.
2. Livestock sanitary board and state veterinary surgeon—quarantine—inspection and destruction of diseased stock—licensing dairies, milk plants and slaughter houses, 46-201 to 46-246.
 3. Tuberculin regulation, sale and distribution, 46-301 to 46-303.
 4. Montana meat inspection law, 46-401 to 46-415.
 5. Butchers' and meat peddlers' licenses—duty as to hides of slaughtered cattle, 46-501 to 46-513.
 6. Brands—recording—venting—livestock mortgages, 46-601 to 46-610.
 7. Inspectors and detectives, 46-701 to 46-709.
 8. Inspection of livestock before removal from county, 46-801 to 46-807.
 9. Livestock markets—inspection and quarantine—license and bonding, 46-901 to 46-921.
 10. Estrays—disposal of, 46-1001 to 46-1013.
 11. Hides of slaughtered cattle—regulation—hide dealers' licenses, 46-1101 to 46-1113.
 12. Improvement of livestock, 46-1201 to 46-1206.
 13. Stallions and jacks—stallion registration board, Repealed—Section 1, Chapter 34, Laws of 1953.
 14. Legal fences—liability of owners for trespassing stock, 46-1401 to 46-1414.
 15. Herd districts, 46-1501 to 46-1507.
 16. Horse herd districts, 46-1601 to 46-1607.
 17. Animals running at large, 46-1701 to 46-1719.
 18. Roundup and sale of abandoned horses, 46-1801 to 46-1815.
 19. Bounties for killing wild animals—killing dogs injuring livestock, 46-1901 to 46-1917.
 20. Impounding livestock or domestic animals, 46-2001 to 46-2008.
 21. Sheep—protection from predatory animals—tax, 46-2101 to 46-2104.
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 23. Grass conservation—grazing districts, 46-2301 to 46-2332.
 24. Rendering or disposal plants—licensing—regulation, 46-2401 to 46-2413.
 25. Artificial insemination of animals and poultry, 46-2501 to 46-2515.
 26. Regulation of industry treating or feeding garbage to swine and other animals, 46-2601 to 46-2611.
 27. County livestock protective committees, 46-2701 to 46-2708.

CHAPTER 1

LIVESTOCK INDUSTRY—REGULATION BY LIVESTOCK COMMISSION

- Section 46-101. Livestock commission—appointment, qualifications and term of office of members—vacancies.
- 46-102. Compensation of members.
- 46-103. Organization of board—secretary and other employees—powers of board.
- 46-104. Duties and powers of commission.
- 46-105. Duty of commission to audit and certify bills for expenses—warrants—livestock commission fund.
- 46-106. Annual report of commission.
- 46-107. Sections repealed—transfer of powers.

46-101. (3253) Livestock commission—appointment, qualifications and term of office of members—vacancies. Upon the passage and approval of this act, the board of stock commissioners and the board of sheep commissioners shall be consolidated, and their powers and duties, except as herein modified, shall be exercised by a board to be known as the livestock

commission, which said board is hereby created, to be composed of six members, each of whom must be, at the time of his appointment, a resident of the state of Montana and the owner of cattle, sheep, or horses in the said state. The governor is hereby authorized and empowered to appoint, by and with the consent of the senate, the members of the said livestock commission. Upon the approval of this act, the governor shall appoint two members of the said livestock commission to hold office for a term of two years; and two members to hold office for a term of four years; and two members to hold office for a term of six years, from and after the first day of March, 1917, respectively, and thereafter the members of the said livestock commission so appointed by the governor shall hold office for the term of six years from and after the appointment, and until their successors are appointed and qualified. In the case of death, resignation, or removal of a member, the governor shall appoint to fill the vacancy thus occasioned. Each of the members, before entering upon his duties, must take and file with the secretary of state the constitutional oath of office.

History: The board of stock commissioners was created by act of March 12, 1885, amended by act of March 9, 1887, appearing as sections 32 to 46, 5th Division Compiled Statutes, 1887. The composition of the board was changed by section 1, p. 177, Laws of 1897 and the law governing it was amended by sections 2950 to 2957, Political Code 1895. The foregoing sections appeared as sections 1782 to 1789, Revised Codes 1907, including amendment by chapter 50, Laws of 1903. The board of sheep commissioners was created by act of May 5, 1897; Laws of 1897, p. 99, section 102; amended by chapter 45, Laws of 1905, appearing as

sections 1854 to 1859 et seq., Revised Codes 1907.

En. Sec. 1, Ch. 51, L. 1917; re-en. Sec. 3253, R. C. M. 1921.

Collateral References

Animals—17, 29.

3 C.J.S. Animals §§ 40, 51.

2 Am. Jur. 807, Animals, §§ 157 et seq.

Liability of public officers for killing or injuring animals while acting under statute in relation to inspection or destruction of livestock. 12 ALR 734.

Constitutionality of statute for control of diseases of livestock. 65 ALR 525.

46-102. (3254) Compensation of members. The members of the livestock commission shall receive no compensation for their services, but shall be allowed their actual expenses for and while attending meetings, such expenses to be audited, allowed, and paid as in the case of other expenditures of the said commission.

History: En. Sec. 2, Ch. 51, L. 1917; re-en. Sec. 3254, R. C. M. 1921.

46-103. (3255) Organization of board—secretary and other employees—powers of board. The commission shall organize by electing one of its members president, and one of its members vice-president. It shall also have power to appoint a secretary and fix his salary, and appoint such other agents and employees as may be necessary for the proper conduct of the business of the commission. They shall have power to adopt, subject to the approval of the governor, by-laws and rules and regulations for the government and conduct of the business of the commission. The secretary shall be the general recorder of marks and brands.

History: En. Sec. 3, Ch. 51, L. 1917; re-en. Sec. 3255, R. C. M. 1921.

46-104. (3256) Duties and powers of commission. It shall be the duty of the livestock commission to exercise general supervision over, and, so far as possible, protect the livestock interests of the state from theft and

disease, and recommend from time to time such legislation as will, in the judgment of the commission, foster this industry. The commission shall have power to procure all necessary and lawful process for the attendance of witnesses, and to employ counsel to assist in the prosecution of violations of laws made for the protection of the livestock interests, and to assist in any lawful way in the prosecution of any persons charged with any offenses against the laws of the state in feloniously branding or stealing livestock, or any other crime or misdemeanor under any of the laws of the state for the protection of the rights and interests of the stock owners. It shall also have power to make rules and regulations governing the recording and use of livestock brands.

History: En. Sec. 4, Ch. 51, L. 1917;
re-en. Sec. 3256, R. C. M. 1921.

Cross-References

Noxious rodents, control, secs. 3-2701 to 3-2704.

Noxious rodents, control, cooperation with county commissioners, secs. 16-1175 to 16-1178.

Power of Representing Attorney

An attorney who represents the state board of stock commissioners has the right to appear in aid of the prosecution of one accused for grand larceny in having stolen livestock. *State v. Biggs*, 45 M 400, 403, 123 P 410.

46-105. (3257) Duty of commission to audit and certify bills for expenses—warrants—livestock commission fund. It shall be the duty of the livestock commission to audit all bills for expenses incurred by it in the discharge of its duties, and when found correct, to certify the same to the state auditor, who shall thereupon draw a warrant upon the state treasurer in favor of the party or parties entitled thereto for the amount so certified, which warrants shall be drawn upon and paid out of the livestock commission fund, which said fund shall be created by placing to its credit the amounts heretofore directed to be placed to the credit of the sheep inspection and indemnity fund and the stock inspection and detective fund by section 84-5212, and other funds hereafter appropriated for the support and maintenance of the said commission.

History: En. Sec. 5, Ch. 51, L. 1917;
re-en. Sec. 3257, R. C. M. 1921.

46-106. (3258) Annual report of commission. The commission must make an annual report in writing to the governor on the first day of December of all its transactions for the year.

History: En. Sec. 6, Ch. 51, L. 1917;
re-en. Sec. 3258, R. C. M. 1921.

46-107. (3259) Sections repealed—transfer of powers. Sections 1782, 1783, 1784, 1785, 1786, 1787, 1788, and 1789 of the revised codes of Montana of 1907, relating to the board of stock commissioners, and sections 1854, 1855, 1856, 1857, 1858, 1859, 1860 and 1861 of the revised codes of Montana of 1907, relating to the board of sheep commissioners, and all other acts or parts of acts in conflict herewith, are hereby repealed; provided, however, that all powers conferred and duties imposed upon the board of stock commissioners and the board of sheep commissioners by statutes other than those in this section mentioned shall be hereafter imposed and conferred upon and exercised by the livestock commission created hereby.

History: En. Sec. 7, Ch. 51, L. 1917;
re-en. Sec. 3259, R. C. M. 1921.

CHAPTER 2

LIVESTOCK SANITARY BOARD AND STATE VETERINARY SURGEON—
QUARANTINE—INSPECTION AND DESTRUCTION OF DISEASED STOCK
—LICENSING DAIRIES, MILK PLANTS AND SLAUGHTER HOUSES

- Section 46-201. Creation of livestock sanitary board.
 46-202. Verification and approval of claims.
 46-203. Veterinary surgeon—appointment and qualifications.
 46-204. Same—duties.
 46-205. Appointment of inspectors and deputies.
 46-206. Appointment of federal veterinary inspectors.
 46-207. Authority of veterinary surgeon and agents.
 46-208. Powers of livestock sanitary board.
 46-209. Poultry industry—powers and authority of livestock sanitary board.
 46-210. Violation constitutes misdemeanor.
 46-211. Promulgation of rules.
 46-212. Establishment of livestock disease control area—entry into area—
compulsory inspection area, when.
 46-213. Duty of county assessor.
 46-214. Owner guilty of misdemeanor, when.
 46-215. Act intended as additional legislation.
 46-216. Sale of carcasses unsanitarily slaughtered or handled.
 46-217. Authority of municipal corporations.
 46-218. Classification of animals as to compensation for slaughter.
 46-219. Payment for other personal property.
 46-220. Indemnity—from what funds paid.
 46-221. Presentation of claims for indemnity.
 46-222. Indemnity for class 2 animals in state less than one hundred and
twenty days.
 46-223. Additional to existing statutes.
 46-224. Examination and payment of claims.
 46-225. Same—payment from county funds.
 46-226. Sale of condemned carcasses—disposal of proceeds.
 46-227. Rules and regulations—agreement with federal government.
 46-228. Persons entitled to indemnity.
 46-229. Compensation from federal government or other agency.
 46-230. Expenses, how paid—lien and foreclosure.
 46-231. Expense of cleaning and disinfecting carriers' facilities.
 46-232. Licensing of milk plants and dairies selling milk or cream for public
consumption.
 46-233. Exceptions of certain producers of meats and dairy products.
 46-234. Co-operation by public officers.
 46-235. Slaughter house license—fees and renewals.
 46-236. Duty to report contagious diseases.
 46-237. Diseased animals not to run at large—burial of carcasses.
 46-238. Penalty for violation of act.
 46-239. Same—civil liability.
 46-240. Power of board concerning oaths and witnesses.
 46-241. Livestock sanitary board account.
 46-242. Annual report of state veterinary surgeon.
 46-243. Personal liability—members and officers of board.
 46-244. Effect of partial invalidity of act.
 46-245. Governor may prohibit importation of animals from localities where
disease exists.
 46-246. Penalty for violation.

46-201. (3260) Creation of livestock sanitary board. In addition to the powers and duties now conferred on the livestock commission, the members thereof shall constitute the livestock sanitary board. Meetings of the livestock sanitary board shall be held upon call of the chairman or executive officer, or of any three members; a majority of the board shall constitute a quorum for the transaction of business; and the chairman of the livestock commission shall act as chairman of the livestock sanitary board. The members of the livestock commission shall receive no compensation for

acting on said board, but they shall receive their actual and necessary traveling and subsistence expenses while in attendance upon and in going to and from board meetings.

History: The livestock sanitary board was created by chapter 152, Laws of 1907, appearing as sections 1884 to 1903, Rev. C. 1907. This act, together with sections 1862 to 1880, Rev. C. 1907, being part of chapter 45, Laws of 1905, dealing with the inspection of sheep, was repealed by chapter 157, Laws of 1917, as were also chapter 146, Laws of 1911, chapters 68, 90 and 123, Laws of 1913, and chapters 9, and 140, Laws of 1915. All the above laws were superseded by the act given here.

En. Sec. 1, Ch. 262, L. 1921; re-en. Sec. 3260, R. C. M. 1921.

Collateral References

Animals—29.

3 C.J.S. Animals § 51.

2 Am. Jur. 807, Animals, §§ 157 et seq.

Liability of public officers for killing or injuring animals while acting under statute in relation to inspection or destruction of livestock. 12 ALR 734.

Constitutionality of statute for control of diseases of livestock. 65 ALR 525.

46-202. (3261) Verification and approval of claims. All claims against the board must be verified by oath of claimant, or his agent with knowledge of the facts, and be approved by the state board of examiners before payment.

History: En. Sec. 2, Ch. 262, L. 1921; re-en. Sec. 3261, R. C. M. 1921.

46-203. (3262) Veterinary surgeon—appointment and qualifications. The board shall appoint a chief executive officer, who shall act as the state veterinary surgeon. He must be a graduate of a regular and reputable veterinary college, or of the veterinary department of a regular and reputable university, and he must be licensed to practice veterinary medicine in the state of Montana.

History: En. Sec. 3, Ch. 262, L. 1921; re-en. Sec. 3262, R. C. M. 1921.

46-204. (3263) Same—duties. The state veterinary surgeon shall be the executive officer of the livestock sanitary board, and shall act as its secretary; and, subject to the rules and regulations of the board, he shall have power to act for and perform the duties imposed by law on the board, when the board is not in session, but any order or regulation promulgated by him shall be subject to review, modification, or annulment by the board at its next, or any subsequent meeting.

History: En. Sec. 4, Ch. 262, L. 1921; re-en. Sec. 3263, R. C. M. 1921.

46-205. (3264) Appointment of inspectors and deputies. The state veterinary surgeon may, by and with the consent of the livestock sanitary board, appoint inspectors, deputy veterinary surgeons, and other agents and assistants, whose duties it shall be to act under the directions of the state veterinary surgeon and the livestock sanitary board. Such deputy veterinary surgeons must be graduates of a regular and reputable veterinary college, or of the veterinary department of a regular and reputable university.

History: En. Sec. 5, Ch. 262, L. 1921; re-en. Sec. 3264, R. C. M. 1921.

46-206. (3265) Appointment of federal veterinary inspectors. By and with the consent of the livestock sanitary board, together with the approval of either the federal veterinary inspector in charge in the state of Montana, or the chief of the United States bureau of animal industry, the state veterinary surgeon may appoint federal veterinary inspectors stationed in this state, as deputy veterinary surgeons under this act, and by and with such consent and approval, federal lay inspectors stationed in this state may likewise be appointed agents for the livestock sanitary board. All such federal officers so appointed as deputies or agents of the livestock sanitary board shall possess the powers and duties of deputy state veterinary surgeons or agents of the livestock sanitary board, as the case may be, but they shall act without compensation and hold office only at the pleasure of the livestock sanitary board.

History: En. Sec. 6, Ch. 262, L. 1921;
re-en. Sec. 3265, R. C. M. 1921.

46-207. (3266) Authority of veterinary surgeon and agents. In the performance of their official duties, the state veterinary surgeon, and any other agent or officer of the livestock sanitary board shall be, and are hereby, authorized and empowered to enter upon or into any lot, yard, land, building, room, premises, enclosure, car, wagon, boat, or other place or vehicle used for the treatment, storage, manufacture, display, or transportation of animals, meat, or dairy products, intended for sale or disposal as food or whereon or wherein may be found any livestock affected with, or which has been exposed to, or which such officer has reason to believe is either affected with, or has been exposed to, an infectious, contagious, communicable or dangerous disease, or disease-carrying insects.

History: En. Sec. 7, Ch. 262, L. 1921;
re-en. Sec. 3266, R. C. M. 1921.

Cross-Reference

State veterinary surgeons, penalty for disobeying orders, sec. 94-35-193.

46-208. (3267) Powers of livestock sanitary board. The livestock sanitary board shall have power:

1. To supervise and control the action of the state veterinary surgeon, all deputies, inspectors, and other employees, and to prescribe their duties, compensation, and tenure of office.

2. To remove any one or more of its appointees, subordinates, and employees at any time for cause.

3. To supervise the sanitary conditions of livestock in this state, under the provisions of the constitution and statutes of this state and such reasonable rules and regulations as this board may from time to time promulgate, and to this end this board shall have power to quarantine any lot, yard, land, building, room, premises, enclosure, or other place or section in this state, which is or may be used or occupied by livestock, and which, in the judgment of the state veterinary surgeon, or of his authorized agent, is infected or contaminated with an infectious, contagious, communicable, or dangerous disease, or disease-carrying medium by which such disease may be communicated; and this board shall have power to quarantine any livestock in this state, whenever, in the judgment of the state veterinary surgeon, or of his authorized agent, such livestock is affected with, or has been exposed to such disease or disease-carrying medium; and this board

shall have power to prescribe treatments and enforce sanitary regulations which, in the judgment of the state veterinary surgeon, or of his authorized agent, are reasonable, necessary, and proper to circumscribe, extirpate, control, or prevent such diseases.

4. To foster, promote, and protect the livestock industry in this state by the investigation of diseases and other subjects related to ways and means of prevention, extirpation, and control of diseases, or to the care of livestock and its products; and to this end to establish and maintain a laboratory, and to make, or cause to be made, biologic products, curatives, and preventative agents; and to do or perform such other acts and things as in their judgment may be necessary or proper in the fostering, promotion, or protection of the livestock industry in this state.

5. To promulgate and enforce such reasonable rules, regulations, and orders as they may deem necessary or proper to prevent the introduction or spreading of infectious, contagious, communicable, or dangerous diseases affecting livestock into this state, and to this end to promulgate and enforce such reasonable rules, regulations and orders as they may deem necessary or proper governing inspections and tests of all livestock intended for importation into this state, before it may be imported into this state.

6. To promulgate and enforce such reasonable rules, regulations, and orders as they may deem necessary or proper for the inspection, testing, and quarantine of all livestock imported into this state.

7. To promulgate and enforce such reasonable rules, regulations and orders, as may to them seem necessary or proper for the supervision, inspection and control of the standards and sanitary conditions of slaughterhouses, meat depots, meat and meat food products, dairies, milk depots, milk and its by-products, barns, dairy cows, factories, and other places and premises where meat, or meat foods, milk or its products, or any thereof intended for sale or consumption as food are produced, kept, handled, or stored; and for the purposes of this act they, or any duly authorized representative of said board, may take samples of any such product or products, so produced, kept, handled, or stored, for analysis or testing by the livestock sanitary board chemist or bacteriologist or the state chemist, and the records of such samples and their analysis and test, when identified, as to the sample by the oath of the officer taking the same, and verified, as to the analysis or test, by the oath of such chemist or bacteriologist making the same, shall be prima facie evidence of the facts therein set forth, when offered in evidence in any prosecution or action at law or in equity for violation of the provisions of this act, or any rule, regulation or order of said board, made in pursuance to this act, provided that the standards referred to in this subsection 7, insofar as they relate to dairies or milk and its by-products, shall not be deemed to include standards of weight or measurement.

8. To promulgate and enforce such reasonable rules, regulations, and orders as may to them seem necessary or proper for the supervision and control of manufactured and refined foods for livestock, and the manufacture, importation, sale, and method of using any biologic remedy or curative agent for the treatment of diseases of livestock; provided, how-

ever, that as far as practicable the standards approved by the United States department of agriculture shall be adopted.

9. To install an adequate system of meat inspection at any time and in such places as public welfare may demand under the rules and regulations which may provide fees for the maintenance of such inspection, and which shall provide ways and means for shipping home-grown and home-killed meats into any city in Montana. As far as practicable, such rules and regulations shall conform with the meat-inspection requirements of the United States bureau of animal industry.

10. To slaughter, or cause to be slaughtered, any or all livestock in this state known to be affected with, or which has been exposed to, an infectious, contagious, communicable, or dangerous disease, when, in the opinion of the state veterinary surgeon, or of a deputy veterinary surgeon, such slaughter is necessary for the protection of other livestock; and to destroy, or cause to be destroyed, all barns, stables, sheds, out-buildings, fixtures, furniture, and personal property infected with any such infectious, contagious, communicable, or dangerous disease, when, in the judgment of the state veterinary surgeon or his authorized agent, the same cannot be thoroughly cleaned and disinfected, and in the judgment of that officer, or his authorized agent, such destruction is necessary to prevent the spreading of such disease.

11. To indemnify the owner of any property destroyed by order of this board, or its authorized representatives, under the provisions of this act, or any rules, regulations, or orders promulgated by this board in pursuance of this act.

12. To require persons, firms, and corporations engaged in the production or handling of meat or meat-food products, or dairy products or any thereof, to furnish statistics of the quantity and cost of such food and food products produced or handled, and the name and address of person or persons supplying them any of such products.

History: En. Sec. 8, Ch. 262, L. 1921;
re-en. Sec. 3267, R. C. M. 1921.

46-209. (3267.1) Poultry industry—powers and authority of livestock sanitary board. For the promotion and protection of the poultry industry, and to prevent, control, and exterminate infectious, contagious, dangerous and destructive diseases affecting poultry, the livestock sanitary board shall have power and it shall be its duty:

1. To supervise the sanitary condition of poultry in this state, under the provisions of the constitution and statutes of this state, and such reasonable rules and regulations as this board may from time to time promulgate, and to this end this board shall have power to quarantine any lot, yard, land, building, room, premises, enclosure, or other place or section in this state, which is or may be used or occupied by poultry, and which, in the judgment of the state veterinary surgeon, or of his authorized agent, is infected or contaminated with an infectious, contagious, communicable or dangerous disease, or disease carrying medium by which such disease may be communicated; and this board shall have power to quarantine any poultry in this state, whenever, in the judgment of the state

veterinary surgeon, or his authorized agent, such poultry is affected with, or has been exposed to, such disease or disease carrying medium; and this board shall have power to prescribe treatments and enforce sanitary regulations which, in the judgment of the state veterinary surgeon, or of his authorized agent, are reasonably necessary and proper to circumscribe, extirpate, control or prevent such diseases.

2. To foster, promote and protect the poultry industry in this state by the investigation of diseases and other subjects related to ways and means of preventing, controlling, and exterminating diseases of poultry, to promulgate and enforce reasonable rules and regulations for the prevention and extermination of such diseases, and to do or perform such other acts and things as in their judgment may be necessary or proper in the fostering, promotion, or protection of the poultry industry in this state.

3. To promulgate and enforce such reasonable rules, regulations and orders as they may deem necessary or proper to prevent the introduction or spreading of infectious, contagious, communicable or dangerous diseases affecting poultry into this state, and to this end to promulgate and enforce such reasonable rules, regulations and orders as they may deem necessary or proper governing inspections and tests of all poultry intended for importation into this state, before it may be imported into this state.

4. To promulgate and enforce such reasonable rules, regulations and orders as they may deem necessary or proper for the inspection, testing and quarantine of all poultry imported into this state.

History: En. Sec. 1, Ch. 161, L. 1929.

46-210. (3267.2) Violation constitutes misdemeanor. Any person, persons, firm, or corporation violating any provision of this act, or any rule, regulation, or order promulgated by authority of the same or who shall obstruct or interfere with the performance of any duty, or the exercise of any power hereby conferred shall be guilty of a misdemeanor.

History: En. Sec. 2, Ch. 161, L. 1929.

Collateral References

Animals—35.

3 C.J.S. Animals § 65.

46-211. (3268) Promulgation of rules. It shall be the duty of the livestock sanitary board to promulgate and enforce rules and regulations for the inspection and tuberculin test of all dairy cattle, or other animals, and for the inspection, test, treatment, or disposition of all livestock affected with, or which may have been exposed to, any infectious, contagious, communicable, or dangerous disease, and for the quarantines provided for in this act.

History: En. Sec. 9, Ch. 262, L. 1921;
re-en. Sec. 3268, R. C. M. 1921.

46-212. Establishment of livestock disease control area—entry into area—compulsory inspection area, when. Upon receipt of a petition signed by not less than seventy-five per cent (75%) of the livestock owners of the species of animals to be inspected, tested, treated, or vaccinated, and representing not less than fifty per cent (50%) of such species in any township, as determined by government survey, of any county in the state of Montana, petitioning for the area control, treatment, prevention, or

eradication of any dangerous disease of livestock within such township, the Montana livestock sanitary board is authorized and empowered to establish such township as a disease control area and to enforce the inspection, test, treatment, or vaccination of all livestock of the species designated within such township in accordance with the rules and regulations promulgated by the Montana livestock sanitary board for the inspection, eradication, treatment, or vaccination of such livestock and to reimburse the owners of livestock slaughtered by order of the Montana livestock sanitary board or its authorized agent in accordance with the laws of Montana governing the payment of such animal or animals.

Provided that in any circumscribed disease control area as established under this act, by the Montana livestock sanitary board, no other livestock of the species designated by the Montana livestock sanitary board to be inspected, tested, treated, or vaccinated, shall enter the disease control area unless inspected, tested, treated, or vaccinated under the direction of the Montana livestock sanitary board or are accompanied by a satisfactory health certificate or except under special permit and restrictions provided by the Montana livestock sanitary board.

Provided further that when seventy-five per cent (75%) or more of the townships in any county in Montana are established under this act by the Montana livestock sanitary board as disease control area, it becomes mandatory on the part of the remaining livestock owners in such county to submit their livestock of one or more species for inspection, test, treatment, or vaccination, as directed by the Montana livestock sanitary board.

History: En. Sec. 1, Ch. 94, L. 1943.

Cross-Reference

Importing diseased cattle into state in violation of quarantine, sec. 94-35-190.

46-213. Duty of county assessor. The assessment roll of the county in which the disease control area is to be established shall be the basis for computing the required percentage of livestock owners and livestock, and the county assessor of the county shall certify to the Montana livestock sanitary board at Helena, when the necessary seventy-five per cent (75%) of the owners of livestock representing not less than fifty per cent (50%) of the species of livestock to be inspected, tested, treated, or vaccinated have signed the required petition.

History: En. Sec. 2, Ch. 94, L. 1943.

Cross-Reference

Taxation, assessment of livestock, secs. 84-5201 to 84-5221.

46-214. Owner guilty of misdemeanor, when. Any person in a disease control area who does not gather his livestock after being notified by the Montana livestock sanitary board or its agent, to have such livestock available or refuses to have such livestock inspected, tested, treated, or vaccinated or violates any of the provisions of this act, shall be guilty of a misdemeanor.

History: En. Sec. 3, Ch. 94, L. 1943.

46-215. Act intended as additional legislation. It is expressly provided that it is the intention of this legislative assembly that the enactment of this act does not repeal or amend any of the now existing statutes relating to the establishment of disease control areas or the inspection,

test, treatment, vaccination, or quarantine of livestock, but is intended as additional legislation for the establishment of disease control areas and the prevention and control of diseases of livestock.

History: En. Sec. 4, Ch. 94, L. 1943.

46-216. (3269) Sale of carcasses unsanitarily slaughtered or handled.

It shall be unlawful for any person, firm, or corporation to sell as food for human beings, or to hold or possess as human food intended for sale, the carcass or part of carcass of any animal slaughtered under unsanitary conditions, or which carcass or part of carcass has been prepared, handled, or kept under unsanitary conditions; and it shall be the duty of the livestock sanitary board to see that the provisions of this section are enforced.

History: En. Sec. 10, Ch. 262, L. 1921;
re-en. Sec. 3269, R. C. M. 1921.

Collateral References

Animals 615.

3 C.J.S. Animals §§ 38, 39.

Cross-Reference

Selling diseased carcasses, penalty, secs.
94-35-172, 94-35-173.

46-217. (3270) Authority of municipal corporations. Nothing in this act shall prevent the governing authority of any municipal corporation from enacting or enforcing ordinances providing for the inspection of slaughter houses, meat depots, meat markets, meat-food products, creameries, butter or cheese factories, dairies, and dairy products, sold or offered for sale within the limits of such municipal corporation; but no such ordinance shall be enforced in conflict with the powers of this act delegated to the livestock sanitary board, its officers or agents.

History: En. Sec. 11, Ch. 262, L. 1921;
re-en. Sec. 3270, R. C. M. 1921.

Collateral References

Municipal Corporations 611.

62 C.J.S. Municipal Corporations § 219.

46-218. (3271) Classification of animals as to compensation for slaughter. Animals with reference to compensation for slaughter by direction of the Montana livestock sanitary board or an agent thereof, under the provisions of this act, shall be divided into two classes, to-wit:

1. Animals determined by the state veterinary surgeon or by a deputy state veterinary surgeon to be affected with an incurable disease which are destroyed by order of such officer, shall be designated as animals of class 1 and unless otherwise provided each of such animals shall be paid for on the basis of seventy-five per cent (75%) of its appraised value. The county in which such animal was owned at the time it was determined to be affected with an incurable disease as such ownership and county is determined by affidavit of the owner of the animal or his agent, shall be liable in part, as hereinafter provided, for any indemnity to be paid for such animal. Each animal directed to be destroyed shall be appraised by a representative or an authorized agent of the Montana livestock sanitary board with the owner agreeing in writing as to the value of such animal. When thus appraised, due consideration shall be given to its breeding value as well as its dairy or meat value and the condition of the animal as to the disease and the present and probable effect of the disease on the animal. In the absence of such agreement, there shall be appointed three (3) competent, disinterested parties, one appointed by the Montana livestock sanitary board, one by the owner, and a third by the first two, to

appraise each such animal taking into consideration its breeding value as well as its dairy or meat value and the condition of the animal as to the disease and the present probable effect of the disease on the animal. The judgment of the majority shall be the judgment of said appraisers and shall be binding upon both parties as the final determination of indemnity to be paid for each such animal; provided the total compensation of each of such appraisers shall be limited to five dollars (\$5.00) for such group appraisal, one-half ($\frac{1}{2}$) of which amount shall be paid by the Montana livestock sanitary board; provided the total amount of indemnity paid by the state and any county for any such animal shall not exceed the actual sound value of an animal of its class, and provided further that the total combined amount of indemnity paid for such animal by the state and any county shall not exceed the sum of one hundred dollars (\$100.00) for any registered purebred animal or the sum of fifty dollars (\$50.00) for any grade animal. Animals presented for appraisal as purebreds shall be accompanied by their registration papers at the time of appraisal or they shall be appraised as grades, provided, however, if purebreds are less than three (3) years old and not registered, the Montana livestock sanitary board may grant a reasonable time for their registration, and presentation of their registration papers to the appraiser. Registration papers shall accompany the claim for indemnity.

2. Animals of class 1 shall be paid for on the basis of their full appraised value as herein determined in event no evidence of such incurable disease is disclosed by autopsy, bacteriologic, serologic, microscopic or other findings provided the total combined amount of indemnity paid by the state and any county for any such animal shall not exceed the actual sound value of an animal of its class; provided further that the total combined amount of indemnity paid by the state and any county for such animal shall not exceed one hundred dollars (\$100.00) for any registered purebred animal or fifty dollars (\$50.00) for any grade animal.

3. Animals determined by the state veterinary surgeon or by a deputy state veterinary surgeon to be affected with or exposed to foot-and-mouth disease, rinderpest, contagious pleura pneumonia, surra, other infectious-contagious, communicable, or dangerous disease, which is not of its nature necessarily fatal, which animals are destroyed by order of such officer as a sanitary safeguard, shall be designated as animals of class 2 and each such animal shall be paid for on the basis of its full appraised value, which appraised value shall be determined in the manner set out in sub-section 1 above. The appraisement of such animals shall be based on the meat, dairy, or breeding value of such animal, but where appraisement is based on breeding value of such animal, no such appraisement shall exceed three (3) times its meat or dairy value. The total amount of indemnity paid by the state for any such animal shall not exceed the actual sound value of an animal in its class; and no indemnity whatever for any such animal shall be paid by any county. In the case of destruction of an animal afflicted with brucellosis (Bang's disease), no indemnity shall be paid therefor, unless the livestock sanitary board shall, in its discretion, determine the best interests of the state of Montana will be served by payment of an indemnity, in which event the livestock sanitary board shall set out stand-

ards of indemnity by appropriate rules and regulations, and shall in no event pay in excess of one hundred dollars (\$100.00) for any registered purebred animal, or fifty dollars (\$50.00) for any grade animal. In all cases where the federal government, or agency other than the state, shall compensate the owner in whole or in part for livestock destroyed as a sanitary safeguard, the amount of compensation from the state shall be determined as provided by section 46-229.

4. Animals which may be injured or killed while they are being inspected or tested in accordance with an order of the Montana livestock sanitary board of [or] its agent, and which animals do not come within either class 1 or class 2 as herein provided, may be paid for at their full appraised value, and the claim therefor is recommended for payment at a meeting of the Montana livestock sanitary board and is approved by the state board of examiners and where it is shown that the injury or death of such animal was not proximately due to the negligence of the owner or his agent the whole of such claim when so approved, shall be paid out of Montana livestock sanitary board funds provided, however, that the limit of indemnity for such animal paid by the state shall not exceed that fixed by this act for animals of class 2.

History: En. Sec. 12, Ch. 262, L. 1921; re-en. Sec. 3271, R. C. M. 1921; amd. Sec. 1, Ch. 75, L. 1943; amd. Sec. 1, Ch. 107, L. 1949.

Collateral References

Animals 32.

3 C.J.S. Animals § 55.

2 Am. Jur. 310, Animals, § 160.

Compiler's Note

The bracketed word "or" was inserted by the compiler.

46-219. (3272) Payment for other personal property. Personal property other than livestock destroyed by order of the Montana livestock sanitary board or an authorized representative thereof shall be paid for on the basis of its appraised value; such appraised value to be determined in the manner specified in the preceding section for the determination of the appraised value of animals.

History: En. Sec. 13, Ch. 262, L. 1921; re-en. Sec. 3272, R. C. M. 1921; amd. Sec. 2, Ch. 75, L. 1943.

46-220. (3273) Indemnity—from what funds paid. In payment for animals or property destroyed by order of the livestock sanitary board, the state shall pay one-half of such indemnity out of any moneys at the disposal of the livestock sanitary board, and the county liable in part for the indemnity, as such county is determined by this act, shall pay the one-half part of such total indemnity out of the general fund of the county.

History: En. Sec. 14, Ch. 262, L. 1921; re-en. Sec. 3273, R. C. M. 1921.

46-221. (3274) Presentation of claims for indemnity. Claims against the state and any county thereof arising from the destruction of animals or property destroyed by order of the Montana livestock sanitary board, shall be made upon official forms as provided by the Montana livestock sanitary board which must contain an affidavit by the owner or his agent with knowledge of the facts of such animal or property certifying to the

ownership of such animal or animals or property and the county in which they are owned, and that such animal or animals have been destroyed and the property destroyed, as the case may be, in accordance with the law, and the regulations of the Montana livestock sanitary board; and such claims must be accompanied by a certificate from the state veterinary surgeon or his authorized deputy or agent that such animal or animals or property, as the case may be, were ordered destroyed. Such claims shall likewise be accompanied by a certificate of appraisement as such appraisal is determined under section 46-218, together with an account of sale showing the net proceeds from the sale of the animal if any, paid to the owner of the animal.

History: En. Sec. 15, Ch. 262, L. 1921;
re-en. Sec. 3274, R. C. M. 1921; amd. Sec.
4, Ch. 75, L. 1943.

46-222. Indemnity for class 2 animals in state less than one hundred and twenty days. Indemnity for animals of class 2 when such animals have not been within the state of Montana for at least one hundred and twenty (120) days and such payment is authorized by the Montana livestock sanitary board and approved by the state board of examiners as provided for in sub-section 5 of section 46-228 shall be paid out of livestock sanitary board funds.

History: En. Sec. 5, Ch. 75, L. 1943.

46-223. Additional to existing statutes. It is specifically declared to be the intention of this legislative assembly that the enactment of this act does not repeal or amend sections 46-226 and 46-227, but is intended as additional legislation to facilitate the payment of indemnity in accordance with federal law and regulations of the bureau of animal industry, United States department of agriculture.

History: En. Sec. 6, Ch. 75, L. 1943.

46-224. (3275) Examination and payment of claims. Claims against the state arising under this act, and when passed by the board of examiners, shall be examined by the state auditor, and if found correct, he shall issue a warrant upon the state treasurer for the amount payable by the state and charge the same to any funds or account at the disposal of the livestock sanitary board.

History: En. Sec. 16, Ch. 262, L. 1921;
re-en. Sec. 3275, R. C. M. 1921.

46-225. (3276) Same—payment from county funds. The board of county commissioners of the county liable in part for the indemnity for any such animal or property destroyed shall cause to be paid the amount due from said county out of the general funds of the county.

History: En. Sec. 17, Ch. 262, L. 1921;
re-en. Sec. 3276, R. C. M. 1921.

46-226. (3277) Sale of condemned carcasses—disposal of proceeds. Where a carcass or carcasses of animals ordered destroyed by this act are found, upon official post-mortem inspection, to be fit for human consumption, the owner shall receive the net proceeds from the sale of such carcass or carcasses, which proceeds shall be deducted from his claim against the

state and county on account of such slaughter. The representative of the livestock sanitary board, may, when considered advisable or necessary or when it is desired by the owner, proceed to sell the carcass or carcasses upon such terms as shall to him seem to be the best interests of the state, and the net proceeds obtained therefrom shall be paid to the owner, but such procedure shall not invalidate the owner's claim for indemnity for any balance due him as provided by law.

History: En. Sec. 18, Ch. 262, L. 1921;
re-en. Sec. 3277, R. C. M. 1921; amd. Sec.
1, Ch. 177, L. 1937.

Collateral References
Animals 32.
3 C.J.S. Animals § 55.

46-227. Rules and regulations—agreement with federal government. Whenever it is determined by the livestock sanitary board that it is necessary to eradicate or control any infectious, contagious, communicable or dangerous disease of livestock in the state, in cooperation with the United States bureau of animal industry or other federal agency and to appraise and destroy animals affected with, or which have been exposed to such disease, or to destroy property in order to remove the infection and complete the cleaning and disinfection of the premises, or to do any act or incur any other expense reasonably necessary in suppressing such disease, the board may accept and adopt on behalf of the state, the rules and regulations adopted by the United States bureau of animal industry or other federal agency under authority of an act of congress, or such portion thereof deemed necessary, suitable or applicable, and adopt such other rules and regulations as it deems necessary or desirable for this purpose, and to cooperate with the United States bureau of animal industry or other federal agency in the enforcement of such rules and regulations so accepted and adopted.

History: En. Sec. 2, Ch. 177, L. 1937.

46-228. (3278) Persons entitled to indemnity. The owner of any animal or property destroyed, as provided in this act, shall be entitled to indemnity therefor as herein provided, except in the following cases:

1. Animals belonging to the United States.
2. Animals brought into the state violating any provisions of this act, or regulations of the livestock sanitary board.
3. Animals which the owner or claimant knew to be diseased, or had notice thereof at the time they came into his possession.
4. Animals which had the disease for which they were slaughtered, or which were destroyed by reason of exposure to such disease, at the time of their arrival in the state; providing, however, that any animal or animals of the second class which were shipped into the state of Montana in accordance with the livestock sanitary board regulations and accompanied by the proper certificate of health from a recognized state or federal veterinarian may be paid for when such payment is authorized at a meeting of the livestock sanitary board and approved by the state board of examiners.
5. Animals which have not been within the state of Montana for at least one hundred and twenty days prior to the discovery of the disease; provided, that animals of the second class which have not been in the

state one hundred and twenty days may be paid for when such payment is authorized at a meeting of the livestock sanitary board and approved by the state board of examiners.

6. When the owner or agent has not used reasonable diligence to prevent disease or exposure thereto.

7. When the owner or agent has not complied with the rules and regulations of the livestock sanitary board with respect to animals condemned.

8. No compensation or indemnity will be paid for the destruction of any livestock affected with tuberculosis, or other infectious, contagious, communicable, or dangerous disease, unless the entire herd or band of which such affected livestock is a part shall be under the supervision of the livestock sanitary board for the eradication of such disease.

9. When animals condemned are not destroyed within sixty days after they have been determined to be affected with or exposed to a disease which requires them to be destroyed by order of the livestock sanitary board.

History: En. Sec. 19, Ch. 262, L. 1921;
re-en. Sec. 3278, R. C. M. 1921.

46-229. (3279) Compensation from federal government or other agency.

In all cases where the federal government, or agency other than the state or county, shall compensate the owner in whole or in part for livestock or property destroyed by order of the Montana livestock sanitary board, then the amount of such compensation from the federal government, or other agency, shall be deducted from the owner's claim, as filed against the state and county, that is, from the balance that remains after the net salvage price received from the sale or other disposal of the condemned animal has been deducted from the appraised value; and provided further, that where the owner, or agent, of such livestock or property destroyed by order of the Montana livestock sanitary board shall forfeit any indemnity which the owner would otherwise be entitled to from the federal government, or compensating agency other than the state or county by violation of the regulations of the federal government, or other agency, then and in such case an amount equal to the indemnity which would have been paid by the federal government, or other indemnifying agency, but for the forfeiture, shall likewise be deducted from the owner's claim; that is, the balance that remains after the net salvage price received from the sale or other disposal of the condemned animal has been deducted from the appraised value.

History: En. Sec. 20, Ch. 262, L. 1921; 3, Ch. 75, L. 1943; amd. Sec. 1, Ch. 164, re-en. Sec. 3279, R. C. M. 1921; amd. Sec. L. 1945.

46-230. (3280) Expenses, how paid—lien and foreclosure. The expense of inspecting, testing, supervision of quarantine, supervision of dipping, supervision of disinfection, and supervision of other treatment of livestock by the livestock sanitary board, under the provisions of this act, and the sanitary inspection of dairies, packing houses, meat depots, slaughter houses, milk depots, and other premises as provided in this act, shall be paid for by the livestock sanitary board out of such funds as they may have at their command; provided, however, that the owner of such livestock or property shall be liable for all expenses, save the salary of the

supervising officer or officers, representing this board, when such owner, agent, or person in charge of such livestock or property shall have violated the regulations of the livestock sanitary board, and such expenses shall be a lien upon the livestock or other property, and the agent of the livestock sanitary board may retain possession of the livestock until the charges and expenses are paid; but the lien shall not be dependent upon possession, and the lien may be foreclosed in the name of the agent of the livestock sanitary board by selling of the stock, or as many as may be necessary to pay the sum of the costs, by sale at public auction, and ten days' notice by posting thereof in three public places in the county, or such lien may be foreclosed by an action in any court of competent jurisdiction against the owner of the livestock to recover the amount of charges and expenses.

History: En. Sec. 21, Ch. 262, L. 1921;
re-en. Sec. 3280, R. C. M. 1921.

46-231. (3281) Expense of cleaning and disinfecting carriers' facilities. The expense of cleaning and disinfection of cars, yards, or other transportation facilities of a common carrier, when required by the livestock sanitary board, shall be a charge against and collectible from such common carrier; and likewise the expense of supervising the cleaning and disinfection of cars for transportation of livestock, when required at any point other than disinfection points agreed upon between the board and the carrier, shall be a charge against and collectible from such common carrier.

History: En. Sec. 22, Ch. 262, L. 1921;
re-en. Sec. 3281, R. C. M. 1921.

Collateral References

Animals \Rightarrow 31.

3 C.J.S. Animals § 53.

46-232. (3282) Licensing of milk plants and dairies selling milk or cream for public consumption. It shall be unlawful for the following classes of business to operate in the state of Montana without first securing a license from the livestock sanitary board, to-wit:

1. All dairies selling milk or cream for public consumption in the form in which it is originally produced and without having been converted into some manufactured product.

2. Condensed, evaporated or powder milk plants.

3. Milk plants. A milk plant, as the term is used in this act, shall be defined as a place where milk or cream, or both, is purchased or collected and prepared for distribution to the consumer in liquid form but is not produced at such place.

The licenses herein provided for shall expire on the last day of December of the current year in which they are issued. Said licenses may be revoked at any time by the livestock sanitary board, or said veterinary surgeon when they, or he, shall determine that a person to whom the license is issued has failed to comply with the rules and regulations of the livestock sanitary board, or has failed to conduct his establishment in a sanitary manner. All licenses collected and herein provided for shall be paid into the general fund.

Dairies producing milk or cream for sale to any dairy products manufacturing plant, or dairies producing only butter, shall not be required to take out a license but shall be required to comply with all the laws of the

state, and with the regulations of the livestock sanitary board governing dairies. The livestock sanitary board, or its agent, are hereby authorized to issue a restraining order prohibiting any dairy from selling or giving away any milk or cream not produced or handled in accordance with the laws of Montana, or the regulations of the livestock sanitary board. It shall be unlawful for any dairy, while so restrained, to sell or give away for public consumption any milk or cream produced or handled by such dairy and it shall likewise be unlawful for any dairy products manufacturing plant, milk plant, or cream station to purchase or use the cream or milk from a dairy while such dairy is restrained by the livestock sanitary board from selling milk or cream.

The following schedule of license fees shall be charged for all licenses issued under the provisions of this section:

Condensed, evaporated or powdered milk factories having an output of less than five hundred thousand pounds, five dollars (\$5.00).

Condensed, evaporated or powdered milk factories having an output of more than five hundred thousand pounds, twenty-five dollars (\$25.00).

Milk plants, five dollars (\$5.00).

Dairies of less than twenty cows, one dollar (\$1.00).

Dairies of more than twenty cows, two and 50/100 dollars (\$2.50).

Any person, firm or corporation violating any of the provisions of this act or violating any restraining order of the livestock sanitary board herein provided for shall be guilty of a misdemeanor and upon conviction shall be punished as provided by the laws of Montana for the punishment of misdemeanors.

History: En. Sec. 23, Ch. 262, L. 1921; re-en. Sec. 3282, R. C. M. 1921; amd. Sec. 11, Ch. 35, L. 1923; amd. Sec. 1, Ch. 170, L. 1929.

Cross-References

Carrying on business without license, penalty, sec. 94-1511.

Inspection and licensing of dairies and dealers in milk and milk products, secs. 3-2401, 3-2457, 27-111, 27-408 to 27-412.

Collateral References

Food—3.

36 C.J.S. Food § 12.

See generally, 2 Am. Jur. 393, Agriculture; 22 Am. Jur. 850, Food, §§ 59 et seq.

Constitutionality of regulations as to milk. 18 ALR 235.

Construction and application of regulations as to milk. 122 ALR 1062.

46-233. (3283) Exceptions of certain producers of meats and dairy products. On and after the passage and approval and effective date of this act, the owners or operators of slaughter houses, packing houses, meat depots, dairies, creameries, butter factories, cheese factories, or other places of business engaged in the production, storage or transportation of meats, meat foods, or dairy products, shall not be required to procure a license from the state board of health, insofar as the business of production, storage or transportation of such food products are concerned, but nothing in this act contained shall be construed to limit or conflict with the supervision or regulation of the sanitary condition of any restaurant, hotel, boarding house, or retail market, or the products sold or offered for sale thereat, by the state board of health, nor shall this act be construed to limit or conflict with the duties imposed by law on the state board of health to make and enforce sanitary regulations for the eradication or

control of any epidemic of human disease which may exist in any community.

History: En. Sec. 24, Ch. 262, L. 1921;
re-en. Sec. 3283, R. C. M. 1921.

Cross-References

Butchers' license, sec. 46-501 et seq.
Meat market license, sec. 27-111.

Collateral References

Animals 15; Foods 3; Warehousemen 6.
3 C.J.S. Animals § 38; 36 C.J.S. Food § 12; 67 C.J. Warehousemen and Safe Depositories § 9.

46-234. (3284) Co-operation by public officers. It shall be the duty of the state and several local boards of health of any county, city, town, or village in this state to co-operate with and assist the livestock sanitary board in all matters relating to the execution of its sanitary powers as to livestock and their food products under this act, in such manner as may be by the livestock sanitary board prescribed, either by general regulation or direct order.

History: En. Sec. 25, Ch. 262, L. 1921;
re-en. Sec. 3284, R. C. M. 1921.

46-235. (3285) Slaughter house license—fees and renewals. It shall be unlawful for any person, firm or corporation to maintain or conduct any slaughter house or meat packing house or meat depot in this state without having a license issued by the livestock sanitary board. The annual fee for all licenses issued under the provisions of this section shall be one dollar and shall be paid into the general fund. All licenses shall be made to expire on the last day of December of the current year in which they are issued, and shall be renewed by said board upon request of the licensee; provided, that when the livestock sanitary board shall find that the place for which such license is issued is not conducted in accordance with the rules, regulations, and orders of said board, made and promulgated in accordance with the provisions of this act, then said board shall revoke such license and shall not renew the same until such place is put in a sanitary condition in accordance with such rules and regulations; provided, further, that all licenses now issued by the state board of health for the operation of slaughter houses or meat packing houses or meat depots shall continue in effect for the period of said license, unless canceled by the livestock sanitary board for good cause shown.

History: En. Sec. 26, Ch. 262, L. 1921;
re-en. Sec. 3285, R. C. M. 1921.

Cross-Reference

Penalty for pollution of streets and streams, sec. 94-3542.

Collateral References

Animals 15.
3 C.J.S. Animals § 38.

46-236. (3286) Duty to report contagious diseases. Any person, including the owner or custodian, who has reason to suspect the existence of a dangerous, infectious, contagious, or communicable disease in livestock, or the presence of exposed animals to such disease, at any point within the state of Montana shall forthwith give notice thereof to the state veterinary surgeon.

History: En. Sec. 27, Ch. 262, L. 1921;
re-en. Sec. 3286, R. C. M. 1921.

Cross-Reference

Failure to report infectious disease, penalty, sec. 94-35-194.

46-237. (3287) Diseased animals not to run at large—burial of carcasses. It shall be unlawful for any owner, agent, or person in charge of any domestic animal or animals that are known to be suffering from or exposed to a dangerous, infectious, contagious, or communicable disease, to permit such animal or animals to run at large on the public range or public highway; and it shall be the duty of the owner or agent or person in charge of animals which died, or they have reason to suspect did die from an infectious, contagious, communicable, or dangerous disease, to properly bury or burn the same.

History: En. Sec. 28, Ch. 262, L. 1921;
re-en. Sec. 3287, R. C. M. 1921.

Collateral References

Animals 30, 32.
3 C.J.S. Animals §§ 52, 55.

Cross-Reference

Diseased animals running at large prohibited, penalty, sec. 94-3559.

46-238. (3288) Penalty for violation of act. Any person, persons, firm, or corporation violating any provision of this act, or the rule, regulation, or order promulgated by authority of same, shall be guilty of a misdemeanor; violations of this act shall be tried without undue delay in any court of competent jurisdiction.

History: En. Sec. 29, Ch. 262, L. 1921;
re-en. Sec. 3288, R. C. M. 1921.

Cross-Reference

Contagious diseases, penalties respecting animals having, secs. 94-3593, 94-3594.

46-239. (3289) Same—civil liability. Any person, or persons, firm, or corporation violating any of the provisions of this act or regulations or orders of the livestock sanitary board (or state veterinary surgeon), shall be liable for all damages which may be sustained by any person or persons by reason of such act or acts, which damages may be recovered by such person or persons in a civil action in any court of competent jurisdiction.

History: En. Sec. 30, Ch. 262, L. 1921;
re-en. Sec. 3289, R. C. M. 1921.

Collateral References

Animals 15, 35.
3 C.J.S. Animals §§ 38, 65.

46-240. (3290) Power of board concerning oaths and witnesses. Whenever in the exercise of their powers or the discharge of their duties, it shall become necessary or proper for any member of the livestock sanitary board, the state veterinary surgeon, or authorized agent to investigate facts and conditions, they are hereby authorized to administer oaths, take affidavits and compel the attendance and testimony of witnesses.

History: En. Sec. 31, Ch. 262, L. 1921;
re-en. Sec. 3290, R. C. M. 1921.

46-241. (3291) Livestock sanitary board account. There shall be created the livestock sanitary board account, which, in addition to the livestock sanitary board fund, shall be used to defray all expenses of the livestock sanitary board created by this act.

History: En. Sec. 32, Ch. 262, L. 1921;
re-en. Sec. 3291, R. C. M. 1921.

46-242. (3292) Annual report of state veterinary surgeon. The state veterinary surgeon shall on or before the thirty-first day of December of each year make a written report to the livestock sanitary board, which report must be transmitted by them to the governor.

History: En. Sec. 33, Ch. 262, L. 1921;
re-en. Sec. 3292, R. C. M. 1921.

46-243. (3293) Personal liability—members and officers of board. No member of the livestock sanitary board, or any officer, agent, or employee of said board, shall be personally liable or held for any damage resulting from his official acts or decisions in pursuance of this act, or any rule, regulation, or order promulgated under this act, except it be for his own wilful wrong or gross negligence.

History: En. Sec. 34, Ch. 262, L. 1921;
re-en. Sec. 3293, R. C. M. 1921.

Collateral References
Animals—32.
3 C.J.S. Animals § 55.

46-244. (3294) Effect of partial invalidity of act. If any clause, sentence, paragraph, or part of this act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

History: En. Sec. 35, Ch. 262, L. 1921;
re-en. Sec. 3294, R. C. M. 1921.

Collateral References
Statutes—64.
82 C.J.S. Statutes § 92.

46-245. (3295.1) Governor may prohibit importation of animals from localities where disease exists. Whenever the governor has good reason to believe that any disease dangerous or inimical to the livestock or poultry industry, or dangerous to dogs or other animals, had become epidemic in certain localities in any other state, territory, District of Columbia, or other country, he shall issue a proclamation designating such localities, and prohibiting the importation therefrom into this state, except under such restrictions as he may deem proper, of any livestock, poultry, dogs or other animals, or articles, or commodities likely to convey such disease or diseases.

History: En. Sec. 1, Ch. 31, L. 1925.

Collateral References
Animals—31.
3 C.J.S. Animals § 53.

46-246. (3295.2) Penalty for violation. Any person who, after the publication of such proclamation knowingly receives any livestock, dog, fowl, or other animal, or article, or commodity designated in such proclamation as likely to convey disease from any of the prohibited districts, and transports or conveys the same within the limits of this state, is punishable by imprisonment in the county jail, for not less than 60 days, nor more than 8 months, and by a fine of not less than \$300.00, nor more than \$5000.00, or by both such fine and imprisonment, and is further liable for any and all damages and loss that may be sustained by any person or persons by reason of the disobedience of such proclamation.

History: En. Sec. 2, Ch. 31, L. 1925.

CHAPTER 3

TUBERCULIN REGULATION, SALE AND DISTRIBUTION

- Section 46-301. Tuberculin—permission for sale or distribution of.
 46-302. Same—report of sales or distribution.
 46-303. Violation of act a misdemeanor—penalty.

46-301. (3296) Tuberculin — permission for sale or distribution of. Any person, firm, or corporation desiring to sell or distribute tuberculin for animal use in the state of Montana must first secure permission from the livestock sanitary board.

History: En. Sec. 1, Ch. 118, L. 1917;
 re-en. Sec. 3296, R. C. M. 1921.

Collateral References
 Animals \S 29.
 3 C.J.S. Animals \S 51.

Cross-Reference

Tuberculin test given dairy cattle, sec.
 27-106.

46-302. (3297) Same—report of sales or distribution. Any person, firm, or corporation, having secured permission from the livestock sanitary board to sell or distribute tuberculin for animal use within this state as prescribed in the preceding section, shall, on the same day of selling, furnishing, or supplying tuberculin, report in writing to the livestock sanitary board the name or names and address of the person or persons furnished, including a statement of the amount of tuberculin supplied.

History: En. Sec. 2, Ch. 118, L. 1917;
 re-en. Sec. 3297, R. C. M. 1921.

46-303. (3298) Violation of act a misdemeanor—penalty. Any person, firm, or corporation violating any of the provisions of this act shall be guilty of a misdemeanor, and punished by a fine of not less than twenty-five dollars and not more than five hundred dollars, or by imprisonment for not less than thirty days and not more than ninety days, or both fine and imprisonment.

History: En. Sec. 3, Ch. 118, L. 1917;
 re-en. Sec. 3298, R. C. M. 1921.

CHAPTER 4

MONTANA MEAT INSPECTION LAW

- Section 46-401. Montana meat inspection law.
 46-402. Inspection and grading of meat.
 46-403. Employment of experts authorized.
 46-404. Time for slaughtering animals.
 46-405. Antemortem inspection of animals—notice to refrain from slaughtering—penalty for violation.
 46-406. Post mortem inspection—evidence—marking of passed and condemned carcasses—disposal of condemned carcasses.
 46-407. Application for inspection service—numbering of establishments.
 46-408. Sale of inspected and marked carcasses authorized—exception.
 46-409. Unlawful to possess stamps of or similar to those of livestock sanitary board.
 46-410. Rules and regulations to be provided for execution of provisions—guidance by rules of United States department of agriculture.
 46-411. Unlawful to operate unsanitary slaughter house.
 46-412. Penalty for violations of provisions or regulations.
 46-413. Construction of act not to interfere with regulations of state board of health.
 46-414. Municipalities may regulate if not in conflict with act.
 46-415. Additional to existing statutes.

46-401. (3298.1) Montana meat inspection law. This act shall be known as "the Montana meat inspection law."

History: En. Sec. 1, Ch. 142, L. 1931.

Collateral References

22 Am. Jur. 819, Food, §§ 18, 19.

Validity, construction, and application of statutes or ordinances relating to inspection of food sold at retail. 127 ALR 322.

46-402. (3298.2) Inspection and grading of meat. The livestock sanitary board is hereby empowered to establish a system of meat inspection and meat grading in cities of the first class and in any other city, town, county or district when considered necessary for the public health or welfare and are given supervision over all establishments used in the business of slaughtering and preparing animals for food purposes in the state of Montana, except establishments slaughtering or preparing animals for food purposes where inspection is maintained by the bureau of animal industry of the United States department of agriculture. And the livestock sanitary board is empowered and directed at any and all times to visit any establishment, place, or premise where animals are slaughtered or prepared for food purposes, as well as all retail meat markets, meat canneries, sausage factories, curing and smoke houses, and similar places, for the purpose of determining the wholesomeness and healthfulness of animals slaughtered for food purposes, meats and meat food products intended for human consumption and the sanitary conditions of buildings, drainage, sewage, cleanliness, equipment, utensils, employees, clothing, water supply, and disposal of refuse, and the livestock sanitary board is further authorized and empowered to provide suitable rules and regulations to insure a healthful, wholesome, and safe meat supply for the state of Montana.

History: En. Sec. 2, Ch. 142, L. 1931.

Collateral References

Animals 15.

3 C.J.S. Animals § 38.

22 Am. Jur. 837, Food, § 45.

46-403. (3298.3) Employment of experts authorized. For the purpose of this act, the Montana livestock sanitary board is authorized to employ persons skilled in the inspection of meats and meat food products for wholesomeness and healthfulness, necessary additional employees and equipment as required, and such board is authorized to utilize and employ in the enforcement of this act any employee or agent of the Montana livestock sanitary board.

History: En. Sec. 3, Ch. 142, L. 1931.

46-404. (3298.4) Time for slaughtering animals. No animal shall be slaughtered for food purposes in the state of Montana except between the hours of five o'clock a. m. and nine o'clock p. m., unless a special permit in writing is issued by the livestock sanitary board or their authorized agent.

History: En. Sec. 4, Ch. 142, L. 1931.

46-405. (3298.5) Antemortem inspection of animals — notice to refrain from slaughtering—penalty for violation. When it is deemed necessary, in order to safeguard the public health, the livestock sanitary board shall cause to be made an antemortem inspection of any cattle, sheep, swine, or other animals before being slaughtered for food purposes. Such

inspection shall be made prior to slaughter and satisfactory facilities shall be provided for conducting such examinations and separating from the passed animals those deemed unfit for immediate slaughter, and if any owner or person in charge is about to slaughter for food purposes any animal or animals, which the livestock sanitary board believes may be affected with disease, said board shall notify the owner or person in charge of said animals to refrain from slaughtering them for food purposes until the previously mentioned antemortem examination shall be completed, and any owner or person slaughtering animals for food purposes after notification by the livestock sanitary board shall be guilty of a misdemeanor; provided, however, that no owner or person shall be required to refrain from slaughtering animals for a period longer than seventy-two (72) hours.

History: En. Sec. 5, Ch. 142, L. 1931.

46-406. (3298.6) Post mortem inspection—evidence—marking of passed and condemned carcasses—disposal of condemned carcasses. The livestock sanitary board is authorized to provide post mortem inspection of all animals slaughtered for food purposes in any or all establishments in the state of Montana, if they deem the same necessary in order to safeguard the public health or welfare. The head, tongue, tail, thymus glands, viscera, and other parts and blood used in the preparation of meat food, meat food products, or medicinal products shall be retained in such a manner as to preserve their identity until after the post mortem examination has been completed. Carcasses and parts thereof found to be sound, healthful and wholesome after inspection, fit for human food shall be passed and may be marked in the following manner: "Mont. L. S. S. B. Inspected and Passed." This mark may also include any number given the establishment. Each carcass or part thereof which is found on post mortem inspection to be unsound, unhealthful, unwholesome, or otherwise unfit for human food shall be marked conspicuously by the inspector at the time of inspection with the words, "Mont. L. S. S. B. Inspected and Condemned," and such carcasses or parts thereof, under the supervision of the inspector, shall be rendered unfit for human consumption in a manner approved by the livestock sanitary board.

History: En. Sec. 6, Ch. 142, L. 1931.

46-407. (3298.7) Application for inspection service—numbering of establishments. Any person, firm or corporation engaged in the slaughtering of cattle, sheep, swine, or other animals for food purposes, within any area designated by the livestock sanitary board where meat inspection will be established, desiring to maintain inspection service in the establishment, in order to have the healthfulness of the meat and meat food products certified to, may make application for the inauguration for inspection service in such establishment. Such application shall be in writing addressed to the livestock sanitary board on blanks which shall be furnished by said livestock sanitary board. In such application the applicant for inspection shall agree to comply with the provisions of this act and to maintain said establishment in a clean and sanitary manner. Upon receipt of said application the livestock sanitary board shall make an inspection of said establishment and if found clean and sanitary, and properly


equipped to conduct its business in accordance with the rules and regulations of the livestock sanitary board, they shall inaugurate an inspection service therein and shall give to this establishment an official number and this number shall be used to mark the meat and meat food products of the establishment as provided in this section. Such an establishment shall thereafter be known as "Official Establishment No."

History: En. Sec. 7, Ch. 142, L. 1931.

46-408. (3298.8) Sale of inspected and marked carcasses authorized—exception. The dressed carcasses of all animals intended for human consumption, parts thereof, meats, or meat food products inspected and marked in accordance with sections 46-405 and 46-406 shall be permitted to be sold and offered for public consumption in the state of Montana and any subdivision thereof without restriction, except that imposed upon meat or meat food products bearing the inspection stamp of the United States department of agriculture.

History: En. Sec. 8, Ch. 142, L. 1931.

Collateral References

Food  2.

36 C.J.S. Food § 3.

46-409. (3298.9) Unlawful to possess stamps of or similar to those of livestock sanitary board. It shall be unlawful for any firm, person, or corporation, except employees of the livestock sanitary board, to have in possession, keep or use any mark, stamp or brand, similar in character or import to the mark, stamp or brand, provided or used by the livestock sanitary board for marking, stamping, or branding the carcass of any animal intended for food purposes, parts thereof, meat or meat food products, or to have in possession, keep or use any mark, stamp, or brand having thereon a device or words the same or similar in character or import to the marks, stamps, or brands provided or used by the livestock sanitary board for marking, stamping or branding carcasses of animals intended for food purposes, parts thereof, meats, or meat food products.

History: En. Sec. 9, Ch. 142, L. 1931.

46-410. (3298.10) Rules and regulations to be provided for execution of provisions—guidance by rules of United States department of agriculture. The livestock sanitary board shall from time to time provide rules and regulations necessary for the efficient execution of the provisions of this act, and all inspections and examinations made under this act shall be made in such a manner as described in the rules and regulations provided by said livestock sanitary board not inconsistent with the provisions of this act; provided, however, that in such rules and regulations said livestock sanitary board shall be guided by the rules governing meat inspection of the United States department of agriculture.

History: En. Sec. 10, Ch. 142, L. 1931.

46-411. (3298.11) Unlawful to operate unsanitary slaughter house. It shall be unlawful for any person, firm or corporation to maintain, or operate a slaughtering house, which is unclean or unsanitary.

History: En. Sec. 11, Ch. 142, L. 1931.

46-412. (3298.12) Penalty for violations of provisions or regulations.

Any person, firm or corporation engaged in the business of slaughtering and preparing animals for food purposes or preparing or retailing meats, or meat food products, or manufacturing sausage, or operating meat canneries, curing or smoking rooms, or any owner or person in charge of any animal intended for slaughter for food purposes violating any of the provisions of this act, or the rules and regulations promulgated by the livestock sanitary board for its enforcement, shall be deemed guilty of a misdemeanor, and in addition may have their inspection service discontinued by the livestock sanitary board.

History: En. Sec. 12, Ch. 142, L. 1931.

46-413. (3298.13) Construction of act not to interfere with regulations of state board of health. Nothing in this act shall be construed as interfering or rescinding in any way the duties now conferred upon, or the regulations promulgated by the state board of health with reference to the inspection of meat markets or restaurants or the examination of meat products sold, possessed or offered for sale, by such meat markets or restaurants, or penalties provided for violations thereof.

History: En. Sec. 13, Ch. 142, L. 1931.

46-414. (3298.14) Municipalities may regulate if not in conflict with act. Nothing in this act shall prevent the governing authority of any municipal corporation or any county from enacting or enforcing ordinances providing for the inspection of slaughter houses, the inspection of animals, meats or meat food products for human consumption but no such ordinance shall be enforced in conflict with the powers of this act delegated to the livestock sanitary board, its officers or agents.

History: En. Sec. 14, Ch. 142, L. 1931.

Collateral References

Municipal Corporations 611.

62 C.J.S. Municipal Corporations § 219.

46-415. (3298.15) Additional to existing statutes. It is expressly provided that it is the intention of this legislative assembly that the enactment of this act does not repeal or amend any of the now existing statutes relating to the establishment of a system of meat inspection or the sale, inspection, analysis or handling of meat or meat food products but is intended as additional legislation for the establishment of meat inspection and meat grading as hereby provided.

History: En. Sec. 15, Ch. 142, L. 1931.

CHAPTER 5

BUTCHERS' AND MEAT PEDDLERS' LICENSES—DUTY AS TO HIDES OF SLAUGHTERED CATTLE

Section 46-501. Butcher and meat peddler defined.

46-502. Butchers' and meat peddlers' licenses—amount of fees—disposition of moneys—penalty for failure to display license—cattle of own breeding.

46-503. Inspection and marking of hides of slaughtered cattle—records—bill of sale to be presented, when—license or inspection not necessary, when.

46-504. License or inspection, when not necessary.

- 46-505. Deputy sheriffs—appointment as inspectors—fees.
- 46-506. Proviso.
- 46-507. Duty of butchers and meat peddlers to report violations.
- 46-508. Inspection of hides before disposal—person slaughtering cattle must exhibit hides.
- 46-509. Unlawful to purchase uninspected hides or carcass—exception.
- 46-510. Officers' authority concerning enforcement—seizure and sale of meat held in violation of act.
- 46-511. Transportation of uninspected meat unlawful.
- 46-512. Forfeiture of license for violations.
- 46-513. Penalties for violation of act or falsifying records.

46-501. (3298.16) Butcher and meat peddler defined. Every person, firm, corporation, or association who slaughters or causes to be slaughtered neat cattle for the purpose of selling or distributing any of the meat or by-products of such cattle in this state and who maintains slaughter houses for this purpose and every person, firm, corporation or association who maintains a meat market or meat markets for the purpose of selling or distributing any of the meat or by-products of such cattle in this state, and who, in either case, complies with the rules and regulations of the Montana livestock sanitary board and the state board of health, and with the city or town health ordinances where said business is operated, or any other ordinance pertaining to meat dealers, shall, for the purpose of this act, be designated a "butcher." Every other person, firm, corporation, or association who slaughters or causes to be slaughtered any neat cattle or who buys and sells any dress beef or veal, and who does not maintain a licensed slaughter house or market, shall, for the purpose of this act, be designated a "meat peddler."

History: En. Sec. 1, Ch. 172, L. 1931;
amd. Sec. 1, Ch. 42, L. 1943.

46-502. (3298.17) Butchers' and meat peddlers' licenses—amount of fees—disposition of moneys—penalty for failure to display license—cattle of own breeding. Every butcher shall, before engaging in or conducting any market or business as such, in any county, pay to the county treasurer of such county a license fee of five dollars (\$5.00) for each such market or business so engaged in or conducted within the county, which license shall continue in force and effect for the balance of the calendar year in which it was issued, and which shall be deemed null and void after January 1st of the succeeding year, and every meat peddler shall, before commencing or doing any business or performing any acts in any county as such meat peddler, pay to the county treasurer of such county, a license of one hundred dollars (\$100.00), which shall continue in force and effect for the balance of the calendar year in which it is issued, and which shall be deemed null and void after January 1st of the succeeding year. It shall be the duty of every meat peddler to have his license with him at all times when transacting business, and it shall be the duty of every butcher to display his license in a conspicuous place in his market. Failure to have such license shall be deemed a misdemeanor. The county treasurers of the state are hereby authorized and required, upon the payment of such licenses, to issue a proper certificate of such payment. The moneys collected from such licenses shall be placed in the general fund of the county wherein collected.

This section shall not apply to the slaughter of meat by any person, firm, corporation, or association who may slaughter or cause to be slaughtered any neat cattle of his or its own breeding, nor to the sale of slaughtered cattle of his or its own breeding; provided any person who shall sell the equivalent of more than twenty-five (25) carcasses, beef and/or veal, in any one (1) year shall take out a license as herein provided for.

History: En. Sec. 2, Ch. 172, L. 1931;
amd. Sec. 2, Ch. 42, L. 1943.

Cross-Reference

Meat market license, sec. 27-111.

46-503. (3298.18) Inspection and marking of hides of slaughtered cattle—records—bill of sale to be presented, when—license or inspection not necessary, when. All butchers and meat peddlers and all other persons shall have the hide in its entirety with tail and ears attached of each beef or veal inspected by a sheriff or his deputy in the county where the animal was slaughtered. The sheriff or his deputy shall mark said hide or hides in such manner as the livestock commission may from time to time by fixed rule require. It is hereby made the duty of the sheriff to make the inspection required by this act. Each of the four quarters so presented shall be stamped with an ink stamp, which stamp shall be provided by the county and the form of which shall be specified by the livestock commission. Said sheriff, or deputy, shall keep a record and issue a certificate of inspection, on a form provided by the county, which form shall be specified by the livestock commission, giving the butcher's or peddler's or person's name, the place of business, the serial number of the inspection of the hide, the brand or brands on the hide, the date of inspection, and the place where such inspection was made. The officer making such inspection shall forward a copy of all inspection certificates to the secretary of the livestock commission at Helena, and to the county clerk of the county in which said inspection was made, on or before the first day of each month, and such inspection certificates shall be placed on file in the offices aforementioned.

When ownership of the carcass and hide presented is claimed on a bill of sale, the officer making the inspection shall demand and receive the original bill of sale, which bill of sale shall be attached to the inspector's certificate sent to the county clerk and recorder. When such bills of sale cover cattle not included in the inspection, the inspector shall issue to the owner of the bill of sale a receipt for such bill of sale. Said receipt shall describe the balance of the cattle covered by the original bill of sale.

History: En. as part of Sec. 3, Ch. 172,
L. 1931; amd. Sec. 1, Ch. 78, L. 1941.

3 C.J.S. Animals § 38; 36 C.J.S. Food
§ 12; 39 C.J.S. Hawkers and Peddlers
§ 6.

Collateral References

Animals↔15; Food↔3; Hawkers and
Peddlers↔2.

46-504. License or inspection, when not necessary. Any person who kills beef or veal in good faith for his own use or for the use of himself and three (3) neighbors shall not be required to have such meat inspected or stamped, nor shall he be required to procure any license provided for in this act.

History: En. as part of Sec. 3, Ch. 172,
L. 1931; amd. Sec. 1, Ch. 78, L. 1941.

46-505. Deputy sheriffs—appointment as inspectors—fees. In localities where there is no sheriff or deputy sheriff, and where there is need for the inspection herein required, a deputy sheriff shall be appointed, and shall be authorized by the board of county commissioners of the county to make such inspections, and he shall be paid from the appropriate county fund therefor, a fee of not to exceed twenty-five cents (25c) for each beef hide inspected, and a fee of not to exceed ten cents (10c) for each veal hide inspected. Such deputy sheriff shall have the same powers and authority, and shall perform the same duties as the sheriff. Except as in this section provided, no fee shall be charged or paid for such inspection. No butcher, meat peddler, or employee of any butcher or meat peddler shall be appointed such deputy sheriff.

History: En. Sec. 2, Ch. 78, L. 1941.

46-506. Proviso. Nothing herein provided shall prevent such inspection being made by an inspector appointed by the livestock commission.

History: En. Sec. 3, Ch. 78, L. 1941.

46-507. Duty of butchers and meat peddlers to report violations. It is made the duty of any butcher or meat peddler licensed under the provisions of section 46-502, to report any violation of this act to the sheriff of the county wherein such violation shall occur, and of which such butcher or meat peddler has knowledge, and for his failure so to do such butcher or meat peddler shall suffer a revocation of his license and no license shall again be issued to such person until the expiration of one (1) year from the date of such revocation.

History: En. Sec. 4, Ch. 78, L. 1941.

46-508. (3298.19) Inspection of hides before disposal—person slaughtering cattle must exhibit hides. Every person or persons, firm, corporation or association, slaughtering cattle for their own use, must before selling, destroying or otherwise disposing of the hide or hides from such cattle, have the same inspected by an officer authorized to make such inspection and secure a certificate of inspection as hereinbefore provided for. It shall be unlawful for any person or persons, firm, corporation, or association to sell, offer for sale, destroy or otherwise dispose of any hide or hides from slaughtered cattle which have not been inspected and identified by an authorized inspector. And it shall be the duty of any person or persons, firm, corporation, or association slaughtering cattle, for his own use or otherwise, upon demand of an authorized inspector, to exhibit the hide or hides of such animal or animals for inspection or duplicate bill of sale issued by a hide buyer, or some evidence of inspection by an authorized inspector.

History: En. Sec. 4, Ch. 172, L. 1931;
amd. Sec. 1, Ch. 47, L. 1939.

46-509. (3298.20) Unlawful to purchase uninspected hides or carcass—exception. It shall be unlawful for any person or persons, firm, corporation, or association to purchase the hide or carcass or any part thereof of any beef or veal without the inspection or identification herein provided for. The provision of this section shall not apply to any person or persons

who shall purchase from a licensed butcher or peddler beef or veal in quantities less than one quarter of an animal.

History: En. Sec. 5, Ch. 172, L. 1931.

46-510. (3298.21) Officers' authority concerning enforcement—seizure and sale of meat held in violation of act. Any officer having authority to make the inspection herein provided for may enter into and inspect butcher shop, slaughter houses, and other places of business of meat peddlers and butchers, or places where beef is handled in quantities, for the purpose of determining whether the provisions of this act have been complied with. In case meat is found which is being held in violation of the provisions of this act, the officers shall have authority to seize and take the same. All meat so seized shall be sold under the direction of a stock inspector, sheriff, or other officer authorized, at either public or private sale, for the best price obtainable, and the proceeds shall be paid to the county treasurer of the county in which said meat is seized for the benefit of the general fund of said county.

History: En. Sec. 6, Ch. 172, L. 1931.

46-511. (3298.22) Transportation of uninspected meat unlawful. It shall be unlawful and a misdemeanor for any person to transport by a motor truck or other vehicle or have in his possession for the purpose of sale any meat which has not been inspected and stamped as required by the provisions of this act, and any officer authorized shall have the right to seize and sell the same as hereinbefore provided; provided, however, that this shall not apply to meat being transported or held for the purpose of inspection and stamping as provided for in this act.

History: En. Sec. 7, Ch. 172, L. 1931. 3 C.J.S. Animals § 38; 39 C.J.S. Hawkers and Peddlers § 11.

Collateral References

Animals↪15; Hawkers and Peddlers↪

7.

46-512. (3298.23) Forfeiture of license for violations. In addition to the penalties provided by section 46-513, any butcher, meat peddler, or any other person as defined by this act, who shall violate any of the terms of this act, shall suffer a forfeiture of the license required by this act, and no license shall again be issued to such person until the expiration of one (1) year from the date of such conviction.

History: En. Sec. 8, Ch. 172, L. 1931.

46-513. (3298.24) Penalties for violation of act or falsifying records. Any person or persons who violates any of the provisions of this act, or who wilfully falsifies any of the records required by this act, to be kept, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than one hundred dollars (\$100.00), nor more than five hundred dollars (\$500.00), or by imprisonment in the county jail for a period of not less than thirty (30) days nor more than six (6) months, or by such fine and imprisonment for the first offense, and for each subsequent offense shall be deemed guilty of a felony and punished by imprisonment in the state prison for not less than one (1) year nor more than five (5) years.

History: En. Sec. 9, Ch. 172, L. 1931.

CHAPTER 6

BRANDS—RECORDING—VENTING—LIVESTOCK MORTGAGES

Section	46-601.	Recorder of marks and brands.
	46-602.	Repealed.
	46-603.	Recording of brands required.
	46-604.	Application for recording—record of brands.
	46-605.	Designation of years for re-recording brands.
	46-606.	Right of owner of recorded brand.
	46-607.	Publication of notice of re-recording brands.
	46-608.	Penalty for violation of act.
	46-609.	Fees for recorder of marks and brands.
	46-610.	Repealing clause.

46-601. (3299) Recorder of marks and brands. The secretary of the livestock commission is the general recorder of marks and brands.

History: En. Sec. 2940, Pol. C. 1895;
re-en. Sec. 1790, Rev. C. 1907; re-en. Sec.
3299, R. C. M. 1921.

References

Merrion v. Humphreys, 119 M 495, 176
P 2d 665, 668.

NOTE.—For history of earlier recording
acts see Cuerth et al. v. Arbogast, 48 M
209, 220, 136 P 383.

Collateral References

Animals 8.
3 C.J.S. Animals § 25.
2 Am. Jur. 715, Animals, § 28.

46-602. (3300) Repealed—Chapter 110, Laws of 1947.

46-603. (3301) Recording of brands required. It shall be unlawful for any person, firm, or corporation to artificially brand or mark, or cause to be artificially branded or marked, any domestic animal or livestock, running at large, or upon the public domain, or open range, or which may run or stray at large or upon the public domain or open range, unless such artificial brand or mark has been recorded or re-recorded as provided by law, in the office of the general recorder of marks and brands, in the name of such person, firm, or corporation, within the period of ten years immediately preceding such branding or marking.

History: En. Sec. 1, Ch. 144, L. 1921;
re-en. Sec. 3301, R. C. M. 1921.

References

Merrion v. Humphreys, 119 M 495, 176
P 2d 665, 668.

Cross-References

Alteration of brands, penalty, sec. 94-
3504.

Animals driven through state to be
branded, secs. 94-3515, 94-3516.

Branding when running at large, when
unlawful, sec. 94-3522.

Recorder to file notice of mortgages on
livestock, sec. 52-319.

Collateral References

2 Am. Jur. 714, Animals, §§ 26 et seq.

Constitutionality of statute for preven-
tion of larceny of livestock. 3 ALR 81.

46-604. (3302) Application for recording—record of brands. Any person, firm, or corporation desiring to have recorded an artificial mark or brand for use in distinguishing or identifying the ownership of any domestic animal or livestock, shall make application therefor to the secretary of the livestock commission, who is in this act designated the general recorder of marks and brands. Such application must be in writing, and must contain the name, residence and postoffice address of the applicant, and the species of the animals on which the mark or brand is to be used. The said recorder shall thereupon designate for the applicant's use some practical form of mark or brand, distinguishable with reasonable certainty from all

other marks and brands recorded, or re-recorded, within the period of ten years immediately preceding the time of filing the application, as in this act provided, in the name of some person, firm, or corporation other than the applicant, and he shall designate the position on the animals upon which the mark or brand shall be placed, and the species of animals on which the mark or brand may be used. The general recorder of marks and brands shall keep a record in a book kept by him for that purpose, of the particular mark or brand, the position on the animal where the same is to be used, the species of animals on which the same is to be used, and the date of recording. Such record shall be a public record and shall be prima-facie evidence of the facts therein recorded.

History: En. Sec. 2, Ch. 144, L. 1921;
re-en. Sec. 3302, R. C. M. 1921.

References

Merrion v. Humphreys, 119 M 495, 176
P 2d 665, 668.

46-605. (3303) Designation of years for re-recording brands. The year A. D. 1921, and each tenth year thereafter are hereby designated years for the re-recording of all artificial marks and brands used to distinguish and identify the ownership of domestic animals and livestock; and it shall be the duty of the general recorder of marks and brands, upon the application of any person, firm, or corporation, or the transferee of such person, firm, or corporation, made in any year in this act designated a year for re-recording such marks and brands, to re-record any mark or brand which at the time of such application stands of record in said recorder's office in the name of such person, firm, or corporation; provided, that on and after January 1, 1922, no mark or brand which was neither originally recorded nor re-recorded in the name of such person, firm, or corporation, during the re-recording year last preceding the date when such application is filed, nor originally recorded in the name of such person, firm, or corporation, or his or its predecessor or predecessors in interest therein between the time of such application and the re-recording year last preceding such application, shall be deemed of record in the office of such general recorder of marks and brands.

History: En. Sec. 3, Ch. 144, L. 1921;
re-en. Sec. 3303, R. C. M. 1921.

References

Merrion v. Humphreys, 119 M 495, 176
P 2d 665, 668.

46-606. (3304) Right of owner of recorded brand. The person, firm, or corporation in whose name any mark or brand is of record, as in this act provided, is entitled to the right to the exclusive use of such mark or brand on the species of animal and in the position designated in such record, and a copy of such record certified by the general recorder of marks and brands shall be prima-facie evidence of such right; and such certificate shall likewise be prima-facie evidence that the person, firm, or corporation entitled to use such mark or brand is the owner of all animals on which the same appears in the position and on the species of animal stated in such certificate.

History: En. Sec. 4, Ch. 144, L. 1921;
re-en. Sec. 3304, R. C. M. 1921.

Valley County Bank of Hinsdale, 69 M
386, 391, 222 P 439.

Operation and Effect

Prima facie one is the owner of cattle bearing his recorded brand. Klind v.

The best evidence of ownership of a livestock brand is the certificate of ownership executed by the recorder of marks and brands provided for by this section;

therefore admission of the oral testimony of the secretary of the state livestock commission as to the owners of various brands found on horses shown by an inspector's reports with regards to shipments made by one charged with having received stolen animals was technical error. *State v. Keays*, 97 M 404, 417, 34 P 2d 855.

Held, that a transfer of a herd of cattle, at the time in the possession of a lessee, after they were segregated from other cattle, identified and counted out in the presence of seller and buyer, the lessee at the time agreeing to the substitution of owners, was sufficient to transfer possession, even though the brand of the transferor was not vented, there being uncontroverted evidence to overcome the prima facie presumption flowing from the fact that they still bore the brand of the seller.

Costello v. Shields, 99 M 335, 342, 43 P 2d 879.

Vented Brand Prima Facie Evidence of Sale or Transfer

The recorded brand on livestock is under this section prima facie proof of ownership of livestock bearing it, which, however, may be rebutted, and one of the best methods of rebutting it is prescribed by section 3300, R. C. M. 1935 (since repealed), which provided that the venting of brands shall be prima facie evidence of sale or transfer of animals. *Bohart v. Songer*, 110 M 405, 411, 101 P 2d 64.

References

Merrion v. Humphreys, 119 M 495, 176 P 2d 665, 668.

46-607. (3305) Publication of notice of re-recording brands. Between the first day of January and the first day of July in each year in this act designated a re-recording year, the general recorder of marks and brands shall cause to be published in at least one issue of at least one newspaper of general circulation in each county of this state, wherein such a newspaper is published, a notice to the effect that such year is a year for re-recording such marks and brands, and that no mark or brand shall continue of record unless re-recorded, and shall likewise mail to each person, firm, and corporation in whose name any such mark or brand stands of record, a similar notice addressed to such person, firm or corporation at his or its postoffice address as shown by the records in such recorder's office.

History: En. Sec. 5, Ch. 144, L. 1921;
re-en. Sec. 3305, R. C. M. 1921.

References

Merrion v. Humphreys, 119 M 495, 176 P 2d 665, 668.

46-608. (3306) Penalty for violation of act. Any person, firm, or corporation violating any provision of this act shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not exceeding one thousand dollars, or imprisonment in the county jail for not to exceed one year, or both such fine and imprisonment.

History: En. Sec. 6, Ch. 144, L. 1921;
re-en. Sec. 3306, R. C. M. 1921.

Cross-Reference

Brand regulations, penalties, secs. 94-3515 to 94-3522.

References

Merrion v. Humphreys, 119 M 495, 176 P 2d 665, 668.

Collateral References

Animals 13.
3 C.J.S. Animals § 33.

46-609. (3307) Fees for recorder of marks and brands. The general recorder of marks and brands shall charge and collect for recording each mark or brand the sum of six dollars (\$6.00), and for re-recording each mark or brand the sum of three dollars (\$3.00), and for a certified copy of any such record and each duplicate certificate one dollar (\$1.00), and all fees so collected shall be paid into the livestock commission fund; provided, however, that not more than ten per cent (10%) of the net re-recording

fees after all expenses of re-recording are paid, shall be expended in any one year except in case of an emergency declared by the governor.

History: En. Sec. 7, Ch. 144, L. 1921; re-en. Sec. 3307, R. C. M. 1921; amd. Sec. 1, Ch. 14, L. 1929; amd. Sec. 1, Ch. 109, L. 1949.

References

Merrion v. Humphreys, 119 M 495, 176 P 2d 665, 668.

46-610. (3308) Repealing clause. Chapter 27 of the laws of Montana of the twelfth session of 1911, and section 1791 of the revised codes of Montana of 1907, and all acts and parts of acts in conflict herewith are hereby repealed, save that no action or proceeding pending, and no penalty incurred under any law hereby repealed, at the time of such repeal, shall be abated hereby, but the same may be prosecuted and enforced in all respects as though such law or laws had not been repealed.

History: En. Sec. 8, Ch. 144, L. 1921; re-en. Sec. 3308, R. C. M. 1921.

References

Merrion v. Humphreys, 119 M 495, 176 P 2d 665, 668.

CHAPTER 7

INSPECTORS AND DETECTIVES

Section 46-701. Appointment and powers.

46-702. Bond and oath.

46-703. Duties.

46-704. Compensation.

46-705. District officers, detectives and inspectors.

46-706. Brands fraudulently changed.

46-707. Compensation for animals killed.

46-708. Action by dissatisfied owner—costs.

46-709. Commissioners must designate places for loading livestock for inspection, when.

46-701. (3309) Appointment and powers. The livestock commission may appoint such stock inspectors and detectives as are necessary for the protection of the livestock interests of the state. Such inspectors and detectives shall take and subscribe the official oath required by law and shall have like powers and authority as are conferred by law upon deputy sheriffs; save they shall not be entitled to the fees or emoluments awarded by law to deputy sheriffs.

History: En. Sec. 2970, Pol. C. 1895; re-en. Sec. 1796, Rev. C. 1907; amd. Sec. 1, Ch. 170, L. 1921; re-en. Sec. 3309, R. C. M. 1921.

Cross-Reference

Bond of inspectors, sec. 6-101.

Collateral References

Animals \Rightarrow 6.

3 C.J.S. Animals § 25.

46-702. (3310) Bond and oath. The stock inspectors and detectives must each make and execute a bond with two sufficient sureties, in the sum of one thousand dollars, to the state, conditioned for the full and faithful performance of their duties, said bond to be approved by and filed with the secretary of state, and each must take and subscribe the constitutional oath of office.

History: En. Sec. 2971, Pol. C. 1895; re-en. Sec. 1797, Rev. C. 1907; re-en. Sec. 3310, R. C. M. 1921.

NOTE.—Section 6-101 fixes the bonds of six market inspectors at \$2,000 and those of twelve inspectors of the livestock commission at \$1,000 each.

46-703. (3311) Duties. It is the duty of the stock inspectors and detectives to arrest all persons who in their presence violate the stock laws of the state, and every stock inspector and detective, upon information that any person has committed any offense against the laws of the state, in feloniously branding or stealing any stock, or any offense against the laws of the state, for the protection of the rights and interests of stock owners, must make the necessary affidavit for the arrest and examination of such person, and upon warrant issued therefor, immediately arrest such person and bring him before the proper officer and notify the board of his acts.

History: En. Sec. 2972, Pol. C. 1895;
re-en. Sec. 1798, Rev. C. 1907; re-en. Sec.
3311, R. C. M. 1921.

Cross-Reference

Transportation on highway, truck may
be stopped to determine whether livestock
stolen, sec. 31-110.

46-704. (3312) Compensation. The stock inspectors and detectives are under the exclusive control and direction of the board, and must be paid for their services such sums as may be agreed upon by the board out of the fund hereinafter provided for, but in no case must they receive any mileage.

History: En. Sec. 2973, Pol. C. 1895;
re-en. Sec. 1799, Rev. C. 1907; re-en. Sec.
3312, R. C. M. 1921.

46-705. (3313) District officers, detectives and inspectors. The stock inspectors and detectives are district officers, and the board must designate the district in which the inspectors and detectives shall serve, and the district must be designated in their commissions.

History: En. Sec. 2991, Pol. C. 1895;
re-en. Sec. 1800, Rev. C. 1907; re-en. Sec.
3313, R. C. M. 1921.

46-706. (3314) Brands fraudulently changed. Whenever a mark or brand upon any neat cattle, horse, or other animals has been fraudulently altered, obliterated, or defaced, so that the original mark or brand cannot be determined through the external inspection thereof, any stock inspector or sheriff may seize and kill said animal to ascertain the mark or brand so altered or defaced, upon paying to the owner the value of said animal.

History: En. Sec. 2974, Pol. C. 1895;
re-en. Sec. 1801, Rev. C. 1907; re-en. Sec.
3314, R. C. M. 1921.

Collateral References

Animals § 11.
3 C.J.S. Animals § 31.

46-707. (3315) Compensation for animals killed. The value of the animal so taken and killed shall be determined by three disinterested parties living in the vicinity where the animal is seized, and the tender of the valuation so made to the owner shall be full compensation on account of the loss of said animal. All sums of money disbursed as herein provided shall be paid out of the livestock commission fund, and whenever possible the dead bodies of the animals killed shall be disposed of for cash, and the proceeds turned into said fund.

History: En. Sec. 2975, Pol. C. 1895;
re-en. Sec. 1802, Rev. C. 1907; re-en. Sec.
3315, R. C. M. 1921.

46-708. (3316) Action by dissatisfied owner—costs. Should the owner of the animal so seized and killed feel dissatisfied with the valuation made, he may maintain an action against said officer seizing said animal, and should he fail to recover damages in any greater amount than that allowed under section 46-707, he shall bear all costs that may be incurred in the maintenance of said action.

History: En. Sec. 2976, Pol. C. 1895;
re-en. Sec. 1803, Rev. C. 1907; re-en. Sec.
3316, R. C. M. 1921.

46-709. Commissioners must designate places for loading livestock for inspection, when. The board of county commissioners must, at the request of the Montana livestock commission, designate within their respective counties certain convenient places and provide suitable facilities at said places for unloading and loading of livestock for inspection purposes.

History: En. Sec. 1, Ch. 74, L. 1939;
amd. Sec. 1, Ch. 211, L. 1947.

Collateral References

Inspection 5.

44 C.J.S. Inspection § 6.

CHAPTER 8

INSPECTION OF LIVESTOCK BEFORE REMOVAL FROM COUNTY

- Section 46-801. Inspection of livestock before removal from county.
46-802. Duties of state stock inspectors and deputy state stock inspectors.
46-803. Seizure of livestock, retention of livestock, sale, disposal of proceeds.
46-804. Fees for inspection and livestock transportation permit.
46-805. Defining state stock inspector and deputy state stock inspector.
46-806. Penalties for violations of act.
46-807. Pending actions not abated.

46-801. Inspection of livestock before removal from county. (1) Except as in this act otherwise provided, it shall be unlawful to remove or cause to be removed from any county in this state any cow, ox, bull, stag, calf, steer, heifer, horse, mule, mare, colt, foal or filly, by means of any railroad car, motor vehicle, trailer, horse-drawn vehicle, boat or in any manner whatsoever unless such animal shall have been inspected for brands by a state stock inspector or deputy state stock inspector and certificate of such inspection shall have been issued in connection with and for the purpose of such transportation or removal as in this act provided. Such inspection must be made in daylight.

(2) It shall be unlawful to sell or offer for sale at a livestock market any cow, ox, bull, stag, calf, steer, heifer, horse, mule, mare, colt, foal or filly originating within any county in the state of Montana in which a livestock market is maintained, or transported under a market consignment permit until such animal has been inspected for marks and brands by a state stock inspector, as in this act provided.

(3) It shall be unlawful to remove or cause to be removed any cow, ox, bull, stag, calf, steer, heifer, horse, mule, mare, colt, foal or filly from the premises of any livestock market in this state unless such animal shall have been inspected for marks and brands by a state stock inspector and an inspection certificate for such animal shall have been issued in connection with and for the purpose of such removal from the premises of such livestock market, as in this act provided.

(4) The person in charge of any such cow, ox, bull, stag, calf, steer, heifer, horse, mule, mare, colt, foal or filly being removed from any county in this state, where inspection thereof is required by this act or when moved under a market consignment permit shall have in his possession the certificate of inspection or market consignment permit issued in connection therewith, and shall exhibit the same to any sheriff, deputy sheriff, constable, highway patrolman, state stock inspector or deputy state stock inspector at the request of either of them and the provisions of section 46-803 shall be extended to livestock transported under the above mentioned permits.

(5) In case of saddle, work or show horse or horses being transported from county to county within the state by the owner thereof for his personal use or business and where there is no change of ownership, the inspection certificate as required by this act, may be endorsed as to purpose and extent of transportation by the inspector issuing same in order to serve as a travel permit within the state for a period not to exceed one year for the horse or horses described thereon. Such permit becomes void upon any transfer of ownership or if such horse or horses are to be removed from the state. In such instances an inspection must be secured for removal and the endorsed certificate surrendered.

(6) The provisions of section 1 of this act (this section) shall not apply,

(a) to any cow, ox, bull, stag, calf, steer, heifer, horse, mule, mare, colt, foal or filly being transported through the state in interstate commerce without leaving the custody of the carrier;

(b) to any cow, ox, bull, stag, calf, steer, heifer, horse, mule, mare, colt, foal or filly transported by railroad consigned to and which, without leaving the custody of the carrier, does reach a market at which the livestock commission of the state of Montana regularly maintains a stock inspector, and for which animal a loading tally has been filed by the shipper with the carrier as provided in section 46-1008;

(c) to any cow, ox, bull, stag, calf, steer, heifer, horse, mule, mare, colt, foal or filly when driven on the hoof and not moved by means of any motor vehicle, trailer, horse-drawn vehicle, railroad car or boat, by the owner from one (1) county to the next adjoining county within the state of Montana on to land owned or controlled by the owner of livestock so moved for the purpose of pasturing, feeding or changing the range thereof;

(d) to any cow, ox, bull, stag, calf, steer, heifer, horse, mule, mare, colt, foal or filly when driven on the hoof or moved by means of any motor vehicle, trailer, horse-drawn vehicle, railroad car or boat, by the owner from one (1) county to the next adjoining county within the state of Montana on to land owned or controlled by the owner of livestock without leaving land owned or controlled by such owner when moved for the purpose of pasturing, feeding, or changing the range thereof;

(e) to any such animal or animals when driven on the hoof from one (1) county to an adjoining county within the state for the purpose of shipment by railroad or delivery to a licensed public market by any person who has been the owner of said animal or animals for a period of at least three (3) months;

(f) to any such animal or animals from one (1) county to be consigned to, and which actually reach by means other than railroad a licensed livestock market located in another county of the state at which the livestock commission of the state of Montana regularly maintains a stock inspector, and for which a market consignment permit has been obtained in the manner provided by law.

History: En. Sec. 1, Ch. 59, L. 1943; amd. Sec. 1, Ch. 176, L. 1945; amd. Sec. 1, Ch. 210, L. 1947; amd. Sec. 1, Ch. 110, L. 1949; amd. Sec. 1, Ch. 184, L. 1953.

Collateral References

Animals↔7; Inspection↔5.
3 C.J.S. Animals § 25; 44 C.J.S. Inspection § 7.

46-802. Duties of state stock inspectors and deputy state stock inspectors. It shall be the duty of state stock inspectors and deputy state stock inspectors, upon the application of the owner of any such animal referred to in section 46-801, or the duly authorized agent of such owner, to inspect all such animals intended for removal or shipment as in this act provided, and to issue his certificate of inspection therefor, if it shall appear with reasonable certainty that the applicant is the owner of such animal or has the lawful right to the possession thereof.

The inspection herein provided for shall include such examination of the animal and all marks and brands thereon as to identify the same. The certificate of inspection shall be made in triplicate and shall specify the date of inspection, the place of origin and place of destination of the shipment, the name and address of the owner of the animal or of the applicant for inspection, the class of the animal as specified in section 46-801, the marks and brands, if any, upon the animal, and such other information and upon such form of certificate as the livestock commission may from time to time require. One (1) copy of the certificate shall be retained by the inspector, one (1) copy thereof shall be furnished by the inspector to the owner or shipper of the animal, and one (1) shall be filed by the inspector with the secretary of the livestock commission at Helena, Montana, within five (5) days.

If it shall appear with reasonable certainty that the applicant is the owner of such animals or has the lawful right to the possession thereof, the state stock inspectors or deputy state stock inspectors, upon application of an owner or his agent of any such animal or animals to be consigned and delivered directly to a licensed livestock market located in another county of the state, shall issue to such person a separate market consignment permit for each owner when the owner, or owners, or their duly authorized agents sign such permit certifying the brands, description and destination of such animals. The market consignment permit shall be made in triplicate, shall specify the date and time issued, the place of origin and place of destination of the shipment, the name and address of the owner of the animal or animals and the name and address of the person actually transporting the animal or animals if different than the owner, the kind of animal or animals, the marks and brands, if any, upon the animal or animals, a description of the vehicle or vehicles to be used to transport such animal or animals to include the license number of such vehicle or vehicles and such other information and upon such form of permit as the livestock commission may from time to time require. Any such permit so issued shall be good

for shipment within 36 hours from date and time of issue; provided, however, that permits not used within this time limitation must be returned to the issuing officer to be canceled and to release permittee from performance. One copy of such permit shall be retained by the inspector, one copy shall be filed by the inspector with the secretary of the livestock commission at Helena, Montana within five (5) days of the date of issue, and one copy shall be furnished by the inspector to the owner or shipper of the animal or animals which such copy of the permit shall accompany the shipment and be delivered to the state stock inspector at the livestock market where the animal or animals are delivered.

History: En. Sec. 2, Ch. 59, L. 1943; amd. Sec. 2, Ch. 184, L. 1953.

Cross-References

Larceny of livestock, penalty, sec. 94-2704.

Transportation on highway, truck may be stopped to determine whether livestock stolen, sec. 31-110.

Report—Admission in Evidence

One of the copies of the report of the

inspector made under former section 3324, Revised Codes of 1935 was admissible in an action for conversion although the report was not made until the day after the sale. *Smith v. Armstrong*, 121 M 377, 198 P 2d 795, 800.

Collateral References

Animals 6; Inspection 5.

3 C.J.S. Animals § 25; 44 C.J.S. Inspection § 7.

46-803. Seizure of livestock, retention of livestock, sale, disposal of proceeds. All state stock inspectors inspecting any livestock, either before or after shipment or removal from any county in this state, shall, in addition to the powers granted them by law, possess the further authority to inspect and seize either at the point of shipment or destination or enroute any livestock, or proceeds thereof, which said inspector may have good reason to believe is stolen, or upon which brands have been altered or obliterated, or which does not conform to the description contained on the tally sheet furnished by the shipper thereof or to the description contained in any certificate of inspection issued before shipment or removal of such livestock.

Upon taking possession of any such livestock in the exercise of the authority granted by this act, the state stock inspector may retain same in his possession for not to exceed fifteen (15) days for the purpose of making further investigation relative to its ownership, or may either at once or at any time within said period of fifteen (15) days sell said livestock at any licensed livestock market, or in the open market, for the best available price and remit the proceeds, less the cost of keeping and sale, to the livestock commission together with a full description of the animal sold, giving marks and brand, if any, and a statement of the reason for the seizure and sale thereof. Said proceeds shall be deposited by the livestock commission with the state treasurer and credited to the stock estray fund, where it shall be subject to claim by the owner of the livestock in the same manner and for the same length of time as is provided by law for the making of claims against said fund.

History: En. Sec. 3, Ch. 59, L. 1943.

Cross-Reference

See reference to this section in sec. 46-801, par. (4).

46-804. Fees for inspection and livestock transportation permit.

(a) For the service of inspection or for the issuance of market consign-

ment permit herein provided for before removal from county, the inspector making such inspections or issuing of such permit shall receive twenty-five cents (25c) per head for twelve (12) head or less, or three dollars (\$3.00) for from twelve (12) head to thirty (30) head and shall receive ten cents (10c) per head for each animal over thirty (30) head and shall receive in addition thereto his necessary actual expenses, to be paid by the owner thereof or the person for whom the inspection is made or permit issued; provided, however, that for each market consignment permit issued a minimum fee shall be one dollar (\$1.00) and a maximum fee shall be five dollars (\$5.00). All such inspection and permit fees and expenses shall be collected by the inspector making the same at the time of inspection or issuance of permit and all such fees and expenses collected by a deputy state stock inspector shall be retained by him and all such fees and expenses collected by a state stock inspector shall be sent by him to the livestock commission for deposit in the state treasury to the credit of the livestock commission fund.

(b) For the service of inspection herein provided for before any such animal is sold or offered for sale at any licensed public market, the state stock inspector making such inspection shall receive (1) twenty cents (20c) per head for any such animal originating within the county in the state in which such market is maintained, or transported under a market consignment permit, and (2) ten cents (10c) per head for any such animal previously inspected before removal from county as herein provided. All such fees to be paid by the owner thereof or by the person for whom the inspection is made. For inspecting any such animal before same is removed from the premises of such licensed public market the state stock inspector making such inspection shall receive ten cents (10c) per head from the owner thereof or the person for whom the inspection is made. All such fees for inspection at such market shall be collected by the state stock inspector making the inspection at the time such inspection is made and shall be sent by him to the livestock commission for deposit in the state treasury to the credit of the livestock commission fund.

(c) A question or doubt having arisen as to the intention of the legislature and policy of the state concerning the disposition of inspection fees and expenses collected by the state stock inspectors of the state of Montana for the inspection of livestock, it is hereby declared to be the policy of this state and the intent of the said twenty-eighth legislative assembly of the state of Montana that all such inspection fees and expenses be paid to the livestock commission for deposit in the state treasury to the credit of the livestock commission fund, and that said state stock inspectors shall be paid for their services and receive for their expenses only such sums as shall be agreed upon by the livestock commission of the state of Montana and fixed and determined by the state board of examiners.

History: En. Sec. 4, Ch. 59, L. 1943; amd. Sec. 1, Ch. 106, L. 1949; amd. Sec. 3, Ch. 184, L. 1953.

Fees of Inspector

This section does not permit the inspector to retain as additional compensation

the fees received under this section for inspections made at other than a public market occasioned by the removal of livestock from one county to another. State ex rel. Erwin v. Warren, 124 M 378, 224 P 2d 142.

46-805. Defining state stock inspector and deputy state stock inspector.

The term "state stock inspector" as used in this act shall mean an employee of the livestock commission of the state of Montana designated by such commission as such, and the term "deputy state stock inspector" as used in this act shall mean any person designated or appointed by said commission as a deputy state stock inspector and who does not receive salary or compensation from said commission.

History: En. Sec. 5, Ch. 59, L. 1943.

46-806. Penalties for violations of act. (a) Any person who removes or causes to be removed from any county in the state any animal or animals of the class referred to in section 46-801; (1) without having the same inspected prior to removal where such inspection is required by law; (2) without obtaining a market consignment permit for such animal or animals, where such market consignment permit is obtainable by law; (3) and does obtain a market consignment permit for such animal or animals but does not deliver such animal or animals transported thereunder to the livestock market designated in the market consignment permit; shall be guilty of a misdemeanor and shall be punishable as hereinafter provided.

(b) Any person who sells or offers for sale at a livestock market, or removes or causes to be removed from a livestock market, any animal or animals of the class referred to in section 46-801, without having the same inspected in the manner provided shall be guilty of a misdemeanor and shall be punishable as hereinafter provided.

(c) Any person who shall ship by railroad carrier, and the railroad carrier transporting, any animal or animals of the class referred to in section 46-801 for which a loading tally has been filed as provided by section 46-1008 and for which shipment of animals an inspection has not been made, and after shipment, causes or permits such animal or animals to leave the custody of the railroad carrier at a place other than where the state of Montana regularly maintains a stock inspector, shall be guilty of a misdemeanor and shall be punishable as hereinafter provided.

(d) Any person who has in his charge any animal or animals of the class referred to in section 46-801 being removed from any county in the state, and for which an inspection certificate or a market consignment permit has been issued, and fails to have in his possession accompanying such animal or animals the inspection certificate or market consignment permit as issued for such animal or animals; or who, having such certificate of inspection or market consignment permit, fails to exhibit the same to any sheriff, deputy sheriff, constable, highway patrolman, state stock inspector or deputy state stock inspector at the request of any such person; shall be guilty of a misdemeanor and shall be punishable as hereinafter provided.

(e) Any person violating any of the provisions of this act in respect to moving, removing or transporting any animal or animals of the class referred to in section 46-801, or in any other particular, shall be guilty of a misdemeanor and shall be punishable as hereinafter provided.

(f) Upon conviction of any person, firm, association, or corporation under this act, they shall be fined in a sum of not less than fifty dollars

(\$50.00) nor more than five hundred dollars (\$500.00) or imprisoned in the county jail for a period of not more than six (6) months, or shall be punished by both such fine and imprisonment. Of all fines assessed and collected under the provisions of this act, fifty per cent (50%) thereof shall be paid into the state treasury and credited to the livestock commission fund, and fifty per cent (50%) thereof shall be paid into the general fund of the county in which the conviction occurred.

History: En. Sec. 6, Ch. 59, L. 1943;
amd. Sec. 4, Ch. 184, L. 1953.

46-807. Pending actions not abated. No action or proceeding pending in court under the provisions of either Chapters 133 or 136 of the laws of Montana of 1937; Chapters 85 and 87 of the laws of Montana of 1939; Chapter 106 of the laws of Montana of 1941; or under the provisions of Chapter 287 or Chapter 288 of the Revised Codes of Montana of 1935, as amended, shall abate by reason of this act, but may be prosecuted to final judgment under the provisions of the law or laws herein otherwise repealed.

History: En. Sec. 7, Ch. 59, L. 1943.

NOTE.—All of the statutes referred to in the above section were repealed by Sec. 8, Ch. 59, Laws 1943.

CHAPTER 9

LIVESTOCK MARKETS—INSPECTION AND QUARANTINE— LICENSE AND BONDING

- Section 46-901. Public markets—record books of sales of livestock.
46-902. Inspection of public markets.
46-903. Quarantine of diseased animals—ownership of animals to be determined—proceeds from sale of stock of unknown owner.
46-904. State treasurer to hold proceeds of sales of stray stock.
46-905. Penalties.
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46-908. Certificate to operate livestock market required—application, contents of—fee.
46-909. Hearing and procedure—limitation upon issuance of certificates.
46-910. Existing livestock markets licensed—grounds of discontinuance.
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46-913. Records kept by licensees.
46-914. Rules and regulations—board to adopt.
46-915. Cancellation or suspension of certificates—grounds.
46-916. Investigation of actions of licensees—hearing of complaints—additional powers and duties of members of commission, sanitary board or agents—witnesses.
46-917. Appeal by licensee or applicant for certificate—bond—procedure.
46-918. Operator of market to warrant title of livestock sold—other duties.
46-919. Dispersal sales.
46-920. Penalties for violating act.
46-921. Jurisdiction of district courts.

46-901. (3328) Public markets—record books of sales of livestock. Hereafter any person, firm, corporation, or association of individuals, desiring to establish, maintain, or conduct a market for the sale of horses or other livestock at public auction, or otherwise, shall keep a full and complete record book in which must be recorded the name or names of any person, corporation, or association of individuals bringing to the said market, or offering for sale at such market, any horses or other livestock,

together with a description thereof as to their kind, and of all brands of every kind thereon. And if requested by the sheriff of the county or a stock inspector, in case question arises respecting the ownership, particular description shall be recorded showing, in addition to all the brands, the color and sex of such animals; and, in addition, such record shall clearly show the name of the person for whom such animal or animals were sold, the date of the sale, and the person to whom such animal or animals were sold, and the particular character of the animal or animals. Such record book must be open for inspection by the public for persons interested at any and all reasonable times.

History: En. Sec. 1, Ch. 96, L. 1907; Sec. 1815, Rev. C. 1907; amd. Sec. 1, Ch. 21, L. 1909; re-en. Sec. 3328, R. C. M. 1921.

Cross-Reference

Auctioneers, records required, secs. 66-210, 66-211.

Collateral References

Auctions and Auctioneers 2; Factors 2.

7 C.J.S. Auctions and Auctioneers § 2; 35 C.J.S. Factors § 2.

35 Am. Jur. 136, Markets and Marketing, §§ 4 et seq.

46-902. (3329) Inspection of public markets. The stock inspector of the county or district, or the sheriff of any county in this state, and the state veterinarian, or any person duly appointed and representing the livestock commission, may enter upon the premises where any such livestock are being held or sold, and be accorded every facility by the owners thereof in determining whether any violations of the law are being made, or are likely to be made, by any person, association, or corporation whatsoever; provided, however, that such inspection shall not unnecessarily interfere with the conduct of the sales; and that no horses or other livestock so sold at such market shall be delivered to the purchaser until he shall first have received an inspection certificate, issued by one of the officers hereinabove designated, for the inspection of such livestock, showing clearly and explicitly that the person making such inspection, as herein authorized, is satisfied as to the ownership of such livestock and the health of all animals so sold.

History: En. Sec. 2, Ch. 96, L. 1907; Sec. 1816, Rev. C. 1907; re-en. Sec. 3329, R. C. M. 1921.

NOTE.—In this and other sections the words “state board of livestock commissioners” have been changed by the code commissioner of 1921 to “livestock commission” to conform to later enactments.

46-903. (3330) Quarantine of diseased animals—ownership of animals to be determined—proceeds from sale of stock of unknown owner. Should the person herein authorized to inspect such livestock at any such sale find any of the animals afflicted with an infectious or contagious disease, he shall immediately take possession of such animals and place them in quarantine, to be thereafter disposed of as may be directed by the state veterinary surgeon. And, in the event there is any question arising respecting the ownership of any animal sold, the person so making the inspection, as herein authorized, shall have the right, privilege, power, and authority to take possession of such animal or animals; provided, that he shall notify the person in charge of such market and conducting the sales, and also the person who may purchase any such livestock at any such sale, within a reasonable time; provided, further, that where any livestock is sold,

the ownership of which is not known or determinable by the person or persons herein authorized to make inspection, they may be sold as strays, and that the net proceeds derived from said sale shall be transmitted to the livestock commission of the state of Montana, at Helena, Montana, to be held and kept, together with a complete description of any such animal or animals, and the brands thereon, and such money shall be held and retained by said commission for the use and benefit of the owner or owners of any such animal or animals, and paid over to such owner or owners when the ownership shall have been satisfactorily determined. And, in the event that the proceeds of the sale of any such animal or animals so transmitted to the livestock commission be not claimed by the lawful owner of the property so sold, within two years from the date of the receipt of the proceeds of such sale, such money shall be held and disposed of as hereinafter provided.

History: En. Sec. 3, Ch. 96, L. 1907;
Sec. 1817, Rev. C. 1907; re-en. Sec. 3330,
R. C. M. 1921.

Collateral References
Animals↔30.
3 C.J.S. Animals § 52.

46-904. (3331) State treasurer to hold proceeds of sales of stray stock.

When the provisions of this law shall have been fully complied with, and the money paid into the state treasury, two years after its receipt from the state livestock commission, the state treasurer shall be required to hold such money in a separate fund, to be known and designated as the "stray stock fund," and his books shall show all information with respect to the sale and proceeds from each animal, in accordance with the published yearly report of the livestock commission, and such money shall be held by the state treasurer for the use and benefit of the rightful owner and claimant of such money for the period of one year, after which it shall become state property and be placed to the credit of the livestock commission fund.

History: En. Sec. 4, Ch. 96, L. 1907;
Sec. 1818, Rev. C. 1907; re-en. Sec. 3331,
R. C. M. 1921.

Collateral References
Animals↔60.
3 C.J.S. Animals § 86.

46-905. (3332) Penalties. Any person or persons, corporation, or association guilty of a violation of any of the provisions of this act shall be deemed guilty of a misdemeanor, and is punishable by a fine not exceeding six hundred dollars, or by six months' imprisonment in the county jail, or by both such fine and imprisonment.

History: En. Sec. 5, Ch. 96, L. 1907;
Sec. 1819, Rev. C. 1907; re-en. Sec. 3332,
R. C. M. 1921.

Collateral References
Animals↔35, 64; Auctions and Auctioneers↔12.
3 C.J.S. Animals §§ 65, 103; 7 C.J.S. Auctions and Auctioneers § 15.

46-906. Definitions. When used in this act:

(a) The word "livestock" means and includes horses, mules, cattle, swine, sheep and goats;

(b) The word "person" means and includes a person, co-partnership, association or corporation;

(c) The words "commission" or "livestock commission" mean the livestock commission of the state of Montana;

(d) The words "sanitary board" mean the Montana livestock sanitary board;

(e) The word "certificate" means the certificate of public convenience and necessity authorized to be issued under the provisions of this act;

(f) The words "commission basis" mean the compensation or charge imposed on the owner of livestock for the services rendered such owner by the operator of the livestock market;

(g) The term "livestock market" means a place where a person shall assemble livestock for either private or public sale by him and such service is to be compensated for by owner, on a commission basis or otherwise, except: (1) Any place used solely for a dispersal sale of the livestock of a farmer, dairyman, livestock breeder or feeder who is discontinuing said business and no other livestock is there sold or offered for sale; (2) Any farm, ranch, or place where livestock either raised or kept thereon for the grazing season or for fattening is sold, and no other livestock is brought there for sale or offered for sale; (3) The premises of any butcher, packer, or processor who received animals exclusively for immediate slaughter; (4) The premises of any person, firm, association, or corporation engaged in the raising of livestock for breeding purposes only, who limits his or its sale to animals of his or its own production; (5) Any place where a breeder or an association of breeders of livestock of any class assemble and offer for sale and sell under his or their own management any livestock, when such breeder or association of breeders shall assume all responsibility of such sale and the title of livestock sold.

History: En. Sec. 1, Ch. 193, L. 1945.

46-907. Regulation of livestock markets. The livestock commission and sanitary board of the state of Montana is hereby vested with power and authority, and it is hereby made its duty: (a) To supervise and regulate livestock markets in this state; (b) To regulate the properties, facilities, operations, services and practices of all livestock markets; (c) To supervise and regulate livestock markets in all matters affecting the relationship between such operators and owners of livestock, and between such operators and purchasers of livestock, at such markets; (d) To prescribe by general order, or otherwise, rules and regulations in conformity with this act applicable to all livestock markets, and not in conflict with the laws of the United States or rules and regulations of the United States department of agriculture or other federal agencies.

History: En. Sec. 2, Ch. 193, L. 1945.

References

Cited or applied in *Montana Meat Co. v. Missoula Livestock Auction Co.*, 125 M 66, 230 P 2d 955, 956.

46-908. Certificate to operate livestock market required—application, contents of—fee. No person shall hereafter operate a livestock market in the state of Montana without first having obtained from the commission, under the provisions of this act, a certificate declaring that public convenience and necessity require such operation. Any person making application for such certificate shall do so in writing, verified by the applicant, and specifying the following matters:

- (1) The name and address of the applicant, and the names and addresses of its officers, if any;
- (2) The place where applicant proposes to operate a livestock market;
- (3) A complete and detailed description of the property and facilities proposed to be used in connection with such livestock market;
- (4) The commissions or charges applicant proposes to impose on the owners of livestock for services rendered to them by applicant in the operation of such livestock market;
- (5) A detailed statement showing the assets and liabilities of applicant;
- (6) The location of other livestock markets within a radius of two hundred (200) miles of the proposed livestock market, and the names and addresses of the operators thereof;
- (7) A detailed statement of the facts upon which applicant relies showing public convenience and necessity for such livestock market, including the anticipated revenue from inspection fees that may be derived therefrom by the state of Montana;
- (8) Such other or additional information as the commission may require;
- (9) Such application shall be accompanied by a fee of one hundred dollars (\$100.00), which shall also be considered the first annual fee if such application is granted; provided, however, that the annual fee shall be paid on the following first day of May and each year thereafter, as provided herein.

History: En. Sec. 3, Ch. 193, L. 1945.

Operation and Effect

Where applicant showed required financial responsibility, that he was able to furnish adequate facilities, tendered the fee and evinced willingness to place proper bond and in all respects complied with the requirements of the livestock market licensing law as it then existed, the livestock commission had no discretion in the matter of granting or refusing a license. *Peterson v. Livestock Commission*, 120 M 140, 181 P 2d 152, 156.

Id. Livestock commission could not refuse to grant application for license to

operate a livestock market to which applicant was entitled under statute effective at time of hearing before commission, and then require applicant to apply under a subsequently effective statute (this chapter) for the license, to which, through operation under the prior statute the applicant would have been entitled but for the wrongful refusal.

References

Cited or applied in *Montana Meat Co. v. Missoula Livestock Auction Co.*, 125 M 66, 230 P 2d 955, 957.

46-909. Hearing and procedure—limitation upon issuance of certificates.

Upon the filing of such application, the commission shall fix a time and place for hearing thereon, which shall not be less than ten (10) days after such filing. The commission shall cause a copy of such application and notice of hearing thereon to be served by mail upon: (a) the operators of any other livestock markets that in the opinion of the commission might be affected by the granting of any such certificate; (b) the secretaries of the Montana stockgrowers association and the Montana woolgrowers association; (c) the secretary of the district livestock association, if any; and, (d) the secretary of the livestock association or associations, if any, at the place or within the vicinity of the proposed livestock market, if known to the commission; and, (e) upon any railroad company operating into or through any town or city in which the proposed livestock market will be located, at least ten (10) days before the date of hearing.

If, after hearing upon such application, the commission shall find from the evidence that public convenience and necessity require the authorization of the proposed livestock market, a certificate therefor shall be issued to the applicant. In determining whether or not public convenience and necessity require such livestock market, the commission shall give reasonable consideration to the service rendered by other existing livestock markets in the state and the effect upon them if the proposed livestock market is authorized, and shall give due consideration to the likelihood of the proposed service being permanent and continuous throughout twelve (12) months of the year; provided, however, that the commission shall not authorize the proposed livestock market unless it shall appear from the evidence submitted at the hearing that the minimum revenue derived by the state from inspection fees shall be equal to seventy-five per cent (75%) of the cost to the state in maintaining a resident livestock inspector and an office for him at such proposed livestock market, and the cost of maintaining at such office of a sufficient record of the recorded livestock brands and marks in the state; provided, however, that the commission may authorize the same if the operator of the proposed market shall by bond approved by the commission guarantee the payment of such minimum revenue.

History: En. Sec. 4, Ch. 193, L. 1945.

46-910. Existing livestock markets licensed—grounds of discontinuance.

All livestock markets legally licensed by the commission under the provisions of Chapter 52, Laws of Montana, 1937, and engaged in business at the time of the effective date of this act, shall be entitled to receive from the commission, without further application or fee, a certificate as provided in this act, authorizing the continuance thereof; provided, however, that if after hearing in the manner provided in this act it shall appear to the commission that such livestock market, or any livestock market which may be licensed as provided in this act, shall, for a period of two (2) successive years, fail to provide the minimum revenue to the state as provided in this act, such livestock market may be discontinued by the order of the commission.

History: En. Sec. 5, Ch. 193, L. 1945.

NOTE.—Chapter 52, Laws 1937, referred to above, was repealed by Sec. 18, Ch. 193, Laws 1945.

46-911. License fee. Every person operating a livestock market in this state shall be required to pay on May 1st, annually, a license fee of one hundred dollars (\$100.00) to the livestock commission. All fees provided for under this act shall be paid into the state treasury, and shall be placed by the state treasurer to the credit of the livestock commission fund.

History: En. Sec. 6, Ch. 193, L. 1945.

Cross-Reference

Carrying on business without license, penalty, sec. 94-1511.

46-912. Bond required—conditions. Every person operating a livestock market in this state shall provide a bond in favor of the state of Montana, upon a form and with surety to be approved by the commission, in the minimum penal sum of ten thousand dollars (\$10,000.00) or such greater sum as the livestock commission may determine, conditioned upon:

(a) the payment forthwith upon the sale of such livestock of all money received, less reasonable expenses and commissions, by the licensee and operator of such livestock market to the rightful owner or owners of livestock so consigned and delivered to such licensee for sale; (b) the payment of the minimum fees as provided by section 46-909; and, (c) a full compliance with all the terms and requirements of this act, including all rules and regulations made thereunder. When so approved said bond shall be filed with the secretary of the livestock commission. Actions of law may be brought in the name of the state upon any such bond for the use and benefit of any person who may suffer loss or damage from violations thereof, and may be brought by any such person suffering loss or damage in the county of his residence.

History: En. Sec. 7, Ch. 193, L. 1945.

46-913. Records kept by licensees. Each licensee shall keep such accounts, records and memoranda, and shall make such reports, as may from time to time be required by the commission, and the commission and its authorized agents and employees shall at all times have access to such accounts, records and memoranda for inspection and examination.

History: En. Sec. 8, Ch. 193, L. 1945.

46-914. Rules and regulations—board to adopt. The Montana livestock sanitary board shall adopt and enforce such rules and regulations as it may deem necessary or advisable, in the interest of livestock health or public health and such rules and regulations shall have the same force and effect as those adopted by the commission.

History: En. Sec. 9, Ch. 193, L. 1945.

46-915. Cancellation or suspension of certificates—grounds. Finding by the commission that any licensee: (a) has been guilty of fraud or misrepresentation as to the titles, charges, number, brands, weights, proceeds of sale, or ownership of livestock; (b) has violated any of the provisions of this act; (c) has violated any of the rules or regulations adopted and published by the commission or by the sanitary board; (d) has violated any of the laws of the state of Montana, requiring the inspection of horses and cattle, as contained in sections 46-801 to 46-807; or, (e) has violated any of the conditions of the bond, as provided by this act, shall be deemed a sufficient cause for the cancellation or suspension of the certificate of the offending operator of such livestock market.

History: En. Sec. 10, Ch. 193, L. 1945.

46-916. Investigation of actions of licensees—hearing of complaints—additional powers and duties of members of commission, sanitary board or agents—witnesses. (1) The commission, sanitary board or any member or the secretaries thereof, may upon their own motion, or upon verified complaint in writing of any person, whenever they or either of them deem it necessary, investigate the actions of any licensee, and if they or either of them find it proper to do so, shall file complaint against the licensee with the commission, and said complaint shall be set down for hearing before the commission upon ten (10) days' notice served upon such licensee

either by personal service upon him or by registered mail or by telegram prior to such hearing.

(2) Any member of the commission, sanitary board or the secretaries thereof, shall have power to administer oaths, certify to all official acts and shall have the power to subpoena and bring before them any person in this state as a witness, to compel the producing of books and papers and to take the testimony of any person or deposition in the same manner as is prescribed by law in the procedure before the courts of this state in civil cases. Processes issued by the commission or sanitary board shall extend to all parts of the state and may be served by any person authorized to serve processes. Each witness that shall appear by the order of the commission or the sanitary board shall receive for his attendance the same fees and mileage allowed by law to witnesses in civil cases appearing in the district court, which amount shall be paid by the party at whose request such witness is subpoenaed. When any witness has not been required to attend at the request of any party, but subpoenaed by the commission or sanitary board, his fees and mileage shall be paid by the commission in the same manner as other expenses of the said department are paid.

(3) Any investigation, inquiry or hearing which the commission has power to undertake or to hold, under the provisions of this act, may be undertaken or held by or before any member of the commission or by or before any agent or examiner of the commission designated for the purpose by the commission, and every finding, order or decision made by a member of the commission or agent or examiner of the commission so designated, pursuant to such investigation, inquiry or hearing when approved and confirmed by the commission and ordered filed in its office, shall be deemed to be and be the finding, order or decision of the commission; provided also that any agent or examiner of the commission designated as aforesaid shall have power to administer oaths, examine witnesses and receive evidence.

History: En. Sec. 11, Ch. 193, L. 1945.

46-917. Appeal by licensee or applicant for certificate—bond—procedure. (a) A question or doubt having arisen as to the intention of the legislature and policy of the state concerning appeals from decisions of the livestock commission of the state of Montana relating to livestock markets, it is hereby declared to be the policy of this state and the intent of the twenty-ninth and thirtieth legislative assemblies that such appeals should be heard solely upon the record of the proceedings before the commission in the matter in which the appeal is taken.

(b) If the commission shall refuse to grant an application for a certificate or shall suspend or revoke a certificate the applicant or licensee may appeal to the district court of the county in which the proposed livestock market is to be located or in which the licensee has his principal place of business by giving notice of such appeal in writing to the commission within ten (10) days after receiving notice by registered mail of its decision and within said time filing a bond with the clerk of said district court in the sum of three hundred dollars (\$300.00) to be approved by the judge of said court, conditioned to pay all costs that may be awarded

against such appellant in the event of an adverse decision or the decision of said commission being affirmed or upheld. Within thirty (30) days after such decision or within such additional time as the district court shall allow upon good cause shown, but not exceeding sixty (60) days after said decision, appellant shall file with the clerk of said district court a transcript of the testimony and proof presented to the commission including notice of appeal, complaint, pleadings, notices, motions and other papers filed in the cause with the commission certified by the secretary of the commission. Cost of preparing such transcript shall be paid by appellant. In case of suspension or revocation of a certificate the filing of such notice and bond shall stay the order of the commission until the final determination of the appeal. If the appellant should fail to perfect his appeal or file said transcript as herein provided said stay shall automatically terminate. The trial shall be had summarily before the district court upon the record of the evidence presented to the commission of which a complete record must be kept of the hearings of the commission as shown by said transcript and the exhibits, if any, presented to the commission and certified by the secretary of the said commission, and upon which its decision was rendered and there shall not be any additional evidence introduced or anything in the nature of a trial de novo. The court shall not substitute its discretion for that of the commission but shall determine whether the commission acted capriciously, arbitrarily, or abused its discretion and whether it acted according to law. Appeals from judgments of the district court may be taken to the supreme court in the same manner as appeals are taken in civil actions.

History: En. Sec. 12, Ch. 193, L. 1945;
amd. Sec. 1, Ch. 231, L. 1947.

46-918. Operator of market to warrant title of livestock sold—other duties. The operator of each livestock market in this state shall warrant to the purchaser thereof the title of all livestock sold through his livestock market and shall be liable to the rightful owner thereof for the net proceeds in cash received for such livestock so sold, and it shall be the further duty of such operator of a livestock market when notified by the authorized brand inspector, that there is a question as to whether any designated livestock sold through such market is lawfully owned by the consignor thereof, to hold the proceeds received from the sale of said livestock for a reasonable time not to exceed thirty (30) days, to permit the consignor to establish ownership, and if at the expiration of that time, the consignor fails to establish his lawful ownership of such livestock, said proceeds shall be transmitted by such operator of a livestock market to the secretary of the livestock commission, which secretary shall have authority to dispose of such proceeds in accordance with Chapter 10 of this title, relating to the distribution of stray money, and the secretary's receipt therefor shall relieve said operator of a livestock market from further responsibility for said proceeds. Proof of ownership and account of all sales of livestock shall be transmitted by the authorized brand inspector to the secretary of the livestock commission.

History: En. Sec. 13, Ch. 193, L. 1945.

46-919. Dispersal sales. All dispersal sales made at livestock markets shall meet the requirements prescribed for other livestock passing through such market.

History: En. Sec. 14, Ch. 193, L. 1945.

46-920. Penalties for violating act. Any person who shall violate any provisions or requirements of this act or rule or regulation adopted by the commission or the sanitary board pursuant to this act, shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than one hundred dollars (\$100.00) nor more than six hundred dollars (\$600.00), or by imprisonment in the county jail not less than thirty (30) days nor more than six (6) months, or by both such fine and imprisonment. Every person who having been convicted of a violation of this act shall after such violation of any of the provisions of this act again be found guilty of a violation as aforesaid shall be punished by a fine of not less than two hundred dollars (\$200.00) nor more than one thousand dollars (\$1,000.00), or by imprisonment in the county jail for not less than three (3) months nor more than six (6) months, or by both such fine and imprisonment. Such second conviction shall require the commission to suspend or cancel the certificate of such person without hearing, in which event such person shall not again be granted a certificate for a period of one (1) year.

History: En. Sec. 15, Ch. 193, L. 1945.

46-921. Jurisdiction of district courts. The district courts shall have original jurisdiction in all criminal actions for violations of the provisions of this act.

History: En. Sec. 16, Ch. 193, L. 1945.

CHAPTER 10

ESTRAYS—DISPOSAL OF

- Section 46-1001. Estrays—livestock commission authorized to take possession of.
 46-1002. Taking up and disposal of estrays—advertisement.
 46-1003. Sale at public auction—branding.
 46-1004. Expenses, how paid—disposition of proceeds of sale.
 46-1005. "Estray," as herein used, defined.
 46-1006. Publication of description of estrays sold—disposition of proceeds remaining in state treasury.
 46-1007. Penalty for wrongful taking of estray.
 46-1008. Shipment of stray cattle—duty of shipper and railroad agents.
 46-1009. Violations, penalty for.
 46-1010. Description of animals taken out during shipment.
 46-1011. Powers and duties of inspectors outside of state.
 46-1012. Livestock commission to furnish blanks.
 46-1013. Failure of shipper or inspector to comply with this act—penalty.

46-1001. (3333) Estrays—livestock commission authorized to take possession of. The livestock commission, by and through its legally appointed stock inspectors, be and it is hereby authorized to take possession of any and all estrays found running at large within the state of Montana, and to dispose of the same, subject to the following restrictions.

History: En. Sec. 1, Ch. 34, L. 1915;
 re-en. Sec. 3333, R. C. M. 1921.

Cross-Reference

Fee for recording transcript concerning estrays, sec. 25-231.

References

Jorgenson v. Story et al., 78 M 477, 493,
254 P 427.

Collateral References

Animals 60.
3 C.J.S. Animals § 86.

46-1002. (3334) Taking up and disposal of estrays—advertisement.

Any stock inspector authorized by the Montana livestock commission shall take into his possession all estrays found within his district, and shall either ship, or arrange for the shipment of, such estrays to a licensed livestock market for sale, the proceeds from such sale to be disposed of as provided for in sections 46-1004 and 46-1006; or he may hold such estrays so collected by him in his possession, and care for the same in the cheapest and most practicable manner for a period of not less than thirty (30) days, nor more than sixty (60) days, during which time he shall advertise the facts that he holds such estray or estrays, and that unless claimed by the owner thereof he will, on a date to be specified in said notice, sell such estray or estrays at public auction to the highest bidder for cash, which said notice shall be published in the newspaper doing the county printing of the county wherein such estray or estrays are found, and in addition thereto in a paper published in the town or city nearest the place at which such estray is held, which said notice shall be published at least once a week for four (4) consecutive weeks, and shall contain a statement of the date of the sale, the place where such sale is to be held, and a general description of such estray, including the sex of the same and the approximate age, together with an illustration of the brand and the position of such brand upon such estray, together with a description of the place or locality where such estray was found or taken up; and the owner of such estray may appear and claim the same at any time prior to the sale or shipment, as hereinafter provided, and without cost or expense to said owner.

History: En. Sec. 2, Ch. 34, L. 1915;
re-en. Sec. 3334, R. C. M. 1921; amd. Sec.
1, Ch. 34, L. 1943.

Collateral References

2 Am. Jur. 794, Animals, §§ 138 et seq.

46-1003. (3335) Sale at public auction—branding. On the date specified in the notice provided in the preceding section, such stock inspector shall cause said estray or estrays to be sold at public auction to the highest bidder for cash; and before removal from said sale the said stock inspector shall cause the said estray or estrays to be branded with the recorded estray brand of the livestock commission.

History: En. Sec. 3, Ch. 34, L. 1915;
re-en. Sec. 3335, R. C. M. 1921.

46-1004. (3336) Expenses, how paid—disposition of proceeds of sale.

All expenses attending the collecting, holding, advertising, and selling of such estray or estrays shall be paid out of the gross proceeds of the sale of such estray or estrays, and the balance of the proceeds of such sale shall be forwarded to the secretary of the livestock commission to be by him advertised as estray funds in the manner now provided by law, and such proceeds shall be subject to claim by the owner of the animal for a period of two years from the date of such sale; provided, that in the event the owner of such estray claims said animal prior to the sale thereof, the expense

theretofore incurred by the stock inspector shall be paid by the livestock commission as an expense of said commission.

History: En. Sec. 4, Ch. 34, L. 1915;
re-en. Sec. 3336, R. C. M. 1921.

46-1005. (3337) "Estray," as herein used, defined. An estray within the meaning of this act shall be any horse, mule, mare, gelding, colt over one year old, cow, ox, bull, stag, steer, heifer, or calf over one year old, not bearing a brand and the ownership of which cannot be determined by the stock inspector of the district wherein such animal may be found, by inquiry among reputable resident stock owners or freeholders therein; or any of such animals bearing a recorded brand but the owner of which brand cannot be located at or through the postoffice designated upon the records of the recorder of marks and brands, or which owner cannot be located by the stock inspector of the district where such estray is found by inquiry among reputable resident stock owners or freeholders therein; or any of the animals above enumerated which bears an unrecorded brand, the owner of which unrecorded brand cannot be ascertained by the stock inspector of the district wherein said animal is found, by inquiry among reputable resident stock owners or freeholders therein.

History: En. Sec. 5, Ch. 34, L. 1915;
re-en. Sec. 3337, R. C. M. 1921.

46-1006. (3338) Publication of description of estrays sold—disposition of proceeds remaining in state treasury. A full description of estrays for which the proceeds derived from the sale remains in the hands of the treasurer unclaimed shall be published for the period of two (2) consecutive weekly or semi-monthly or monthly issues next after May first of each year in not more than four (4) weekly or semi-monthly or monthly publications in the state of Montana, said publications to be designated by the state livestock commission, and when such publication shall have been made and the proceeds from the sale of such animals shall have remained in the hands of the state treasurer for a period of two (2) years, it shall be, by the treasurer, upon request of the state livestock commission, at once placed to the credit of the state livestock commission fund.

History: En. Sec. 5, Ch. 2, L. 1911; 3338, R. C. M. 1921; amd. Sec. 1, Ch. 63, amd. Sec. 1, Ch. 20, L. 1919; re-en. Sec. L. 1927; amd. Sec. 1, Ch. 95, L. 1941.

46-1007. (3340) Penalty for wrongful taking of estray. Any person who shall, for his own use or benefit and without the owner's consent, take into his possession any estray, shall be guilty of a misdemeanor and shall be punishable by a fine of not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment in the county jail not exceeding sixty days, or by both such fine and imprisonment.

History: En. Sec. 2, Ch. 169, L. 1921;
re-en. Sec. 3340, R. C. M. 1921.

Collateral References
Animals 64.
3 C.J.S. Animals § 103.

46-1008. (3341) Shipment of stray cattle—duty of shipper and railroad agents. Every person, agent, firm, corporation, pool or roundup association, who shall ship cattle by railroad to any market where Montana livestock inspectors are maintained, may ship with their own cattle any

estrays which may be among them, but they must before shipment, or at the time of loading same on the cars for shipment, carefully and as accurately as possible inspect or tally the brand on such cattle, whether their own or estrays, making a list in duplicate, which list shall state the date of loading, name of shipper, description of brands on each animal, number and class of the cattle bearing such brand, destination, name of the commission firm to whom consigned, and the name of the person in charge of the shipment except that in the case of cattle not owned by the shipper and which are marked with a recorded brand, or where the owner is known to be someone other than the shipper, the shipper must obtain the written consent of such owner or owners, or the written consent of a state stock inspector or a deputy state stock inspector before shipment of such cattle. It shall be the duty of the railroad agent at the point of loading to require from the shipper lists as described in this act, and to forward, within twenty-four (24) hours after loading, one copy to the livestock commission at Helena, Montana, and another copy to the Montana brand inspector at the point of destination.

History: En. Sec. 1, Ch. 94, L. 1907; R. C. M. 1921; amd. Sec. 1, Ch. 29, L. Sec. 1820, Rev. C. 1907; re-en. Sec. 3341, 1923; amd. Sec. 1, Ch. 137, L. 1943.

46-1009. (3341.1) Violations, penalty for. Every person, agent, firm or corporation violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding three hundred dollars (\$300.00), or imprisonment in the county jail not to exceed six (6) months, or both such fine and imprisonment.

History: En. Sec. 2, Ch. 29, L. 1923.

46-1010. (3342) Description of animals taken out during shipment. Every person in charge of or who accompanies such shipment as the shipper in charge shall take an accurate description, including the brands of each and every animal, whether dead or alive, taken out of shipment in transit between original loading point and final destination, and shall hand such description to the state stock inspector at such point of destination immediately upon arrival of the shipment in the stock-yards.

History: En. Sec. 2, Ch. 94, L. 1907; Sec. 1821, Rev. C. 1907; re-en. Sec. 3342, R. C. M. 1921.

46-1011. (3343) Powers and duties of inspectors outside of state. The stock inspector appointed to inspect Montana cattle at any cattle market outside of this state shall be duly commissioned by the livestock commission, and shall be qualified and have power and authority to inspect any or all cattle that may come from this state to the market where he may be located, having the same power as other stock inspectors within the state to inspect and seize any stock which he may have reason to believe is stolen, or upon which brands have been altered or obliterated, and shall have authority to take the proceeds of any animal in dispute, or bearing altered or burned brands, remitting such proceeds to the livestock commission, who shall hold same pending a decision as to ownership, and such stock inspector shall, upon receipt of the certified lists mentioned in the two preceding sections, make inspection of the cattle so listed, and if,

upon comparison of such list with his own inspection, he shall find any difference or discrepancy, he shall make a second inspection of any animal or animals or upon which the two tallies do not agree, clipping the animal when necessary to determine, accurately and definitely, which inspection or tally is correct, and he shall forthwith make inspection report to the livestock commission, stating in detail wherein any discrepancies with the loading tally exist, and calling special attention to his own inspection of such animal or animals, and he shall, on his own report, make mention of any and every animal, with the brands thereon, which were taken out by the shipper in charge of the stock while in transit between the original loading point and point of final destination; all such reports to be entered in a suitably bound book and be at all times open to public inspection.

History: En. Sec. 3, Ch. 94, L. 1907; Sec. 1822, Rev. C. 1907; re-en. Sec. 3343, R. C. M. 1921.

Operation and Effect

Under this section, the state livestock commission may seize any Montana livestock at any market outside the state where its inspector has reason to believe that the animals were stolen or where

brands upon them appear to have been altered or obliterated, leaving their ownership in doubt, and hold the proceeds pending decision as to their ownership. *Schoenborn v. Williams et al.*, 83 M 477, 481, 272 P 992.

References

Jorgenson v. Story et al., 78 M 477, 254 P 427.

46-1012. (3344) Livestock commission to furnish blanks. The livestock commission shall have printed the necessary blanks for the tallying of cattle at loading point as provided in section 46-1008, and shall furnish same free to shippers on application. The expense of such printing shall be paid out of the livestock commission fund.

History: En. Sec. 4, Ch. 94, L. 1907; Sec. 1823, Rev. C. 1907; re-en. Sec. 3344, R. C. M. 1921.

46-1013. (3345) Failure of shipper or inspector to comply with this act—penalty. Any person, agent, firm, corporation, pool, or round-up association who shall ship cattle from this state, and shall fail to make such inspection or tally at point of loading, or who shall fail to file a true and correct tally, to the best of their knowledge and belief, of all the brands of cattle in such shipment with the railroad agent at the point of shipment, or who shall fail to forward a true and correct copy, duly signed by them as parties making the shipment, to the stock inspector at point of destination, or any person who shall accompany a shipment of cattle as the shipper in charge from this state, and shall fail to take a description of any and every animal taken out in transit and hand such description to the stock inspector at point of destination, or any stock inspector at market points who shall fail to make inspection as provided in section 46-1011, shall be deemed guilty of a misdemeanor, and shall be subject to a fine of not less than fifty dollars nor more than five hundred dollars for each and every offense. The fines so collected shall be turned into the general fund of the county where conviction is had, and any stock inspector, sheriff, or other police officer shall have power to make arrests to enforce the provisions of this act.

History: En. Sec. 5, Ch. 94, L. 1907; Sec. 1824, Rev. C. 1907; re-en. Sec. 3345, R. C. M. 1921.

CHAPTER 11

HIDES OF SLAUGHTERED CATTLE—REGULATION—
HIDE DEALERS' LICENSES

- Section 46-1101. Hide buyers to procure a bill of sale—contents of bill of sale—inspection of hides compulsory.
- 46-1102. Falsifying bill of sale of hides deemed a misdemeanor.
- 46-1103. Mutilation or concealment of hides deemed felony.
- 46-1104. Sufficiency of pleading and proof in criminal prosecution under act.
- 46-1105. Penalty for felonious violation.
- 46-1106. Hide buyer defined.
- 46-1107. Hide dealer or buyers license fee—disposal of proceeds.
- 46-1108. Inspection tags to be on purchased hides.
- 46-1109. Unlawful for carriers to transport uninspected and untagged hides.
- 46-1110. Fees for inspection.
- 46-1111. Penalty.
- 46-1112. Penalty for violation of act or falsification of records.
- 46-1113. Forfeiture of license for violations.

46-1101. (3350.1) Hide buyers to procure a bill of sale—contents of bill of sale—inspection of hides compulsory. (1) Any person, firm, association or corporation who shall purchase or receive any hide or hides of cattle or of any horse, mare, colt, mule, jack, or jenny, shall obtain from the owner thereof or from his legally authorized agent, at the time of purchasing or receiving the same, a bill of sale in writing, which bill of sale shall recite in full the date of receiving the hide or hides, the name of the person, firm, association or corporation selling such hide or hides, a description of each hide which shall include the marks and brands on each hide and which shall be in the following form:

BILL OF SALE _____, Montana.

This is to certify that _____ have this _____ day of _____, 19____, sold to _____ hides or pelts described below, for and in consideration of the sum of _____ dollars \$_____.

COLOR	BRAND	POSITION	TAG NUMBER
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-----	-----	-----	-----
-----	-----	-----	-----
-----	-----	-----	-----
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As prescribed by the laws of the State of Montana, I have affixed tag or tags, as shown above to the individual described hides in the presence of the seller.

The tag or tags numbered as shown above were affixed to the above described hides in my presence and I guarantee to the buyer title to said hides.

Buyer

Seller

P. O. Address and County

P. O. Address and County

and shall keep a permanent record of all such purchases. Such bill of sale forms shall be furnished by the Montana livestock commission to the said buyer, at actual cost of printing, mailing and handling, and may be obtained by the said buyer from any sheriff of the state.

(2) On purchasing any hide or hides of a seller thereof, the buyer at the time of the purchase shall make a record thereof in triplicate on the bill of sale as aforesaid, filling out in detail the data required, which bill of sale shall then and there be signed by the buyer and seller. One copy of such bill of sale shall be retained by the seller, one copy retained by the hide buyer, and the original copy shall be filed in the office of the clerk and recorder of the county of sellers residence, without cost. At the time of the sale the buyer shall securely affix in each hide a numbered lead seal, the form of which shall be specified by the livestock commission. Each seal shall bear the number assigned to the county by the livestock commission. Such seals shall be furnished by the county and shall be procured from the sheriff of the county of the sellers residence, and the sheriff shall keep an accurate record in a bound book furnished by the county of all seals procured from him. The number of the tag in the bill of sale shall correspond with the number on the lead seal so attached. Thereupon and prior to removing the hide from the county of the transaction, which shall be the seller's county of residence, the buyer shall forthwith submit all hides purchased for inspection to the sheriff of the county or his deputy, or to any person designated by the board of county commissioners, or the livestock commission, who shall inspect such hide or hides and issue a certificate of inspection in such form as may be required by the Montana livestock commission and such inspector shall issue to the hide buyer a certificate of inspection and shall file without cost a duplicate in the office of the clerk and recorder of the county of the seller's residence and shall retain a duplicate for his own records, except that no inspection or tag shall be required in the case of hides which have already been inspected and marked, or tagged, as provided for in sections 46-501 to 46-513.

(3) No delivery of any hide or hides shall be made as between the seller and hide buyer in any county other than the county of seller's residence, unless and until the hide or hides have been inspected by an inspecting officer as herein mentioned, in the county of seller's residence.

(4) If the animal or animals from which such hide or hides have been taken have been killed or butchered in a county other than that wherein seller resides then such inspection and delivery may be had in either of said counties, but such certificate must be filed in the county of seller's residence as hereinbefore provided.

History: En. Sec. 1, Ch. 61, L. 1923;
amd. Sec. 3, Ch. 177, L. 1939.

46-1102. (3350.2) Falsifying bill of sale of hides deemed a misdemeanor. Any person, firm, association, or corporation either selling or disposing of or purchasing hides in any manner, who shall wilfully or intentionally falsify the bill of sale covering such hides, shall be deemed

guilty of a misdemeanor and shall be punished as provided by section 46-1112.

History: En. Sec. 2, Ch. 61, L. 1923;
amd. Sec. 4, Ch. 177, L. 1939.

46-1103. (3350.4) Mutilation or concealment of hides deemed felony. Every person who wilfully or maliciously mutilates, destroys, or conceals the hide from any horse, mare, colt, mule, jack, jennet, bull, steer, cow, calf, goat, hog or sheep with intent to or for the purpose of removing evidence of ownership of such hide or the animal from which said hide was removed, is guilty of a felony, and punishable as hereinafter provided.

History: En. Sec. 1, Ch. 76, L. 1923.

46-1104. (3350.5) Sufficiency of pleading and proof in criminal prosecution under act. In any prosecution for the violation of the provisions of this act, it shall not be necessary for the state to allege in the complaint or information or proof, the ownership of the hide, or of the animal from which said hide was removed, but it shall be sufficient to allege in the complaint or information or proof that the owner of said hide or of the animal from which said hide was removed, is unknown and not the property of the defendant.

History: En. Sec. 2, Ch. 76, L. 1923.

Collateral References

Licenses↪42(3).
53 C.J.S. Licenses § 70.

46-1105. (3350.6) Penalty for felonious violation. Any person or persons who violates any of the provisions of this act shall be deemed guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the state prison for not less than one year nor more than ten years.

History: En. Sec. 3, Ch. 76, L. 1923.

Collateral References

Licenses↪41.
53 C.J.S. Licenses § 63.

46-1106. (3350.7) Hide buyer defined. For the purpose of this act, every person, firm, corporation or association engaged in the business of buying or selling the hide or hides of any cattle or of any horse, mare, colt, mule, jack, or jenny, shall be designated a hide dealer or buyer.

History: En. Sec. 1, Ch. 151, L. 1929;
amd. Sec. 1, Ch. 177, L. 1939.

46-1107. (3350.8) Hide dealer or buyers license fee—disposal of proceeds. Every hide dealer or buyer, before engaging in, or conducting any business as such, in any county, shall pay to the county treasurer of such county a license fee of one (\$1.00) dollar, which license shall continue in force and effect for that calendar year. The county treasurers of the state are hereby authorized and required, upon payment of any such license fee, to issue a proper certificate of such payment. The moneys collected from such licenses shall be placed in the general fund of the county wherein collected.

History: En. Sec. 2, Ch. 151, L. 1929;
amd. Sec. 2, Ch. 177, L. 1939.

Collateral References

Licenses↪33.
53 C.J.S. Licenses § 56.

Cross-Reference

Carrying on business without license,
penalty, secs. 46-1111, 94-1511.

46-1108. (3350.10) Inspection tags to be on purchased hides. It shall be unlawful for any person, firm, association or corporation to purchase the hide or hides of any horse, mare, colt, mule, jack or jenny, or cattle which does not bear the inspection tag placed on such hide by an inspector as herein provided or by the buyer at time of purchase.

History: En. Sec. 4, Ch. 151, L. 1929;
amd. Sec. 5, Ch. 177, L. 1939.

Collateral References

Inspection↔7.
44 C.J.S. Inspection § 13.

46-1109. (3350.11) Unlawful for carriers to transport uninspected and untagged hides. It shall be unlawful and a misdemeanor punishable as provided in section 46-1112, for any railroad company, express company or other common carrier to accept for shipment or transport any hide or hides, as referred to in this act, unless such hide or hides has affixed thereto the lead tag or seal provided in this act or the mark or tag as provided by section 46-503, and each shipment must be accompanied by an itemized list prepared by the shipper, to accompany the bill of lading showing the number and kinds of hides and giving the brand or brands on each hide and the serial number and the county as given on the lead tag. Provided, however, that in case of shipment of hides out of the state of Montana in earload or truckload lots the tags or seals may be removed at the time of shipment and no itemized list need accompany the bill of lading.

History: En. Sec. 5, Ch. 151, L. 1929;
amd. Sec. 6, Ch. 177, L. 1939.

46-1110. Fees for inspection. Hide inspectors may collect a fee, not to exceed ten cents (10c) for each hide inspected, which fee shall be retained by the said inspector.

History: En. Sec. 7, Ch. 177, L. 1939.

Collateral References

Inspection↔6.
44 C.J.S. Inspection § 12.

46-1111. Penalty. Any person or persons, firm, association, company or corporation who shall fail to comply with the provisions of this act shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished as provided by section 46-1112.

History: En. Sec. 8, Ch. 177, L. 1939.

Collateral References

Inspection↔7; Licenses↔40.
44 C.J.S. Inspection § 13; 53 C.J.S. Licenses § 66.

46-1112. (3350.12) Penalty for violation of act or falsification of records. Any person or persons who violate any of the provisions of this act, or who wilfully falsifies any of the records required by this act to be kept, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than (\$50.00), nor more than (\$250.00) or by imprisonment in the county jail for a period of not less than thirty days nor more than ninety days, or by both such fine and imprisonment.

History: En. Sec. 6, Ch. 151, L. 1929.

46-1113. (3350.13) Forfeiture of license for violations. In addition to the penalties provided by section 46-1105, any hide dealer or buyer who shall violate any of the terms of this act shall suffer a forfeiture of the

license required by this act, and no license shall again be issued to such person until the expiration of one year from date of such conviction.

History: En. Sec. 7, Ch. 151, L. 1929.

Collateral References

Licenses 38.

53 C.J.S. Licenses § 44.

CHAPTER 12

IMPROVEMENT OF LIVESTOCK

- Section 46-1201. County assessor to collect names of owners of purebred stock.
 46-1202. Delivery of information to experiment station.
 46-1203. Official books of breed association.
 46-1204. Publication of owners of purebreds—bulletins.
 46-1205. Sale of animals under false registration certificates—changing markings—auctioneer.
 46-1206. Penalty for violation of preceding section.

46-1201. (3351) County assessor to collect names of owners of purebred stock. The county assessor in each county during the odd-numbered years shall, in the regular routine of his duties, collect the names and addresses of all owners or breeders of purebred horses, cattle, sheep, swine, and poultry in the county, and in each case secure the name of the breed.

History: En. Sec. 1, Ch. 6, L. 1913;
 re-en. Sec. 3351, R. C. M. 1921.

Collateral References

Animals 17.

3 C.J.S. Animals § 40.

46-1202. (3352) Delivery of information to experiment station. On or before the first day of November, the assessor shall compile the information secured, and deliver same to the director of the Montana agricultural experiment station, located at Bozeman.

History: En. Sec. 2, Ch. 6, L. 1913;
 re-en. Sec. 3352, R. C. M. 1921.

46-1203. (3353) Official books of breed association. Purebred animals are those recorded in the official books of the various breed associations. A list of these books shall be furnished to the assessor of each county by the director of the Montana agricultural experiment station, and the assessor shall accept as purebreds only such breeds as are given in this list as shown by certificates of registration in the possession of the owner.

History: En. Sec. 3, Ch. 6, L. 1913;
 re-en. Sec. 3353, R. C. M. 1921.

46-1204. (3354) Publication of owners of purebreds—bulletins. On or before the first day of January of the even-numbered years, the director of the experiment station shall prepare for publication and cause to be printed a bulletin giving the names and addresses of all owners and breeders of purebred livestock in the state of Montana, as reported the previous year by the county assessors. This bulletin shall be for free distribution in the state of Montana, and on request, to breeders and farmers outside the state.

History: En. Sec. 4, Ch. 6, L. 1913;
 re-en. Sec. 3354, R. C. M. 1921.

46-1205. (3355) Sale of animals under false registration certificates—changing markings—auctioneer. No person, or persons, company, or corporation shall sell to another person or persons, any animal with a certifi-

cate of registration or breeding that does not belong to said animal; nor change in any way the certificate of registration or breeding of any animal; nor shall any person or persons, company, or corporation falsely represent any production record of any cow or of any dam, specified in any registration certificate; nor shall any person change the markings of any animal with the intent to deceive the purchaser. Providing that this act shall not apply to any auctioneer or agent acting in good faith under the direction of the owner.

History: En. Sec. 5, Ch. 6, L. 1913;
re-en. Sec. 3355, R. C. M. 1921; amd. Sec.
1, Ch. 68, L. 1933.

Collateral References

2 Am. Jur. 405, Agriculture, §§ 12 et
seq.

Cross-Reference

False pedigree, penalty, secs. 94-1813,
94-1814.

46-1206. (3356) Penalty for violation of preceding section. Any person or persons, company, or corporation violating the preceding section shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars, or by imprisonment of not less than ten days or more than six months, or by both fine and imprisonment.

History: En. Sec. 6, Ch. 6, L. 1913;
re-en. Sec. 3356, R. C. M. 1921.

CHAPTER 13

STALLIONS AND JACKS—STALLION REGISTRATION BOARD

(Repealed—Section 1, Chapter 34, Laws of 1953)

46-1301 to 46-1318. (3357 to 3373) Repealed.

Repeal

These sections (Secs. 1 to 16, Ch. 108,
L. 1909; amd. Sec. 1, Ch. 133, L. 1915;
amd. Secs. 1, 2, 4, 5, Ch. 24, L. 1943), re-

lating to stallions and jacks, were repealed
by Sec. 1, Ch. 34, Laws 1953, effective
February 16, 1953.

CHAPTER 14

LEGAL FENCES—LIABILITY OF OWNERS FOR TRESPASSING STOCK

- Section 46-1401. Legal fences defined.
46-1402. Penalty for violation.
46-1403. Barbed wire fences to be kept in repair.
46-1404. Fallen wire fencing declared nuisance—abatement.
46-1405. Notice to owner to repair fence—duty of county commissioners.
46-1406. Procedure when owner unknown or not resident of state—sale of wire removed.
46-1407. Disposal of proceeds of sale of wire after payment of expense.
46-1408. Damage to planted trees.
46-1409. Liability of owners of stock for trespass.
46-1410. Stock trespassing may be retained.
46-1411. Marking land and mining claims in national forest.
46-1412. Method of marking.
46-1413. Marking—right of action against trespassing stock.
46-1414. Partition fences.

46-1401. (3374) Legal fences defined. Any one of the following, if not less than forty-four inches nor more than forty-eight inches in height, shall be a legal fence in the state of Montana:

1. All fences constructed of at least three barbed, horizontal, well-stretched wires, the lowest of which must not be less than fifteen inches nor more than eighteen inches from the ground, securely fastened as nearly equidistant as possible to substantial posts, firmly set in the ground, or to well-supported leaning posts, not exceeding twenty feet apart, or thirty-three feet apart where two or more stays or pickets are used equidistant between posts; provided, that all corral fences which are used exclusively for the purposes of inclosing stacks which are situated outside of any lawful inclosure shall not be less than sixteen feet from such stack so inclosed, and shall be substantially built with posts not more than eight feet distant from each other and not less than five strands of well-stretched barb wire, and shall not be less than five nor more than six feet high; provided, further, that any kind of a fence equally as effectual for the purpose of a corral fence may be made in lieu thereof.

2. All fences constructed of any standard woven wire not less than twenty-eight inches in height, securely fastened to substantial posts not more than thirty feet apart, shall be a legal fence; provided, that two equidistant barbed wires shall be placed above the same at a height of not less than forty-eight inches from the ground.

3. All other fences made of barbed wire, which shall be as strong and as well calculated to protect inclosures as those above described, shall be considered legal fences.

4. All fences consisting of four boards, rails, or poles, with standing or leaning posts not over seventeen feet and six inches apart; provided, that if leaning posts are used, there shall be a pole or wire fastened securely on the inside of the leg or support of such leaning post.

5. All rivers, hedges, mountain ridges and bluffs, or other barrier over or through which it is impossible for stock to pass.

History: Ap. p. Sec. 1, p. 46, L. 1881; amd. Sec. 1, p. 76, L. 1885; amd. Sec. 1111, 5th Div. Comp. Stat. 1887; amd. Sec. 3250, Pol. C. 1895; amd. Sec. 1, p. 139, L. 1901; amd. Sec. 1, Ch. 37, L. 1905; amd. Sec. 1, Ch. 64, L. 1913; amd. Sec. 1, Ch. 163, L. 1919; re-en. Sec. 3374, R. C. M. 1921.

Cross-References

Coterminous owners, duty to maintain, sec. 67-802.

Encroachment on highway, removal, sec. 32-1002.

Injuring fence, penalty, secs. 94-3309, 94-3312.

Leaving gates open, sec. 94-35-116.

Operation and Effect

The provisions of this section et seq., relative to legal fences, prescribing what are such fences, and defining the duty to maintain and repair partition fences, do not affect the right of an adjoining owner to build a division fence partly on the other's land. *Hoar v. Hennessy*, 29 M 253, 261, 74 P 452.

Trespass on Unfenced Lands

Where a livestock owner, claiming a strip of land thirty feet wide and one-half mile in length within plaintiff's inclosure, turned his cattle loose under circumstances which showed that it was intended that they should go into plaintiff's inclosure and graze upon his lands, he was liable for the damage done by them to plaintiff's pasture, the fact that plaintiff did not maintain any fence between the strip and defendant's land being no defense. *Dorman v. Erie*, 63 M 579, 583 et seq., 208 P 908.

A lawful fence entirely surrounding his lands is a condition precedent to the right of a land owner to recover damages from owners of livestock trespassing thereon, unless the latter with knowledge of the private ownership of unfenced land willfully herds them thereon or drives them to a point so near the boundaries that they are certain to go upon and feed thereon. *Schreiner v. Deep Creek Stock Assn.*, 68 M 104, 110, 217 P 663.

One turning his cattle out to graze unrestrained on lands where he has a right

to do so is under no obligation to prevent them from entering on another's unenclosed premises, and is not responsible for damage occasioned by their entry thereon through following their natural instincts but absence of lawful fence does not justify willful trespass. *Dunbar v. Emigh*, 117 M 287, 291, 158 P 2d 311.

References

Cited or applied as section 3250, Political Code, before amendment, in *Clem-*

mons v. Gillette, 33 M 321, 328, 83 P 879; as section 2082, Revised Codes, before amendment, in *Herrin v. Sieben*, 46 M 226, 232, 127 P 323.

Collateral References

Animals 92.

3 C.J.S. *Animals* § 186.

Constitutionality of fencing and stock laws. 6 ALR 212.

46-1402. (3375) Penalty for violation. Any person constructing or maintaining any fence of any kind not described in the next preceding section is liable in a civil action for all damages caused by reason of injury to stock resulting from such defective fence.

History: En. as Secs. 1112 to 1120, 5th Div. Comp. Stat. 1887; re-en. Sec. 3251, Pol. C. 1895; re-en. Sec. 2083, Rev. C. 1907; re-en. Sec. 3375, R. C. M. 1921.

Collateral References

Animals 101.

3 C.J.S. *Animals* § 210.

46-1403. (3376) Barbed wire fences to be kept in repair. The owners of barbed wire fences must keep the same in repair, and any person receiving notice in writing that his barbed wire fence or any part thereof is down, or in such condition as to be likely to injure any livestock, and fails or refuses to repair such fence, is liable to pay damages in an amount equal to the value of any cattle, horse, mule, or other domestic animal which may be injured by coming into contact with the fence.

History: En. as Secs. 1112 to 1120, 5th Div. Comp. Stat. 1887; re-en. Sec. 3252, Pol. C. 1895; re-en. Sec. 2084, Rev. C. 1907; re-en. Sec. 3376, R. C. M. 1921.

Cross-Reference

Barbed wire fences, penalties, sec. 94-3577.

46-1404. (3376.1) Fallen wire fencing declared nuisance—abatement. All barbed wire and other wire fencing which has sagged or fallen to the ground so as to be ineffectual for the purpose of turning stock, and a menace to any person riding or walking over the same is declared to be a public nuisance, and subject to abatement in the manner hereinafter provided.

History: En. Sec. 1, Ch. 84, L. 1927.

Cross-Reference

Dangerous fences, penalty, sec. 94-3577.

References

Van Voast v. Blaine County et al., 118 M 375, 167 P 2d 563, 566.

46-1405. (3376.2) Notice to owner to repair fence—duty of county commissioners. Upon ascertaining the existence in the county of any nuisance specified in the preceding section of this act, the board of county commissioner shall notify by registered mail the owner of such wire, if such owner be known to said board and within the state, to remove same. If such owner shall fail to remove said wire or to rebuild said fence within sixty days following receipt of said notice, the board of county commissioners shall have authority to remove and dispose of said wire in the manner provided by the next section of this act.

History: En. Sec. 2, Ch. 84, L. 1927.

References

Van Voast v. Blaine County et al., 118 M 375, 167 P 2d 563, 566.

46-1406. (3376.3) Procedure when owner unknown or not resident of state—sale of wire removed. If there be no known owner of such wire within the state, or if such owner be unknown to the board of county commissioners, said board shall have authority to collect and remove said wire at the expense of the county. All such wire or other fencing as in the opinion of the board of county commissioners can be sold at a price sufficient to cover at least the expense of removal and sale, shall be sold by the county commissioners in the manner now provided by law for the sale of county property, except that notice of such sale need be published only once and need be given only ten days before such sale.

History: En. Sec. 3, Ch. 84, L. 1927.

References

Van Voast v. Blaine County et al., 118 M 375, 167 P 2d 563, 566.

46-1407. (3376.4) Disposal of proceeds of sale of wire after payment of expense. The proceeds of such sale shall be used to defray the cost of collecting and selling said wire, and the balance, if any, be placed by the county treasurer in a special fund, and shall be held by him subject to claim by any person establishing to the satisfaction of the board of county commissioners that he was the lawful owner of said wire and entitled to the remaining proceeds of such sale. If no person claims said money within one year of the date of sale, the same shall be deposited in the general fund of the county.

History: En. Sec. 4, Ch. 84, L. 1927.

46-1408. (3377) Damage to planted trees. In case of any damage done to planted trees by animals, the owner of the trees may recover damages from the owner of the animals, if said trees are planted inside of a lawful fence or boxed to a height of not less than five feet.

History: En. Sec. 3281, Pol. C. 1895; re-en. Sec. 2096, Rev. C. 1907; re-en. Sec. 3377, R. C. M. 1921.

46-1409. (3378) Liability of owners of stock for trespass. If any cattle, horse, mule, ass, hog, sheep, or other domestic animal break into any enclosure, the fence being legal, as hereinbefore provided, the owner of such animal is liable for all damages to the owner or occupant of the enclosure which may be sustained thereby. This section must not be construed so as to require a legal fence in order to maintain an action for injury done by animals running at large contrary to law.

History: En. Sec. 1119, 5th Div. Comp. Stat. 1887; re-en. Sec. 3258, Pol. C. 1895; re-en. Sec. 2090, Rev. C. 1907; re-en. Sec. 3378, R. C. M. 1921.

Complaint—Sufficiency

In an action on an implied contract to recover the reasonable value of the pasturage of livestock, the complaint alleging ownership and right of possession in plaintiff, the ownership of the animals in defendant, that the lands were inclosed by a fence which defendant broke down and pastured them thereon, and the reasonable value of the pasturage per head per month, stated a cause of action. *Dorman v. Erie*, 63 M 579, 584, 208 P 908.

Operation and Effect

A reasonable and substantial compliance with the statute is all that is required, and an immaterial variation in the height of the fence from that of a lawful fence will not defeat the action. *Smith v. Williams*, 2 M 195, 202.

The provisions of this section apply to all domestic animals, but have no application to animals in charge of a herder. *Herrin v. Sieben*, 46 M 226, 232, 127 P 323.

Trespass on Unfenced Land

A lawful fence entirely surrounding the grounds or premises entered, or some obstruction equivalent thereto, is a condition precedent to the right to bring an action

against the owner of trespassing animals for damages sustained by reason of such trespass. *Smith v. Williams*, 2 M 195, 201.

There can be no recovery for damages sustained to the owner of uninclosed lands by reason of sheep straying or being driven thereupon and destroying the grass and verdure, unless it appear that they were maliciously driven upon such lands for the purpose of causing injury. *Fant v. Lyman*, 9 M 61, 62, 22 P 120.

This section applies to trespasses committed by animals running at large without the knowledge of the owner, and not to a case where one knowingly and wilfully appropriates the use of another's land. *Monroe v. Cannon*, 24 M 316, 320, 61 P 863. See also *Musselshell Cattle Co. v. Woolfolk*, 34 M 126, 132, 85 P 874; *Rea Bros. Sheep Co. v. Rudi*, 46 M 149, 161, 127 P 85; *Light v. United States*, 220 U S 523, 537, 55 L Ed 570, 31 S Ct 485.

This section, and the custom of the state making the maintenance of a legal fence by a landowner a prerequisite to recovery for trespass by domestic animals of another, do not charge the landowner with the duty to keep cattle lawfully at large from coming on his land, or make their entry thereupon rightful, so as to make him liable for injuries to such animals caused by the existence of dangerous agencies on the land, but not wantonly or intentionally caused. *Beinhorn v. Griswold*, 27 M 79, 88, 69 P 557.

The owner of animals may not knowingly and wilfully drive or herd them upon the lands of another, whether such lands are protected by an inclosure or not, and to avoid encroaching upon his neighbor he must at his peril ascertain the line at which his rights end and his neighbor's begin. *Herrin v. Sieben*, 46 M 226, 233, 127 P 323.

Where a livestock owner, claiming a strip of land thirty feet wide and one-half mile in length within plaintiff's inclosure, turned his cattle loose under circumstances which showed that it was intended that they should go into plaintiff's inclosure and graze upon his lands, he was liable for the damage done by them to plaintiff's pasture, the fact that the plaintiff did not maintain any fence between the strip and

defendant's land being no defense. *Dorman v. Erie*, 63 M 579, 584, 208 P 908.

Held, that where plaintiff, the owner of uninclosed lands within a forest reserve in which defendants had a permit to graze their cattle, in his action for damages for depasturing his land relied upon the allegation in the answer that defendants were running their cattle "under herd" and "in charge of herders" as an admission that the animals were placed upon his premises by defendants' agents and did not introduce evidence that they were wilfully or negligently driven or permitted to remain thereon, it appearing on the contrary that the herders endeavored to keep them off of his premises and drove them therefrom when found there, a judgment in his favor was unwarranted under the above rules. *Schreiner v. Deep Creek Stock Assn.*, 68 M 104, 110, 217 P 663.

Under fence statute, one turning his livestock at large on land where he has the right to do so is not liable in damages for their invasion of private lands of another failing to maintain lawful fence, though he expects and intends such trespass to be committed. *Dunbar v. Emigh*, 117 M 287, 291, 158 P 2d 311.

Unlawful Fencing of Public Domain

A person who unlawfully fences a portion of the public domain acquires only a tortious possession, which does not authorize him to maintain an action against another for depasturing such land, nor entitle him to restrain the latter, by way of injunction, from continuing to depasture the land. *Clemmons v. Gillette*, 33 M 321, 328, 83 P 879.

Collateral References

Validity, construction, and effect of statute eliminating scienter as condition of liability for injury by animals. 1 ALR 1113.

Injunction against repeated or continuing trespasses on real property by livestock. 32 ALR 463, 540.

Liability for injury to trespassing stock from poisonous substance or other conditions on the premises. 33 ALR 448.

Scienter as condition of liability for damage by trespassing animals. 33 ALR 1305.

46-1410. (3379) Stock trespassing may be retained. (1) If any such animal breaks into an enclosure surrounded by a legal fence, or is wrongfully upon the premises of another, the owner or occupant of the enclosure or premises may take into his possession the animal trespassing, and keep the same until all damages, together with reasonable charges for keeping and feeding are paid. The person taking any such animal into his possession shall, within seventy-two hours thereafter, give written notice to the owner or person in charge of the animal, stating that he has taken up such

animal; said notice shall also give the date of such taking, the description of the animal or animals taken up, including marks and brands, if any, the amount of damages claimed and the charge per head per day for caring for and feeding the same, and shall describe, either by legal subdivisions or other general description, the location of the premises upon which said animals are held. In all cases a copy of said notice shall likewise be posted at a point where said stock was taken up.

(2) Such notice shall be given to the owner or person in charge only when said owner or person in charge of the animal or animals is known to the person taking up the same and resides within twenty-five miles of the premises upon which such animals have been taken up. In case the owner or person in charge of such animals resides more than twenty-five miles from the place of such taking, notice as aforesaid shall be mailed to him, and in such case, and also in case the owner be unknown, a like notice shall be mailed to the Montana livestock commission and the sheriff of the county in which such animals have been taken up. Upon receipt of such notice, the sheriff shall post a copy thereof at the court house and shall send by registered mail a copy thereof to the owner of the stock, if known to him; if unknown to him, the sheriff shall send a copy of such notice to the nearest state livestock inspector.

(3) In case the parties do not within five days thereafter agree as to the amount of damages, the lien claimant must within ten days thereafter institute a civil action to foreclose his lien in any court of competent jurisdiction, pending the outcome of which suit, the person taking up said stock may, at the expense of the owner, retain a sufficient amount of such stock to cover the amount of damages claimed by him; provided, however, that the defendant may, after the institution of an action as aforesaid, upon filing in said cause a bond executed by two or more sureties and approved by the court, in double the sum sued for, conditioned for the payment to the plaintiff of all sums, including costs that may be recovered by said plaintiff, have the return to him of all livestock held as aforesaid, and said person shall be liable to such owner for any loss or injury to said stock occurring through his fault or neglect. If the person taking up said stock shall fail to recover in said action a sum equal to that offered him by the owner of the stock, the former shall bear the expense of keeping and feeding same while in his possession.

(4) Any person taking or rescuing any such animal from the possession of the person taking the same, without his consent, is guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine of not less than one hundred dollars nor more than five hundred dollars.

History: En. Sec. 8, p. 48, L. 1881; re-en. Sec. 1120, 5th Div. Comp. Stat. 1887; re-en. Sec. 3259, Pol. C. 1895; re-en. Sec. 2091, Rev. C. 1907; amd. Sec. 1, Ch. 231, L. 1921; re-en. Sec. 3379, R. C. M. 1921.

Constitutionality

This statute is constitutional. *Doornbos v. Ihde*, 124 M 570, 228 P 2d 235, 237.

Extent of Danger—Evidence

Where evidence was conflicting as to

value of goats and as to extent of damages and there was ample evidence to show that value of goats was not disproportionate to damage caused, supreme court could not say that trial court was not justified in retaining all the goats to satisfy his claim. *Doornbos v. Ihde*, 124 M 570, 228 P 2d 235, 237.

Fence—Necessity

Under some circumstances a person is permitted to take animals into possession regardless of whether the premises are

enclosed by a legal fence. *Doornbos v. Ihde*, 124 M 570, 228 P 2d 235, 236.

Injury to Animals

Where evidence was conflicting as to whether goats were injured by failure of taker up to milk them, trial court did not err in not awarding damages on cross-complaint especially where owner could have milked them himself where confined or could have regained possession of them by giving bond. *Doornbos v. Ihde*, 124 M 570, 228 P 2d 235, 237.

Jurisdiction of Court

Where plaintiff might have sued under this section for three hundred and fifty dollars because of the wrongful rescue of animals which had been trespassing upon his premises, but his demand was for only two hundred and eighty-six dollars, a justice's court had jurisdiction of the cause. *Reynolds v. Smith*, 48 M 149, 150, 135 P 1190.

Not Amended or Extended by Grazing District Law

No provision of the grazing district law (secs. 46-2301 to 46-2332) gives the owner of land within a grazing district, but not owned or controlled by it, the right to impound livestock of another on such land or claim a lien for the keep thereof under this section. *McKee v. Clark*, 115 M 438, 441, 144 P 2d 1000.

Id. Under law pertaining to open range, where plaintiff's land was un-

fenced, and there was no evidence that defendant herded his horses upon plaintiff's land or overstocked his own range so that horses would be compelled to go on plaintiff's land for food, plaintiff was not entitled to any damages for trespass of the horses or compensation for care and feed for them while he held them impounded.

Notice—Waiver of Defects

Where owner of goats was personally served with notice and went and examined the goats in the corral and also examined the field in which they were grazing to determine damage, he waived any defect in notice. *Doornbos v. Ihde*, 124 M 570, 228 P 2d 235, 236.

Place of Posting Notice

A notice posted where goats were confined was a notice where they were "taken up" although the place where they were found grazing was from one to one and one-half miles from place where found grazing. *Doornbos v. Ihde*, 124 M 570, 228 P 2d 235, 236.

References

Cited or applied as section 3259, Political Code, in *Hoar v. Hennessy*, 29 M 253, 261, 74 P 452.

Collateral References

Animals ⇨ 95(1).
3 C.J.S. *Animals* §§ 190, 193.
2 Am. Jur. 801, *Animals*, § 150.

46-1411. (3380) Marking land and mining claims in national forest. It shall be the duty of the owner, or the person holding possessory right, to all unfenced lands, or patented mining claims, which said lands or patented mining claims lie within the boundary of national forest reserves in the state of Montana, or lying on public ranges adjoining to any national forest reserve, to mark the boundaries thereof by substantial monuments that can be readily seen and observed so that such boundaries can be readily traced.

History: En. Sec. 1, Ch. 222, L. 1921;
re-en. Sec. 3380, R. C. M. 1921.

Collateral References

Woods and Forests ⇨ 8.
71 C.J. *Woods and Forests* § 23.

46-1412. (3381) Method of marking. For the purposes of this act, it shall be prima facie evidence that such boundaries are properly marked if the same are defined; provided, that such monuments or some tree, stump, or post adjacent thereto shall be conspicuously marked with the name of the owner or claimant of such ground and the name of the claim or the description of the land claimed.

History: En. Sec. 2, Ch. 222, L. 1921;
re-en. Sec. 3381, R. C. M. 1921.

46-1413. (3382) Marking—right of action against trespassing stock. No person owning or possessing agricultural or grazing land, or patented

mining claims lying within said national forest reserves of this state or on the public range lying adjoining to any said national forest reserve, the boundaries of which said lands are not marked as required by the provisions of this act, shall have any claim or cause of action or right of action against the owner of sheep, cattle or other livestock under the charge of a herder, for trespass committed by such livestock upon said land, and such shall be the rule regardless of whether the said sheep so trespassing strayed thereon on their own inclination and without being driven, or whether said sheep were herded or driven on said land; provided, that no person or persons can claim exemption for trespassing under the provisions of this section where such person or persons shall have actual knowledge of the boundary lines of any lands herein referred to; but in no event shall damages other than nominal damages be assessed against said trespass, unless the land owner or his duly authorized agent shall within six months after said trespass has been committed, give said trespasser written notice demanding a sum certain for damages sustained by reason of such trespass.

History: En. Sec. 3, Ch. 222, L. 1921;
re-en. Sec. 3382, R. C. M. 1921; amd. Sec.
1, Ch. 78, L. 1927.

46-1414. (3383) Partition fences. Certain regulations relating to partition fences are found in sections 67-803 to 67-807.

History: New section recommended by
code commissioner, 1921.

Collateral References
Fences \hookrightarrow 6.
36 C.J.S. Fences § 5.

CHAPTER 15

HERD DISTRICTS

- Section 46-1501. Herd districts—creation, size, location—dissolution—exclusion of government land—records.
46-1502. Penalty for permitting animals to run at large in herd districts—permitting bull to run at large in herd districts constitutes misdemeanor.
46-1503. Trespassing animals in herd district—retention for damages and keep.
46-1504. Former proceedings for the formation of herd districts validated.
46-1505. Rescue of impounded animals a misdemeanor—penalty.
46-1506. Unlawful introduction of livestock into herd district a misdemeanor—penalty.
46-1507. Changing time when herd districts will be in effect—petition—notice—hearing.

46-1501. (3384) Herd districts—creation, size, location—dissolution—exclusion of government land—records. (a) Herd districts may be created in any county in the state of Montana to contain fifty-four square miles or more, lying not less than three miles in width, outside of the incorporated cities; excepting only that herd districts may be created containing not less than six nor more than fifty-four square miles, lying not less than two miles in width, when such territory joins and is contiguous with the boundaries of a city having a population of ten thousand or more and such territory so to be created in a herd district has a suburban population of not less than two hundred people; upon petition of owners or possessors of fifty-five per centum (55%) of the land in such

district, and providing twenty-five per centum (25%) or more of the land in such district is in actual cultivation.

In formation of such a district the entire holding of any owner or lessee must be included unless such owner or lessee consent that less than his entire contiguous holdings be included in the petition. And such petition shall designate the months of the year when herd district is effective, and upon presentation and filing of such petition, properly signed, giving outside boundaries and description of proposed district and the post-office address of the signers thereto, with the clerk and recorder in the county in which the said district is being created, the county commissioners of such county, upon receipt thereof, shall set a date for hearing protests and verifying the signatures thereto, and shall give not less than twenty days' notice of the same by three publications in a newspaper of general circulation in the county of the proposed district. At the hearing held pursuant to such notices the county commissioners shall examine the petition and shall cause a map to be made in order to determine the shape and regularity of the boundaries of the proposed district. The said commissioners may then establish the district, but such district shall be established only in such manner that the district will be reasonably regular and symmetrical in shape, or practicable in relation to the geographical features of such district.

Should it appear to such county commissioners after such hearing that the signatures attached to such petition were genuine, they shall immediately declare such herd district created and established; after which the county commissioners must give notice by four weekly publications in some newspaper nearest the district of the creation of such districts, also stating period such districts will be in effect, and such districts shall not be in effect until thirty days have expired after the order. Upon petition of any owner or possessor of lands lying contiguous and adjoining any herd district theretofore created, and upon like hearing and notice as hereinabove provided for, such lands shall be included in said herd district and become a part thereof. Should the signature of lessee appear on the petition creating or abolishing any herd district, the owner or owners of said land may appear either in person or agent and enter their protest. And the board of county commissioners shall remove the name of the lessee from said petition, and no person shall be permitted to withdraw his name after the hour set for hearing same.

(b) When a petition praying that any established herd district be dissolved is filed with the county clerk and recorder of the county wherein such district has been established, and it is set forth therein that such petition is signed by the owners or possessors of fifty-five per cent (55%), or more of the lands lying within such district, and that less than twenty-five per cent (25%) of the lands included in such district is in actual cultivation, the said county clerk and recorder shall call such petition to the attention of the board of county commissioners of the county at its next regular meeting; and at said meeting by its order the said board shall set such petition for hearing at a specified time on a day certain of which notice shall be given by publication at least once in each week for

three successive weeks in some newspaper of general circulation in the county.

At the time fixed for hearing the board of county commissioners shall first require proof of publication of the notice of said hearing to be made and thereafter shall consider the petition and hear all interested parties. At the conclusion of any such hearing if the board of county commissioners shall find that notice of the hearing has been given in the manner and for the time prescribed herein and that the owners or possessors of fifty-five per cent (55%), or more of the lands lying within such herd district have signed the petition and request that such district be dissolved, and that less than twenty-five per cent (25%), of the lands included in such district are in actual cultivation, then the said board shall forthwith spread such findings upon its minutes and thereupon shall enter an order in terms that by reason of such findings and of the proceedings had upon such petition the said herd district is thereby dissolved. Forthwith upon the making and entry of any such order aforesaid the herd district affected thereby shall be dissolved for all purposes thereafter.

(c) Any tract of land embraced within any established herd district and which contains eighteen government sections of land, or more, so located that at least one-fourth of the perimeter of such tract coincides with the existing boundaries of such herd district, may be excluded therefrom upon proceedings had before the board of county commissioners of the county wherein the said district has been established on a like petition, notice and hearing and by a like order as in the case of proceedings for dissolving herd districts; provided that when the exclusion of any such tract of land from an existing herd district is sought the petition shall describe the tract to be excluded with common certainty and shall set forth that it is signed by the owners or possessors of fifty-five per cent (55%), or more of the lands lying within the boundaries of the tract to be excluded, and that less than fifteen per cent (15%), of the lands included in such tract is in actual cultivation; and provided further that in any such case if the board of county commissioners at the conclusion of the hearing had shall find that the tract of land to be excluded conforms to the requirements of this section and that the allegations of the petition are true its findings to that effect shall be spread upon the minutes and the board shall thereupon enter its order in terms that by reason of such findings and of the proceedings had upon such petition the tract of land described in the petition which shall be further set forth with common certainty in the order is thereby excluded from such herd district for all purposes thereafter. Forthwith upon the making and entry of any such order of exclusion the tract of land therein described shall be deemed for all purposes thereafter to be excluded from and to form no part of the herd district affected thereby.

History: En. Ch. 74, L. 1917; amd. Sec. 2, Ch. 167, L. 1919; re-en. Sec. 3384, R. C. M. 1921; amd. Sec. 1, Ch. 56, L. 1929; amd. Sec. 1, Ch. 117, L. 1931; amd. Sec. 1, Ch. 103, L. 1951.

Notice to Land Owners Jurisdictional

Citing prior to amendment by chapter 171, Laws of 1931, the notice required by

this section to be given by the board of county commissioners of the presentation of a petition for the creation of a herd district, to land owners in the proposed district, is jurisdictional, substantial compliance with the requirements of the statute being indispensable to action by the board. *State v. Board of County Commissioners*, 83 M 540, 547, 273 P 290.

Width of District at Point Where City Located

Where the record on appeal from a judgment dismissing a writ of certiorari asking that an order of the county commissioners creating a herd district be annulled for lack of jurisdiction did not show that a county seat lying within the district was an incorporated city, the contention of relator that upon elimination of the area embraced within the city limits the district was less than three miles in width, contrary to the provision of this section requiring such a district to be at least that width "outside of incorporated cities," may not be upheld. *State v. Board of County Commissioners*, 83 M 540, 273 P 290.

Width of District Where Boundary from Which Measurement Made a River

This section provides that a herd district must be at least three miles in width. A petition for the creation of such a district, lying north and south, showed that its eastern boundary was a river bank

and that its width, measured at right angles to the base line (a line projected as nearly parallel to the course of the river) was at all points at least three miles in width and at some more than three miles. The sufficiency of the petition was attacked on the ground that at the point where the river formed a bend toward the west extending about two miles within the territory of the proposed district, the distance between the peak of the bend and a point on the western boundary, when measured at an acute angle northward, was but a mile and a half. Held that the width of a tract of land must be measured at right angles to its length; that so measured the width was all that was required by the above section and that the width at the point mentioned did not render the petition insufficient. *State v. Board of County Commissioners*, 83 M 540, 547, 273 P 290.

Collateral References

Animals⊖50(2).

3 C.J.S. Animals §§ 112, 123.

46-1502. (3385) Penalty for permitting animals to run at large in herd districts—permitting bull to run at large in herd districts constitutes misdemeanor. Any person who is the owner, or entitled to the possession of any horses, mules, cattle, sheep, or goats, who shall wilfully permit same to run at large within any herd-district, shall be guilty of a misdemeanor; and, upon conviction thereof, shall be punished by a fine of not less than ten (\$10.00) dollars, nor more than twenty-five (\$25.00) dollars for each offense; and each day that each five head, or less, of such horses, mules, cattle, sheep, or goats, are wilfully permitted to run at large shall constitute a separate offense.

Any person who is the owner, or entitled to the possession of any bull over one (1) year of age who shall wilfully permit same to run at large within any herd-district shall be guilty of a misdemeanor; and upon conviction thereof, shall be punished by a fine of not less than ten (\$10.00) dollars, nor more than fifty (\$50.00) dollars for each offense; and each day that such bull be permitted to run at large shall constitute a separate offense.

History: En. Ch. 74, L. 1917; amd. Sec. 3, Ch. 167, L. 1919; re-en. Sec. 3385, R. C. M. 1921; amd. Sec. 1, Ch. 45, L. 1925; amd. Sec. 1, Ch. 165, L. 1945.

Strict Compliance Necessary

The provisions of the herd law must be strictly followed in order to afford protection to those responsible for the impounding and sale of animals under its author-

ity, and where they are not so followed, the taking constitutes a taking of private property without due process of law and a conversion of the property. *Jorgenson v. Story et al.*, 78 M 477, 487, 254 P 427.

Collateral References

Animals⊖50(1).

3 C.J.S. Animals § 110.

46-1503. (3386) Trespassing animals in herd district—retention for damages and keep. (1) If any such animal or animals wrongfully enter upon premises of any person within such district, the owner or person in control of such animal or animals shall be liable for care and feed and for

any damages occasioned by such livestock to the landowner. The owner or occupant of the land upon which such wrongful entry is made may take into his possession such animal or animals, and reasonably care for the same, and may retain possession thereof and be entitled to a lien thereon as security for the payment of damages and charges occasioned by such livestock. If the owner of such livestock, or the person entitled to the possession thereof, can be found or is known to the person who takes it up for trespass, it shall be his duty to notify the owner, owners, or persons in charge thereof, within forty-eight (48) hours after taking possession thereof, by a notice in writing, duly mailed as a registered letter, directed to such owner or person in charge at his post office address or by serving such notice on him personally, which notice shall give a particular description of the livestock and state the amount of damages claimed, and demand that within forty-eight (48) hours after receipt of such notice the damages and costs be paid and that the animal or animals be taken away from the property of the complainant.

(2) Upon demand, the owner or occupant of the land shall release and deliver possession of such stock to the owner or person entitled thereto, upon payment of the damages and charges, and if the parties cannot agree upon the amount, then and in that event, the owner or person entitled to said stock shall give a receipt to the owner or occupant of the land having possession of the same, which receipt shall fully describe the animal or animals so that they may at any time be easily identified, and thereupon the owner or occupant of the land shall give possession of such livestock to the owner or person entitled thereto, making claim therefor. The owner or person so receiving possession of such livestock shall not dispose of the same but shall retain and keep the same in his possession as the legal custodian thereof in order to meet and pay the amount of the lien thereon for damages and charges due in consequence of any such trespass.

(3) The party entitled to such damages or charges shall within ten (10) days after delivery of possession of such livestock commence an action in any court having jurisdiction to recover such damages and charges, and such livestock shall be held for the payment of any judgment as effectually as though held under a writ of attachment. At any time after such action is commenced, the owner or person entitled to the stock, to whom delivery of possession was made, may furnish and file a bond conditioned to pay the damages, charges and costs incurred in the action and upon approval of the bond by the justice of the peace, if the action is commenced in a justice court, or by the judge or clerk of the district court, if the action is commenced in the district court, the lien and claim upon the livestock shall thereupon be discharged.

(4) If the owner or person entitled to such livestock does not furnish such a bond within ten (10) days after the service of summons in the action, an order may be issued authorizing and directing the constable or sheriff to take possession and hold the stock to satisfy any judgment which may be recovered in the action, and such stock, when so taken possession of by the officer shall be held, treated and sold under execution the same as though seized and held in the first instance by writ of attachment.

(5) The owner or person entitled to the stock may, in lieu of furnishing a bond, deposit an amount of money sufficient to pay any judgment which may be recovered in such action, the amount to be determined by the justice or judge of the court in which the action is pending. If the owner or person entitled to the livestock, after delivery of possession to him without payment of damages and charges herein provided for, shall sell or dispose of the same or any part thereof, or permit the same to be taken from his possession, or shall in any manner prevent the seizure of the same by the constable or sheriff, as herein provided, before the lien thereon is fully discharged, he shall be guilty of a misdemeanor and in addition thereto shall be liable to the party entitled to such damages and charges in double the value of the stock. At the time of delivery or possession of such stock [to] the owner or person entitled thereto, a written statement of the amount of the damages and charges shall be furnished to the owner or person entitled to the possession of the stock by the person claiming such damages and charges.

(6) If the owner or claimant of such stock is not known to the person taking up such stock he shall give notice thereof within forty-eight (48) hours by posting a notice at the nearest post office and serving a like notice on the stock inspector of the district, which notice shall describe each animal or animals, the brand thereon, and give a minute description thereof, together with the date of the trespass.

History: En. Ch. 74, L. 1917; amd. Sec. 4, Ch. 167, L. 1919; re-en. Sec. 3386, R. C. M. 1921; amd. Sec. 1, Ch. 165, L. 1931.

Jorgenson v. Story et al., 78 M 477, 487, 254 P 427.

Compiler's Note

The bracketed word "to" in subdivision (5) was inserted by the compiler.

Strict Compliance Necessary

The provisions of the herd law must be strictly followed in order to afford protection to those responsible for the impounding and sale of animals under its authority, and where they are not so followed, the taking constitutes a taking of private property without due process of law and a conversion of the property.

Collateral References

Animals—51.

3 C.J.S. Animals § 133.

2 Am. Jur. 801, Animals, § 150.

Injunction against repeated or continuing trespasses on real property by livestock. 32 ALR 463, 540.

Liability for injury to trespassing stock from poisonous substances or other conditions on the premises. 33 ALR 448.

Scienter as condition of liability for damage by trespassing animals. 33 ALR 1305.

46-1504. (3387) Former proceedings for the formation of herd districts validated. All herd districts heretofore formed or attempted to have been formed under section 1, chapter 74 of the session laws of the fifteenth legislative assembly of the state of Montana, where the proceedings taken have complied with requirements of section 46-1501, shall be and are hereby declared to have been properly formed and valid, and said proceedings are hereby expressly validated, and such districts shall constitute herd districts, and be subject to all the provisions of this act and of law affecting said districts.

History: En. Sec. 5, Ch. 167, L. 1919; re-en. Sec. 3387, R. C. M. 1921.

46-1505. (3388) Rescue of impounded animals a misdemeanor—penalty. Any person who takes or rescues any animal impounded as provided in section 46-1503 from the possession of the person in whose custody the

same may be, without his consent, shall be guilty of a misdemeanor, and upon conviction therefor be subject to a fine of not more than one hundred dollars, or shall be confined in the county jail not more than sixty days, or both such fine and imprisonment.

History: En. Sec. 6, Ch. 167, L. 1919;
re-en. Sec. 3388, R. C. M. 1921.

46-1506. (3389) Unlawful introduction of livestock into herd district a misdemeanor—penalty. Any person or persons not the owner or person in charge of any livestock, who shall drive, put, place, or introduce any livestock into any herd district established under the provisions of this act, or who shall so place, move, or interfere with such livestock that they will trespass on such herd district, shall be guilty of a misdemeanor, and upon conviction thereof be subject to a fine of not less than fifty dollars, or shall be confined in the county jail not less than sixty days, or both such fine and imprisonment, and shall be liable for all damages and costs occurring from such trespass; and for the purposes of this act each separate animal so moved, placed, or interfered with, shall constitute a separate offense.

History: En. Sec. 7, Ch. 167, L. 1919;
re-en. Sec. 3389, R. C. M. 1921.

46-1507. (3389.1) Changing time when herd districts will be in effect—petition—notice—hearing. The time of year or period, when any herd district heretofore or hereafter created under the provisions of the laws of this state, is effective or will be in effect, may be changed as herein provided, by the board of county commissioners of the county in which such herd district has been created, upon the presentation and filing with the clerk and recorder of such county, a petition signed by the owners or possessors of fifty-five per centum (55%) of the land in such district. Such petition shall designate the months of the year when such herd district is effective and designate the contemplated change. Upon receipt thereof, the county commissioners of such county, shall set a date for hearing protests and verifying the signatures thereto, and shall give not less than twenty (20) days' notice of the same by posting five (5) notices of hearing in five (5) public places in the county, one (1) of which shall be at the place such hearing is to be held, and at least two (2) of such notices to be posted within such herd district. Should it appear to the board of county commissioners after such hearing that the signatures attached to such petition are genuine, they shall immediately make an order changing the period of time such herd district will be in effect, as designated in such petition; after which the county commissioners must give notice by four (4) weekly publications in some newspaper in the county, nearest such district, stating the period such district will be in effect; providing, the change of time shall not become effective until such notice has been published as herein provided. Upon the fourth publication of such notice such change of time shall become effective and violation thereof shall be punished as provided under the laws of the state of Montana relative to herd districts.

History: En. Sec. 1, Ch. 78, L. 1931.

CHAPTER 16

HORSE HERD DISTRICTS

- Section 46-1601. Horse herd districts—size—location—petition—notice and hearing—abolishment.
46-1602. Horses running at large in herd district prohibited.
46-1603. Penalty and liability for horses wrongfully entering on premises in horse herd district.
46-1604. Retention and sale of horses for damages and care—procedure—classification of horses for sale—disposal of proceeds—"horses" defined.
46-1605. Petition to dissolve horse herd district—hearing and notice—order of county commissioners.
46-1606. Liability of officers.
46-1607. Existing statutes not affected.

46-1601. (3389.2) Horse herd districts—size—location—petition—notice and hearing—abolishment. Horse herd districts may be created in any county in the state of Montana to contain twelve square miles or more lying not less than one mile in width outside of incorporated cities or towns, upon the petition of owners or possessors of fifty-five per centum of the land of such district, and such petition shall designate the months of the year when horse herd district regulations are effective and upon presentation and filing of a petition properly signed and reciting the outside boundaries and description of the proposed district, together with the postoffice address of the signers thereof, with the clerk and recorder in the county in which the said district is being created; the county commissioners of such county upon receipt thereof shall set a date for hearing protests and verification of signatures thereto, and shall give not less than twenty days' notice of the same by three publications in a newspaper of general circulation in the county of the proposed district, and should it appear to such county commissioners, after such hearing, that the signatures attached to such petition were genuine, they shall immediately make an order declaring such horse herd district created and established; after which the county commissioners must give notice by two weekly publications in some newspaper in the county, nearest the district, stating the period when such horse herd district will be in effect and when such district shall not be in effect; providing such order shall not be effective until thirty days have expired after the order; provided that such herd districts may be abolished at any time upon proceedings as hereinbefore set forth for the establishment of such herd district, the estimated expense of all publications required by this act shall be paid by the petitioners, and no part thereof shall be paid by the county.

Upon petition of any owner or possessor of land lying contiguous and adjoining any herd district heretofore created, and upon like hearing and notice as hereinabove provided for, such lands shall be included in such herd district and become a part thereof.

Should the signature of a lessee appear on the petition creating or abolishing any herd district, the owner or owners of said land may appear either in person or by agent and enter their protest, and the board of county commissioners shall remove the name of lessee from said petition,

and no person shall be permitted to withdraw his name after the hour set for hearing same.

History: En. Sec. 1, Ch. 119, L. 1931;
amd. Sec. 1, Ch. 57, L. 1933.

46-1602. (3389.3) Horses running at large in herd district prohibited.

All horses are hereby prohibited from running at large within any horse herd district as defined in section 46-1601.

History: En. Sec. 2, Ch. 119, L. 1931.

46-1603. (3389.4) Penalty and liability for horses wrongfully entering on premises in horse herd district. If any such horse or horses wrongfully enter upon premises within such district of any person, the owner or person in control of such horse or horses shall be punished according to the provisions of section 46-1506, and in addition to said punishment shall be liable for all damages sustained thereby to the party entitled thereto.

History: En. Sec. 3, Ch. 119, L. 1931.

46-1604. (3389.5) Retention and sale of horses for damages and care—procedure—classification of horses for sale—disposal of proceeds—“horses” defined. (1) The owner or occupant of the land upon which such wrongful entry is made may take into his possession such horse or horses, and shall reasonably care for the same while in his possession, and may retain possession of said horse or horses, and shall have a lien and claim thereon as security for payment of such damages and reasonable charges for the care of said horse or horses while in his possession. The person taking up said horse or horses shall within forty-eight hours after taking possession thereof notify said owner, owners or persons in charge thereof by a notice in writing, describing said horse or horses taken up, including marks and brands, if any, the amount of damages claimed, and the charge per head per day for caring for and feeding the same, and describing, either by legal subdivisions or other general description, the location of the premises upon which said horse or horses are held, and requiring him within forty-eight hours after receiving said notice to take the said horse or horses away after making full payment for all damages and costs of said horse or horses. Such notice shall be given by personal service on the said owner, owners or person in charge thereof, or by leaving said notice at his usual place of residence with some member of his family over the age of fourteen years, or by sending said notice by prepaid registered mail addressed to his last known place of residence. Said service by registered mail shall be deemed complete upon the deposit of the notice in the postoffice.

(2) Upon demand, the owner or occupant of the land shall release and deliver possession of such horse or horses to the owner or person entitled thereto upon payment of damages and charges, but said payment of damages and charges shall not act as a bar to the prosecution of said person, owner, or person in control of such horse or horses, as hereinbefore provided. If the owner or claimant of such horse or horses is not known to the person taking up such horse or horses, or the said owner or claimant shall refuse to pay the amount of damages and charges as herein provided,

the said person taking up such horse or horses shall within seventy-two hours, from the time said horse or horses were so taken up, deliver to the sheriff or a constable of the county in which the horse or horses were so taken up, a statement containing the information required to be given in the notice hereinbefore set out, and in addition thereto, he shall mail by prepaid registered mail a copy of said statement addressed to the nearest state livestock inspector. Upon receipt of such statement, the sheriff or constable shall proceed to advertise and sell at public auction the horse or horses so taken up.

(3) That prior to such sale the sheriff shall have said horses classified as follows:

Class one shall include (a) horses not bearing a registered brand and which in the opinion of the stock inspector are of a value not to exceed ten dollars per head, and (b) horses bearing a registered brand, but which the owner has failed to redeem as herein provided, after notice given, and which in the opinion of the stock inspector are of a value not to exceed ten dollars per head.

Class two shall include horses bearing registered brands and which in the opinion of the stock inspector are of a value in excess of ten dollars per head.

Horses in class one shall be sold on ten days' notice posted at the court house of each county in which any portion of the district lays, and posted in three other public places in such county, one of which shall be in that portion of the district included in the county.

Horses in class two shall be sold on notice posted for twenty-one (21) days, and otherwise as notices are required to be posted for the sale of horses in class one, and such notice shall likewise be published once a week for two successive weeks before said sale in some newspaper published in the county seat of each county including any part of said district, if there be such newspaper, and if there be no newspaper published in any county comprising a part of such district, then such notice shall be published in any newspaper of general circulation in the county or counties including such district. The notice required to be published for the sale of horses in class two shall describe each horse to be sold, giving the approximate age, description and brands, if any. The proceeds of the sale shall be applied by the sheriff to the discharge of the claim and the costs of the proceedings in selling the property and enforcing the claim, and the remainder, if any, shall be deposited with the county treasurer who shall keep the same in a special fund to be designated as the "horse herd district fund" (giving number of district if more than one).

(4) A separate fund, styled as above specified, shall be kept by the county treasurer for each of said districts created in his county. The county treasurer shall make a record of the description of each horse, the amount received for same, and the amount of deductions, which record shall be open to public inspection; and any person making claim to the board of county commissioners at any time within one year from the date of sale, of ownership of such horse, and submitting proof of ownership to such board with such claim, to the satisfaction of such board, shall be entitled

to receive such excess received from the sale of such horse. Any money received from the sale of any such horse which shall not be so claimed within one year after such sale, shall at the expiration of said period be transferred to the general fund of the county.

The term "horses" when used in this chapter shall include any mare, gelding, stallion, colt, foal, filly, mule, jack and jenny.

History: En. Sec. 4, Ch. 119, L. 1931;
amd. Sec. 2, Ch. 57, L. 1933.

46-1605. (3389.6) Petition to dissolve horse herd district—hearing and notice—order of county commissioners. When a petition praying that any established horse herd district be dissolved is filed with the county clerk and recorder of the county wherein such district has been established, and it is set forth therein that such petition is signed by the owners or possessors of fifty-five (55%) per cent, or more of the lands lying within such district, the said county clerk and recorder shall call such petition to the attention of the board of county commissioners of the county at its next regular meeting; and at said meeting by its order the said board shall set such petition for hearing at a specified time on a day certain of which notice shall be given by publication at least once in each week, for three successive weeks in some newspaper of general circulation in the county. At the time fixed for hearing the board of county commissioners shall first require proof of publication of the notice of said hearing to be made and thereafter shall consider the petition and hear all interested parties. At the conclusion of any such hearing if the board of county commissioners shall find that notice of the hearing has been given in the manner and for the time prescribed herein and that the owners or possessors of fifty-five per cent (55%), or more of the lands lying within such herd district have signed the petition and request that such district be dissolved, then the said board shall forthwith spread such findings upon its minutes and thereupon shall enter an order in terms that by reason of such findings and of the proceedings had upon such petition the said horse herd district is thereby dissolved. Forthwith upon the making and entry of any such order aforesaid the horse herd district affected thereby shall be dissolved for all purposes thereafter.

History: En. Sec. 4A, Ch. 119, L. 1931.

46-1606. (3389.7) Liability of officers. No officer, board, or employee of any county, nor any employee of such officer or board shall be liable for any act performed in good faith in discharging official duties under this act; and all such acts shall be presumed to have been in good faith and in conformity with this act.

History: En. Sec. 5, Ch. 119, L. 1931.

46-1607. (3389.8) Existing statutes not affected. It is expressly provided that it is the intention of this legislative assembly that the enactment of this act does not repeal or amend any of the now existing statutes relating to herd districts or horses, but is intended as an additional remedy for the control of horses as herein provided.

History: En. Sec. 6, Ch. 119, L. 1931.

CHAPTER 17

ANIMALS RUNNING AT LARGE

- Section 46-1701. Rams and he-goats not to run at large.
 46-1702. Penalty.
 46-1703. Liability to civil damages.
 46-1704. Swine, sheep and goats running at large.
 46-1705. Penalties.
 46-1706. Disposition of fines.
 46-1707. Male equine animals not to run on open range—definition of “open range.”
 46-1708. Declaration of animals running at large as nuisance—abatement.
 46-1709. Castration of animals running at large—notice to owner—expense and charges.
 46-1710. Killing of animal running at large—notice—posting and service.
 46-1711. Killing animal to prevent injury not prohibited.
 46-1712. Penalty for violations.
 46-1713. Effect of invalidity of part of act.
 46-1714. Certain livestock not to run at large in municipalities.
 46-1715. Punishment for permitting trespass of livestock.
 46-1716. Only purebred bulls to run at large—limitation on time.
 46-1717. Female breeding cattle, purebred bull to accompany.
 46-1718. Penalty for violation of act.
 46-1719. Taking up and castrating bulls, notice to owner.

46-1701. (3390) Rams and he-goats not to run at large. It is unlawful for any owner or person having the management or control of any ram or he-goat to permit the same to run at large between the first day of August and the first day of December of each year.

History: En. Sec. 76, 5th Div. Comp. Stat. 1887; re-en. Sec. 3060, Pol. C. 1895; re-en. Sec. 1881, Rev. C. 1907; re-en. Sec. 3390, R. C. M. 1921.

Operation and Effect

In an action for damages claimed to have been caused by defendant's neglect of duty imposed by this section and section 46-1703, plaintiff must plead non-observance of the statute and make a case bringing the defendant within the liability created thereby. *Ball Ranch Co. v. Hendrickson*, 50 M 220, 225, 146 P 278.

Id. Where simple negligence is relied on as a basis of recovery of damages caused by permitting rams to run at large, the plaintiff must prove, by a preponderance

of the evidence, the negligence alleged, the defendant being held to the exercise of ordinary care only. Where, however, the damages are alleged to spring from non-compliance with the duty imposed by this section, disobedience in this respect constitutes negligence per se, and makes defendant liable, if the injury was proximately caused thereby.

Id. Where rams or he-goats run at large without the tacit consent of the persons in control, or such persons make a reasonable effort to hinder or prevent them from running at large, no offense is committed and no liability is incurred, either under this section and the two succeeding sections, or in an action based upon simple negligence.

46-1702. (3391) Penalty. Any person violating the provisions of the preceding section is guilty of a misdemeanor, and on conviction thereof must be punished as provided in section 8837 of the penal code.

History: En. Sec. 3061, Pol. C. 1895; re-en. Sec. 1882, Rev. C. 1907; re-en. Sec. 3391, R. C. M. 1921.

References

Cited or applied as section 1882, Revised Codes, in *Ball Ranch Co. v. Hendrickson*, 50 M 220, 228, 146 P 278.

NOTE.—Section 8837, referred to above, was repealed by chapter 109, Laws of 1921.

46-1703. (3392) Liability to civil damages. Any person damaged by rams or he-goats running at large during the time mentioned in section 46-1701 of this code may recover in a civil action any damages sustained thereby.

History: En. Sec. 3062, Pol. C. 1895; re-en. Sec. 1883, Rev. C. 1907; re-en. Sec. 3392, R. C. M. 1921.

Collateral References

Animals⇒58.
3 C.J.S. Animals § 145.

References

Cited or applied as section 1883, Revised Codes, in Ball Ranch Co. v. Hendrickson, 50 M 220, 225, 146 P 278.

46-1704. (3393) Swine, sheep and goats running at large. It shall be unlawful for any owner or owners, person or persons in control of swine, sheep or goats, to wilfully permit the same to run at large.

History: En. Sec. 1165, Pen. C. 1895; re-en. Sec. 8838, Rev. C. 1907; re-en. Sec. 3393, R. C. M. 1921; amd. Sec. 1, Ch. 169, L. 1945.

herder, court did not err in holding the plaintiff was not precluded from recovering by reason of the condition of his fences. Doornbos v. Ihde, 124 M 570, 228 P 2d 235, 237.

Trespassing Stock—Fence of Landowner

Where defendant turned his goats out without fencing them and without a

46-1705. (3394) Penalties. Any person or persons violating the preceding section shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in the sum of ten dollars for the first offense and in the sum of twenty dollars for each subsequent offense and shall be liable in damage to any party injured thereby, to be recovered in any court having competent jurisdiction.

History: En. Sec. 1166, Pen. C. 1895; re-en. Sec. 8839, Rev. C. 1907; re-en. Sec. 3394, R. C. M. 1921.

Collateral References

Animals⇒57.
3 C.J.S. Animals § 141.

46-1706. (3395) Disposition of fines. All fines collected under the provisions of this act shall be paid into the county treasury for the use and benefit of the public schools.

History: En. Sec. 1167, Pen. C. 1895; re-en. Sec. 8840, Rev. C. 1907; re-en. Sec. 3395, R. C. M. 1921.

Collateral References

Fines⇒20.
36 C.J.S. Fines § 19.

46-1707. (3400.1) Male equine animals not to run on open range—definition of "open range." It shall be unlawful for any owner, person, firm, corporation or association having the management or control, of any stallion, ridgeling, unaltered male mule, or jackass, over the age of one year, to permit or suffer such animal to run at large on the open range. The term "open range" means all lands in the state of Montana not enclosed by a fence of not less than two wires in good repair; the term "open range" includes all highways outside of private enclosures and used by the public whether or not the same have been formally dedicated to the public.

History: En. Sec. 1, Ch. 63, L. 1925; amd. Sec. 1, Ch. 85, L. 1931.

46-1708. (3400.2) Declaration of animals running at large as nuisance—abatement. Any such animal so running at large shall be, and it is hereby declared to be, a public nuisance, which, in addition to the means and proceedings prescribed by this act for its abatement and removal, may be abated and removed by the means and proceedings now, or hereafter to be, provided by law for the abatement or removal of public nuisances.

History: En. Sec. 2, Ch. 63, L. 1925;
amd. Sec. 2, Ch. 85, L. 1931.

Collateral References
Nuisance—61.
66 C.J.S. Nuisance § 32.

46-1709. (3400.3) Castration of animals running at large—notice to owner—expense and charges. Any person may take up and secure any such animal found running at large on the open range. After taking it up he shall, without unnecessary delay, post at the United States postoffice or as near as may be to the place where the animal was taken up, a notice truly dated and subscribed by him, or his agent, to the effect that the animal, describing it by marks and brands (if any), color, and sex, was taken up on the day named while it was running at large on the open range in the county (naming the county) and that unless claimed and removed within five days next after the date of the posting the animal will be castrated at the expense of the owner thereof. Should the owner, person, firm, corporation or association having management or control, of such animal be known to the person who took the animal up, personal service of such notice upon the owner, person, firm, corporation or association having management or control of the animal shall be the equivalent to the posting, provided, the notice if personally served may state that unless the animal is claimed and removed within two days next after the date of the notice served personally, the animal will be castrated at the expense of the owner thereof.

If such animal so taken up be not claimed and removed within said five days or said two days, as the case may be, it may lawfully be castrated in the usual manner and doing no more harm than is necessary. The expense of castration shall be paid by the owner. If such animal be claimed within the time herein prescribed, the claimant shall pay to the person who took the animal up, the reasonable expense of the keeping and feed thereof since it was taken up, and also the sum of five dollars for the taking up and giving of the notice aforementioned; upon making such payments the claimant shall immediately remove and take away said animal.

History: En. Sec. 3, Ch. 63, L. 1925;
amd. Sec. 3, Ch. 85, L. 1931.

Collateral References
Animals—51.
3 C.J.S. Animals § 133.

46-1710. (3400.4) Killing of animal running at large—notice—posting and service. If any such animal so running at large cannot, by reasonable effort, be captured, taken up, or corralled, it may lawfully be killed unless the owner, or person having the management or control of it shall take the animal off the open range and restrain it from running at large thereon within ten days next after the giving of notice as hereinafter provided. The notice shall be signed by one or more taxpayers of the vicinity of the

range whereon such animal be at large, and be substantially as follows:

"To whom it may concern:

Take notice, that a certain (stallion, ridgeling, unaltered male mule, or jackass, as the case may be) is running at large on the open range (identify the range by general description) in _____ county, Montana. Unless said animal be removed therefrom and restrained from running at large on open range, within ten days next after the date of this notice, it will be killed.

(Date)

(Signature or signatures)."

The notice shall be posted at the post office nearest the place where the animal was last seen on the range, and like notices in two other of the most public places in the vicinity of said range, and like notice shall at once be mailed to the owner or person having management or control of the animal, if his name and address be known.

History: En. Sec. 4, Ch. 63, L. 1925;
amd. Sec. 4, Ch. 85, L. 1931.

Collateral References

Animals 49.
3 C.J.S. Animals § 108.

46-1711. (3400.5) Killing animal to prevent injury not prohibited. This act is not intended, and it shall not be interpreted or understood, to limit or deny the right now existing to destroy or kill any such animal to prevent injury by it to any person or property.

History: En. Sec. 5, Ch. 63, L. 1925;
amd. Sec. 5, Ch. 85, L. 1931.

46-1712. (3400.6) Penalty for violations. Any owner, person, firm, corporation or association violating any provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than ten dollars (\$10.00) or more than twenty-five dollars (\$25.00).

History: En. Sec. 6, Ch. 63, L. 1925;
amd. Sec. 6, Ch. 85, L. 1931.

Collateral References

Animals 56.
3 C.J.S. Animals § 140.

46-1713. (3400.7) Effect of invalidity of part of act. If any provision of this act, or the application thereof to any person or circumstances, be held invalid or inoperative, the remainder of the act, and the application, of such provision to other persons and circumstances, shall not be affected thereby.

History: En. Sec. 7, Ch. 85, L. 1931.

Collateral References

Statutes 64(2).
82 C.J.S. Statutes § 113.

46-1714. (3401) Certain livestock not to run at large in municipalities. It is hereby provided that livestock, consisting of horses, cattle, mules, sheep, goats, and swine or any such animals shall not be allowed to run at large in any incorporated city, or in any incorporated town.

History: En. Sec. 1, Ch. 65, L. 1917;
re-en. Sec. 3401, R. C. M. 1921.

46-1715. (3402) Punishment for permitting trespass of livestock. Any person owning livestock or having in charge any horses, mules, cattle, sheep, goats, or swine or any such animals who wilfully and unlawfully

permit any such livestock to trespass, in violation of any of the provisions of this act, shall be deemed to be guilty of a misdemeanor, and upon conviction thereof shall be punished as such as provided by law.

History: En. Sec. 2, Ch. 65, L. 1917;
re-en. Sec. 3402, R. C. M. 1921.

46-1716. (3403) Only purebred bulls to run at large—limitation on time. It shall be unlawful for any person or persons, firm, company, or corporation to turn upon, or allow to run at large on the public highways, open range, or national forest reserve within the state of Montana, any bull other than a purebred bull of a recognized beef type; and no bull shall be turned upon, or allowed to run at large upon any such public highways, open range or national forest reserve between December 1st and June 1st of each and every year.

History: En. Sec. 1, Ch. 62, L. 1917;
amd. Sec. 1, Ch. 42, L. 1919; re-en. Sec.
3403, R. C. M. 1921; amd. Sec. 1, Ch. 53,
L. 1925; amd. Sec. 1, Ch. 46, L. 1943.

References

Hughey v. Fergus County et al., 98 M
98, 37 P 2d 1035.

46-1717. (3404) Female breeding cattle, purebred bull to accompany. Any person or persons, firm, company, or corporation allowing or permitting female breeding cattle to run at large upon the public ranges or national forest reserves in the state of Montana must place upon said range or national forest reserve one purebred bull of a recognized beef type, not less than fifteen months nor more than eight years of age, for every thirty head of female breeding cattle, pastured upon such range or national forest reserve; provided, however, that any two or more such users of the public range or national forest reserve may join together in furnishing such bull when the aggregate number of female breeding cattle turned loose upon the same range or national forest reserve by such two or more users thereof does not exceed thirty head.

History: En. Sec. 2, Ch. 42, L. 1919;
re-en. Sec. 3404, R. C. M. 1921.

46-1718. (3405) Penalty for violation of act. Any person or persons, firm, company, or corporation violating any of the provisions of this act shall be guilty of a misdemeanor and punishable by a fine of not less than twenty-five dollars nor more than two hundred fifty dollars.

History: En. Sec. 3, Ch. 62, L. 1917;
amd. Sec. 3, Ch. 42, L. 1919; re-en. Sec.
3405, R. C. M. 1921.

46-1719. (3406) Taking up and castrating bulls, notice to owner. Any bull found running at large on the open range or national forest reserve in violation of the provisions of this act may be caught and castrated by any person finding such a bull; provided, any purebred dairy bull found running at large may be taken up and party holding bull shall notify the owner in person, and if the owner of such bull does not take possession of said bull within twenty-four hours after being notified, party holding such bull may castrate him.

History: En. Sec. 2, Ch. 62, L. 1917;
amd. Sec. 4, Ch. 42, L. 1919; re-en. Sec.
3406, R. C. M. 1921.

CHAPTER 18

ROUNDUP AND SALE OF ABANDONED HORSES

- Section 46-1801. Definitions.
- 46-1802. Abandoned horses on public range declared public nuisance subject to condemnation—right of owner.
- 46-1803. Roundup of abandoned horses—petition—expenses.
- 46-1804. Notice of holding roundup—publication—form.
- 46-1805. Roundup foreman—duties—bond—sale or destruction of horses.
- 46-1806. Claim of owner—cost of keeping and feeding horses.
- 46-1807. Proof of ownership—payment of taxes and penalties—decision of commissioners on claim.
- 46-1808. Notice of sale of abandoned horses—form—time of sale—title.
- 46-1809. Assessment of horses taken in roundup.
- 46-1810. Disposal of proceeds—abandoned horse fund—use of fund.
- 46-1811. Report of roundup foreman—disposal of copies.
- 46-1812. Transfer of moneys of abandoned horse fund to general fund.
- 46-1813. Liability of officers and employees.
- 46-1814. Limitation of powers or duties of officers not to be construed from act.
- 46-1815. Gathering horses in roundup district before roundup unlawful—rights of owner.

46-1801. (3406.1) Definitions. The term “abandoned horse” as used in this act means any horse, mare, gelding, filly, jack, mule or any other animal of the genus equus, of the age of one (1) year or over, and unbranded, or if branded, which escaped assessment for taxation for the year next preceding its impounding as hereinafter provided for, and running at large upon the open range of this state, and including foals running with dams coming within the above definition. An animal not bearing a decipherable brand which is recorded in the office of the recorder of marks and brands shall be deemed unbranded.

The term “open range” means all lands in the state of Montana not enclosed by a fence. The term “open range” includes all highways outside of private enclosures and used by the public, whether the same have been formally dedicated to the public or not.

The term “person” shall include individuals, associations or persons and corporations.

History: En. Sec. 1, Ch. 140, L. 1925; amd. Sec. 1, Ch. 29, L. 1927.

Operation and Effect

One has no right to so use his property as to injure others and no vested right to the enjoyment of property if he fails to pay taxes thereon; hence this section, designed to rid the public range of abandoned horses, i.e., such as are unbranded or escaped taxation the previous year and as such declared a public nuisance, held not objectionable as retroactive legislation as interfering with the owner's vested right in the animals, the law affording him an opportunity to protect his right if he sees fit to do so and in effect doing no

more than providing a further means of enforcing his obligations not to use his property so as to injure others and to pay taxes on the animals. *Durocher v. Myers*, 84 M 225, 230, 274 P 1062.

Id. To afford protection to those in charge of a round-up of abandoned horses and their subsequent sale, the provisions of this section must be strictly followed, and if not and the sale is held before the hour of 8 o'clock in the forenoon it is illegal and constitutes a conversion of the animals.

Collateral References

Animals §60.

3 C.J.S. *Animals* § 86.

46-1802. (3406.2) Abandoned horses on public range declared public nuisance subject to condemnation—right of owner. It shall be unlawful for any person to suffer or permit any abandoned horse to run at large upon the open range in the state of Montana; and such horses so running

at large upon the open range in the state are hereby declared to be a public nuisance and a public menace, and are hereby condemned, subject to the right of the owner of any such abandoned horse to reclaim the same as and under the conditions hereinafter provided.

History: En. Sec. 2, Ch. 140, L. 1925;
amd. Sec. 1, Ch. 29, L. 1927.

Collateral References

Nuisance⇒61.

66 C.J.S. Nuisance § 32.

Cross-Reference

Horses, taking up without owner's consent, sec. 94-35-101.

46-1803. (3406.3) Roundup of abandoned horses—petition—expenses. For the purpose of speedily clearing abandoned horses from the open range in any county or in any district thereof, the board of county commissioners of any such county must, upon the petition of at least five (5) responsible property owners, inhabitants of the proposed roundup district, engaged in the livestock business and paying taxes upon livestock in such county, or upon the petition of a reputable local livestock association, authorize a roundup of abandoned horses in any district within such county, any such roundup to be conducted in such manner as to cause as little disturbance as reasonably possible to horses running lawfully on the open range. All expense of any such roundup shall be paid by the petitioners at whose request the same is initiated, and no county officer or board shall have any power to expend any moneys of the county or incur any obligation on its behalf in connection with any such roundup. Such petitioners, however, shall be reimbursed for the expense of such roundup, as and when moneys may be available for that purpose, in the abandoned horse fund, by warrants issued upon claims filed as in the case of other claims against the county. Upon the filing of such petition the board shall make an order authorizing such roundup, which order shall describe generally such district with reasonable certainty; provided, that said district shall not include more nor less territory than that described in the petition; and such order shall also specify the date on or within ten (10) days after which the roundup shall begin and shall designate the place within the district, at which the headquarters of such roundup shall be maintained.

History: En. Sec. 3, Ch. 140, L. 1925;
amd. Sec. 1, Ch. 29, L. 1927.

Collateral References

Animals⇒61.

3 C.J.S. Animals §§ 87, 90, 95.

46-1804. (3406.4) Notice of holding roundup—publication—form. Notice of the holding of any such roundup shall be given by the board of county commissioners at least thirty (30) days prior to the date when the same shall begin, such notices to be published at least once a week for three (3) successive weeks in some newspaper of general circulation, printed and published in the county in which such roundup is to be held, (if any such newspaper be printed and published within such county) and such notice shall be posted in at least five (5) public places, outside of the county seat of such county on public highways in such county or district, as the case may be, in which such roundup is to be held, and three (3) notices shall be posted in three (3) public places in such county seat, one of which notices shall be posted at the front door of the court house, such notices as posted

outside of the county seat to be posted not less than two (2) miles apart and all posted notices to be posted at least twenty (20) days before the date upon or after which the roundup shall begin as stated in such notice. If no newspaper be printed and published in such county, publication in a newspaper shall not be required. At least twenty (20) days before the date upon or after which the roundup is ordered to begin, a copy of such notice shall be, by the clerk of said board of county commissioners, filed with the Montana livestock commission. Such notices shall be in substantially the following form:

"Notice is hereby given that in accordance with the provisions of chapter of the laws of the twentieth session of the legislative assembly of the state of Montana, and beginning on or within ten (10) days after the day of, 19..., a roundup of abandoned horses will be held under the supervision of the undersigned board of county commissioners in the county of, state of Montana (or if only in a district, generally describing the district), and all abandoned horses taken up in such roundup, and not lawfully reclaimed by the owner, will be sold or otherwise disposed of as provided in said chapter. The headquarters of such roundup will be maintained at

Dated the day of, 19....

By order of the board of county commissioners of county.

By:
Clerk of said board."

History: En. Sec. 4, Ch. 140, L. 1925;
amd. Sec. 1, Ch. 29, L. 1927.

46-1805. (3406.5) Roundup foreman—duties—bond—sale or destruction of horses. All roundups shall be under the control and supervision of the board of county commissioners of the county in which the same shall be held. Roundup districts shall be numbered in the order of their creation. Each roundup shall be conducted by some person designated by the board of county commissioners, whose official designation shall be "roundup foreman, roundup district,, county, state of Montana," and such person shall maintain his headquarters at the place designated by the board of county commissioners in its order as the headquarters of such roundup. Such roundup foreman shall have power to administer oaths and affirmations in all matters coming within the scope of his official duties. The board of county commissioners shall require from such roundup foreman an official bond, in an amount not less than two thousand five hundred dollars (\$2,500.00) and not to exceed five thousand dollars (\$5000.00), which bond shall be conditioned as official bonds of county officers, and shall be subject to all provisions of law applicable to such bonds. All abandoned horses taken up in any such roundup shall be delivered to the roundup foreman in charge of such roundup and shall be by him offered for sale at public auction and sold to the highest bidder for cash, if there be any bidder or bidders therefor, and any such abandoned horses so offered for sale, and for which no bid is

made, shall be destroyed or otherwise disposed of in the discretion of the board of county commissioners, unless reclaimed as herein provided.

History: En. Sec. 5, Ch. 140, L. 1925;
amd. Sec. 1, Ch. 29, L. 1927.

46-1806. (3406.6) Claim of owner—cost of keeping and feeding horses. Any person claiming to be the owner of any such abandoned horse or horses may serve written notice upon the roundup foreman in charge of such roundup of his claim of ownership, at any time before sale, or other final disposition of such horse or horses, such claim of ownership to be verified by the oath of the claimant or some one on his behalf, and the sale or other final disposition of such horse or horses shall, as to such horse or horses, be postponed from time to time as may be necessary, to enable the claimant to make proof of his claim as herein provided; provided that such postponement shall not be had unless the claimant shall pay to the roundup foreman in charge of such roundup, or deliver to him satisfactory security for, the estimated cost of keeping and feeding such horse or horses until sale or other final disposition, or delivery to the owner.

History: En. Sec. 6, Ch. 140, L. 1925;
amd. Sec. 1, Ch. 29, L. 1927.

46-1807. (3406.7) Proof of ownership—payment of taxes and penalties—decision of commissioners on claim. Any person claiming any abandoned horse or horses as provided in section 46-1806 shall, within five (5) days after serving the notice provided for in said section 46-1806, or within such further time as the board of county commissioners shall allow, upon good cause shown, submit to such board proof of his ownership, and shall deposit with said board the amount of any unpaid taxes and penalties which may be assessed against such horse or horses, together with the sum of five dollars (\$5.00) roundup fee. The board shall decide all such cases in preference to all other matters coming before it and at the earliest possible moment. If the claim shall be allowed, the roundup foreman in charge of such roundup shall immediately be notified of such decision and he shall forthwith deliver such horse or horses, as to which ownership shall be so proved, to the owner upon payment of any amount due from such owner for the estimated cost of keeping and feeding such horse or horses as aforesaid, and the deposit made by such owner of taxes, penalties, and roundup fee, shall be by the board delivered to the county treasurer; but if such board shall deny the claim of ownership it shall forthwith notify the person in charge of such roundup of its decision, and such horse or horses as to which such claim shall be denied shall be offered for sale at the earliest convenient session of the sales being held under such roundup, and if not sold the same shall be destroyed or otherwise disposed of as though no claim had been presented.

History: En. Sec. 7, Ch. 140, L. 1925;
amd. Sec. 1, Ch. 29, L. 1927.

46-1808. (3406.8) Notice of sale of abandoned horses—form—time of sale—title. Before any sale shall be had, at least ten (10) days notice shall be given by publication and posting in the manner specified in section 46-1804, except that publication, if made in a newspaper, shall be once in

each week for two successive weeks, and posting shall be done at least five (5) days before the date of sale. Such notice shall be in substantially the following form:

NOTICE OF SALE OF ABANDONED HORSES

Notice is hereby given that on day, the day of, 19...., at in the county of, state of Montana, beginning at the hours of M., on said day the following described abandoned horses will be sold at public auction to the highest bidder for cash, to-wit:

(Give general description of horses to be sold by brand, if any, color, approximate weight, and estimated age.)

Any horses not reclaimed before sale as provided by law, and for which no bid is made at said sale, will be destroyed, or otherwise disposed of, in the discretion of the board of county commissioners of county, state of Montana.

Dated the day of, 19....

By order of the board of county commissioners of county, Montana.

By clerk of said board.

All such sales shall be held between the hours of eight (8) o'clock in the forenoon and six (6) o'clock in the afternoon and may be continued from time to time until all abandoned horses taken in such roundup shall have been disposed of. On payment of the price bid for any such horse or horses sold, the delivery thereof, with a bill of sale, vests the title thereto in the purchaser.

History: En. Sec. 8, Ch. 140, L. 1925; amd. Sec. 1, Ch. 29, L. 1927.

Operation and Effect

To afford protection to those in charge of a roundup of abandoned horses and their subsequent sale, the provisions of

this section must be strictly followed, and if not and the sale is held before the hour of 8 o'clock in the forenoon it is illegal and constitutes a conversion of the animals. *Durocher v. Myers*, 84 M 225, 230, 274 P 1062.

46-1809. (3406.9) Assessment of horses taken in roundup. It shall be the duty of the county assessor immediately to assess all horses taken up in such roundup which shall be sold, or reclaimed before sale, and not already assessed for the current year, and forthwith transmit to the county treasurer a copy of each assessment made. Any such horses which have escaped the assessment mentioned in section 46-1801, shall be assessed as provided for in section 84-439.

History: En. Sec. 9, Ch. 140, L. 1925; amd. Sec. 1, Ch. 29, L. 1927.

Collateral References

Taxation⇒70.
84 C.J.S. Taxation § 83.

46-1810. (3406.10) Disposal of proceeds—abandoned horse fund—use of fund. All moneys paid by reclaiming owners of any such horse or horses shall be paid to the county treasurer and by him kept in a fund to be designated as the "abandoned horse fund, roundup district No. (giving number of district in which such horse or horses were rounded up.)" A separate fund, styled as above specified, shall be kept by the county treasurer for each roundup district created in his county. All moneys received from the sale of any such horses shall be paid to the

county treasurer and if such sum received from the sale of any such horse shall not exceed the taxes, penalties, and the roundup fee, the whole thereof shall be immediately deposited in the abandoned horse fund for the district in which such horse or horses were rounded up; but if the sum received from the sale of any such horse shall exceed such taxes, penalties and roundup fee, the amount of such taxes, penalties and roundup fee shall be forthwith deposited in the abandoned horse fund for such district, and the excess shall be kept by the treasurer in a separate fund, and he shall make a record of the description of such horse, the amount received for the same, and the amount of deductions for taxes, penalties and roundup fee, which record shall be open to public inspection; and any person making claim to the board of county commissioners at any time within six (6) months from the date of sale, of ownership of such horse, and submitting proof of ownership to such board with such claim, to the satisfaction of such board, shall be entitled to receive such excess received from the sale of such horse. Any money received from the sale of any such horse in excess of taxes, penalties, and roundup fee, which shall not be so claimed within six (6) months after such sale, shall at the expiration of said period become the property of such county and shall be transferred to the abandoned horse fund for the district in which any such horse was rounded up.

History: En. Sec. 10, Ch. 140, L. 1925; amd. Sec. 1, Ch. 29, L. 1927.

Operation and Effect

The owner of abandoned range horses seeking to recover funds in the county treasury realized from their sale, can under this section, only claim the balance in the county treasury over and above the charges against the horse for taxes, penalties and roundup fees; therefore where

there was no balance to be claimed, the owner's property rights were not affected by failure of the round-up foreman to make the report required by the next section within the proper time and his contention that the two sections construed together, are unconstitutional if not construed in a certain way may not be considered. *Durocher v. Myers*, 84 M 225, 230, 274 P 1062.

46-1811. (3406.11) Report of roundup foreman—disposal of copies.

The roundup foreman in charge of any such roundup shall keep an accurate record of all proceedings had under the order for such roundup and within thirty (30) days after such roundup shall be completed he must prepare, in triplicate, and verify by his oath, a full, true and accurate report of all the proceedings taken or had under the order for the roundup, among other things, particularly including a complete financial statement, the number and description of horses impounded and how disposed of. Within said thirty (30) days one of such triplicates of such report shall be filed with the clerk of the board of county commissioners and such filing shall be notice to the world of all the contents of such report and prima facie proof of the facts herein stated. Within said thirty (30) days one of such triplicate shall also be filed with the county assessor and one with the county treasurer for their information and appropriate action.

History: En. Sec. 11, Ch. 140, L. 1925; amd. Sec. 1, Ch. 29, L. 1927.

Operation and Effect

The owner of abandoned range horses seeking to recover funds in the county treasury realized from their sale, can under the preceding section, only claim

the balance in the county treasury over and above the charges against the horses for taxes, penalties and round-up fees; therefore where there was no balance to be claimed the owner's property rights were not affected by failure of the round-up foreman to make the report required by this section within the proper time

and his contention that the two sections be considered. *Durocher v. Myers*, 84 M construed together, are unconstitutional 225, 230, 274 P 1062. if not construed in a certain way may not

46-1812. (3406.12) Transfer of moneys of abandoned horse fund to general fund. On the 30th day of November of each year the county treasurer shall, if all claims against any such abandoned horse fund are paid and a balance remains in such fund, transfer all moneys so remaining in such fund to the general fund of the county, subject to the usual division with the state as to any portion of such balance which shall consist of taxes collected on the abandoned horses; but no part of the roundup fee of five dollars (\$5.00) shall be paid to the state; and any portion of the taxes so collected which shall be used in paying claims against said fund is hereby declared to be a part of the cost of collection of such taxes.

History: En. Sec. 12, Ch. 140, L. 1925;
amd. Sec. 1, Ch. 29, L. 1927.

46-1813. (3406.13) Liability of officers and employees. No officer, board, or employee of any county, nor any employee of any such officer or board shall be liable for any act performed in good faith in discharging official duties under this act; and all such acts shall be presumed to have been in good faith and in conformity with this act.

History: En. Sec. 13, Ch. 140, L. 1925;
amd. Sec. 1, Ch. 29, L. 1927.

Collateral References

Counties↔88.
20 C.J.S. Counties § 139.

46-1814. (3406.14) Limitation of powers or duties of officers not to be construed from act. Except as herein provided, nothing herein contained shall be construed as limiting the powers or duties of assessors, county treasurers, or other boards or officers.

History: En. Sec. 14, Ch. 140, L. 1925;
amd. Sec. 1, Ch. 29, L. 1927.

Collateral References

Counties↔83; Taxation↔319(1).
20 C.J.S. Counties § 136; 84 C.J.S. Taxation § 376.

46-1815. (3406.16) Gathering horses in roundup district before roundup unlawful—rights of owner. It shall be unlawful for any person or persons to round up from the range any horse or horses in any roundup district, after such districts have been designated by the county commissioners, until after such roundup; provided, however, that an owner of horses on which the taxes have been paid in this district may gather the same by notifying the roundup foreman, and being accompanied by such foreman or a representative of such foreman in gathering such horses.

History: En. Sec. 1, Ch. 29, L. 1927.

Collateral References

Animals↔61.
3 C.J.S. Animals § 87.

CHAPTER 19

BOUNTIES FOR KILLING WILD ANIMALS—KILLING DOGS INJURING LIVESTOCK

Section 46-1901. State bounty fund—creation.

46-1902. Meaning of term "wild animal."

46-1903. Livestock commission to supervise destruction of predatory animals—cooperation with other agencies—advisory committee—state bounty fund use.

- 46-1904. Disposal of proceeds from sale of skins, hides and specimens—presenting to museums.
- 46-1905. Repealed.
- 46-1906. Evidence of killing by bounty claimant.
- 46-1907. Bounty inspectors—form of claim—affidavits required—penalty for falsification—records.
- 46-1908. Bounty claims and certificates to be filed with livestock commission.
- 46-1909. Livestock commission to examine claims and certificates—approval or disapproval of claims.
- 46-1910. Delivery of claims and certificates to board of examiners.
- 46-1911. Indorsement of claims by board of examiners—warrants.
- 46-1912. Use of funds remaining after payment of bounties—sale of furs, skins and specimens—presentation to museums.
- 46-1913. Falsifying certificates or affidavits constitutes perjury—penalty.
- 46-1914. Bounty fund—levy of tax for—limitation on levy—use of fund.
- 46-1915. Penalty for fraudulent claims.
- 46-1916. Killing of dogs destroying or injuring stock—notice to owner.
- 46-1917. Liability of owner for damages by dog.

46-1901. (3414) State bounty fund—creation. For the purpose of providing for the payment of bounty claims there is hereby created a fund to be known as the state bounty fund which shall consist of five per cent. of all license money collected by the several county treasurers of the state and said money shall be paid over by said county treasurers to the state treasurer and shall by the latter be deposited in the state bounty fund.

History: En. Sec. 3075, Pol. C. 1895; re-en. Sec. 1909, Rev. C. 1907; amd. Sec. 1, Ch. 13, L. 1921; re-en. Sec. 3414, R. C. M. 1921.

References

Cited or applied as section 3075, Political Code, in *State v. Camp Sing*, 18 M 128, 129, 44 P 516.

Collateral References

States⇌127.
81 C.J.S. States § 158.

46-1902. (3417.1) Meaning of term “wild animal.” For the purpose of this act the term “wild animal” shall include wolf, wolverine, coyote, mountain lion, lynx, bobcat, and any other animal causing depredations upon livestock.

History: En. Sec. 1, Ch. 73, L. 1923.

Collateral References

Bounties⇌8.
11 C.J.S. Bounties § 13.

46-1903. (3417.2) Livestock commission to supervise destruction of predatory animals—cooperation with other agencies—advisory committee—state bounty fund use. (a) The destruction, extermination and control of wild animals, including wolf, wolverine, coyote, mountain lion, lynx, cougar, bobcat and any other wild animals predatory in nature and causing, or capable of causing the killing, destruction, maiming or injury of domestic livestock of all species, and of domestic poultry of all varieties, or depredations thereon, shall, as respects the protection and safeguarding of all said livestock and poultry in the state, against all depredations from such animals, be conducted in the state and carried out by the Montana livestock commission which is hereby charged with the primary duty and responsibility of formulating practical programs for accomplishing said objectives in all areas of Montana, and of carrying out such programs in an efficient and practical manner, responsive to the need for control in each area of the state. The said commission shall adopt such standing rules

and regulations, within the purview of the authority vested in it by the statutes of the state of Montana applicable to predatory animal control, as are necessary and proper for the systematic destruction of said wild animals by hunting, trapping and poisoning operations, and payments of bounties, and the commission shall, from time to time, issue, modify, amend or repeal field, area, range, or other orders and instructions, including orders and instructions to hunter and trapper personnel and others, as may be appropriate in the various areas, at different seasons of the year, and with reference to the habits, presence, migrations or movements of such animals, and their attacks on livestock and poultry, either singly or in packs or bands. The said commission is hereby expressly authorized, empowered and directed to co-operate with the duly authorized representatives of the United States, including its Biological Survey, its Fish and Wild Life Service, with the state fish and game commission of the state of Montana, and with boards of county commissioners in the several counties of the state, and with voluntary associations of stockgrowers, sheepgrowers, ranchers, farmers and sportsmen, and with corporations and individuals, in the systematic destruction of said wild animals by hunting, trapping and poisoning operations.

(b) The governor shall appoint an advisory committee, composed of one (1) representative of each, the Montana Woolgrowers' Association, the Montana County Commissioners' Association, the Montana Stockgrowers' Association, the Montana Federated Wildlife Clubs, and the state fish and game warden, which advisory committee shall consult with and advise the Montana livestock commission, the state fish and game commission, and county and local predatory animal control organizations in all matters pertaining to their activities hereunder and under any other laws of this state applicable to predatory animal control, and develop and formulate plans for effective predatory animal extermination and controls throughout the state, and advise with respect to the expenditure of all monies for the control of such animals by each said agencies, organizations and persons. The secretary of the Montana livestock commission shall be ex officio, secretary of said advisory committee, and the committee shall elect one (1) of its members chairman thereof. The committee shall meet on five (5) days' notice, at the call of its chairman, or at request of any two members, or at the request of the Montana livestock commission.

(c) Subject to the constitutional authority of the state board of examiners, the Montana livestock commission shall have, and it is hereby invested with control and supervision of the state bounty fund, and it shall administer and expend for predatory animal extermination and control, in production of livestock and poultry in the state of Montana all the monies that are or may be made available to it in said fund, including the monies from the levy under section 9 of article XII of the Constitution of Montana and section 84-5214, enacted pursuant to such provision of the constitution, and all such monies as are made available to said commission by appropriations made by the legislative assembly for predatory animal control by said commission. The commission shall expend said funds for predatory animal control by all effective means, including employment of hunters, trappers and other personnel, procurement of traps, poisons, equipment and

supplies, and, also, for the payment of bounties within the sound discretion of the commission, as advised by the advisory agencies aforesaid, and responsive to the necessities of control in various areas of the state. The commission shall not consider or approve any claims against said state bounty fund, or against additional funds available to it, in excess of the amounts available in any biennium, and no warrants shall be issued or registered for any such claims whether for bounties or for any other purposes.

(d) Nothing herein contained shall be construed to interfere with or impair the power and duties of the state fish and game commission in the control of predatory animals by said commission as authorized by law, nor the obligation of said commission to expend its funds in cooperation with the Montana livestock commission, for predatory animal control as required by law, provided that all funds of the state fish and game commission for such co-operative predatory animal control shall be administered and expended by the state fish and game commission.

History: En. Sec. 2, Ch. 73, L. 1923;
amd. Sec. 1, Ch. 113, L. 1947.

46-1904. (3417.3) Disposal of proceeds from sale of skins, hides and specimens—presenting to museums. All furs, skins and specimens, taken by hunters or trappers, whose salaries may be paid in whole or in part out of the fund herein created, shall be sold by the livestock commission, and the proceeds from such sales shall be credited to the bounty fund, the same to be used in the further carrying out of the provisions of this act, provided that any specimens so taken may be presented, free of charges to any state museum or institution.

History: En. Sec. 3, Ch. 73, L. 1923.

46-1905. (3417.4) Repealed—Chapter 112, Laws of 1947.

46-1906. (3417.5) Evidence of killing by bounty claimant. Any person killing any of the aforesaid animals, except mountain lions, to obtain bounty thereon, shall, within thirty days of the date of the killing, exhibit the entire skin or skins of the said animal or animals, including the entire head with ears, the tail, and all four (4) paws to the bounty inspector nearest to the locality in which the animal or animals were killed, and shall, at the same time file with the bounty inspector, as hereinafter provided, an affidavit setting forth that he killed the animal or animals from which the skin or skins were taken; that the same was killed nearer to, or if more than one hide is presented, that the greater number were killed nearer to the residence of the said bounty inspector to which the same was presented, than to any other bounty inspector, and also state the county or counties in which said animals were killed; and every bounty inspector appointed under the provisions of this act shall be empowered to administer oaths to any and all persons making any affidavit as aforesaid; provided, however, that any person killing any mountain lion, to obtain bounty thereon, shall present the same to a bounty inspector as provided in this section for wolves and coyotes, except that in addition to the requirements of this section the skins of mountain lions shall also contain the entire skin of the lower jaw, which shall be severed by the bounty inspector and

thereafter treated in the same manner as scalps of wolves and coyotes herein provided.

History: En. Sec. 2, Ch. 109, L. 1925.

46-1907. (3417.6) Bounty inspectors—form of claim—affidavits required—penalty for falsification—records. (1) It shall be the duty of the sheriff of any county in this state, and of all under-sheriffs and deputy sheriffs located at the county seat, but not elsewhere, to receive and examine all skins and pelts presented for bounty within their respective counties; the said sheriff shall receive ten cents for each skin examined, said amount to be paid by the owner of the skin. Each sheriff, under-sheriff and deputy sheriff, to prevent fraud, shall minutely examine each skin presented, and should such examination disclose that the scalp and ears with the skin from the entire head of such animal or animals have not been severed, punched, patched, or in any manner marked, he shall, there in the presence of the person presenting such skin, mark such skin by severing the skin from the head, including the ears, and then redeliver the skin or skins to the person presenting the same, and shall require the following affidavit from the claimant:

Bounty Claim

State of Montana }
County of } ss. Affidavit of Claimant.

....., whose post office address is, being first duly sworn, deposes and says: That he killed or caused to be killed the animal from which the skin now here presented to, the sheriff or deputy sheriff in and for the said county of, was taken; that such an animal was killed within the bounds of the county of within the thirty days last past, and that the same or the greater number of them were killed nearer to the residence of said sheriff or deputy sheriff than to the residence of any other sheriff; that his claim is made for bounty pursuant to law for (.....) and (.....) actually killed or caused to be killed by affiant aforesaid; and that all blanks in this affidavit have been filled out by the affiant in his own handwriting, or that because of affiant's inability to write, such blanks were filled out by, a person other than the sheriff or deputy sheriff, at the request of said affiant; and that such person so acting for affiant, in filling out the blanks has signed his name hereto at the affiant's request, below the name of the affiant, for the purpose of identification of this affidavit, as by law required.

Subscribed and sworn to before me this day of, 19.....

..... sheriff, county, Montana.

And shall require affidavits from two resident taxpayers residing in the vicinity in which such animal or animals were killed, setting forth that they are resident taxpayers on livestock, giving their postoffice addresses and stating that they are personally acquainted with the person presenting

the skin or skins, and to their knowledge, information, and belief, said person did kill or cause to be killed the animal or animals from which the skin or skins were taken within thirty days preceding the offering of such skin for a bounty to the sheriff, under-sheriff, or deputy sheriff to which the same is presented; and he shall at the same time make out and deliver to said person a certificate addressed to the county clerk of his county, and immediately deliver to said county clerk a duplicate thereof, showing the date, number, and kind of skins so marked for severing, and the name of the person presenting the same; also the fact of the filing of the affidavits of taxpayers heretofore required and the examination made as required, and said certificate shall be duly signed by him in his official capacity; provided, that when any doubt shall exist as to the kind of skin or skins presented, whether wolf or coyote, the certificate shall be issued for the lesser bounty; and each sheriff shall keep a record in a bound book of all the skins so marked and severed, showing the date, number, and kinds and the names of the persons presenting the same, which book shall be a book of official record. Neither the sheriff, under-sheriff, nor deputy sheriff shall perform any duties under the provisions of this act except at the county seat.

(2) Wilfully making a false certificate or affidavit in any material portion thereof by any taxpayer as herein provided shall be a felony, punishable the same as a crime of perjury. The sheriff shall, not later than the fifteenth of each month, render to the county clerk and recorder a report setting forth the names of the persons presenting skins, with the number of the certificate, the kind and number of the skins so presented, as to each and every certificate which he has issued during said month.

(3) The county clerk shall, upon the receipt of each said certificate, file the same in the order in which they are received, and safely keep them until the arrival of the skin or skins mentioned in such certificate; and upon the receipt of said skin or skins he shall call to his assistance either the county treasurer or in his absence, the clerk of the district court, who, being present, shall both, in order to prevent fraud, minutely examine each scalp; and should such examination disclose that the scalps, as heretobefore specified, of such animal or animals, agree with the number and kind of scalps or lower jaw of mountain lion mentioned in the said certificate, the county clerk shall thereupon, in the presence of said treasurer or clerk of the district court, destroy said scalps, by fire; and said county clerk shall then make out and deliver to the person named in said certificate a second certificate showing the statement of the facts as contained in the certificate to the sheriff, under-sheriff, or deputy sheriff, with the additional statement of the examination so made by him, and that he found said scalps to agree with the number and kind mentioned in the certificate of said sheriff, under-sheriff, or deputy sheriff, and so stated there in said certificate. In no case should a bounty certificate be issued by the county clerk for more scalps than are actually received and counted by him; and the county clerk shall receive for each scalp, or mountain lion lower jaw, accounted for by him, the sum of five cents, to be paid quarterly by the state treasurer out of the bounty fund. The county clerk shall keep a record, in a bound book of all certificates so received and issued, showing the date and description

of the number and kind of hides, and the names of the persons presenting the same, which book shall be an official record. County clerks are required to send a report and statement to the livestock commission on or before the twentieth of each month.

History: En. Sec. 3, Ch. 109, L. 1925.

46-1908. (3417.7) Bounty claims and certificates to be filed with livestock commission. All bounty claims and certificates issued by the county clerks and recorders of the several counties of this state under the provisions of section 46-1907 shall be filed in the office of the livestock commission and registered in a book provided for that purpose.

History: En. Sec. 4, Ch. 109, L. 1925.

46-1909. (3417.8) Livestock commission to examine claims and certificates—approval or disapproval of claims. It shall be the duty of the livestock commission to examine into and investigate every such bounty claim and certificate filed with such commission, and in making such examination and investigation, the commission may require the holder of any such certificate or claim to furnish the commission with such additional evidence or proof with reference thereto as the commission may deem necessary and proper, and such evidence may be either oral or documentary as required by the commission. The livestock commission shall, after making such examination and investigation, indorse on such certificate or claim its approval or disapproval thereof, and if the same or any part thereof be disapproved, such indorsement shall state the reasons for such disapproval. If any such certificate or claim be disapproved by the commission, either in whole or in part, the commission shall immediately notify the holder thereof of the action of the commission and of the reasons therefor, and the date when said certificate or claim will be presented to the state board of examiners for its action thereon.

History: En. Sec. 5, Ch. 109, L. 1925.

46-1910. (3417.9) Delivery of claims and certificates to board of examiners. The livestock commission shall, after such examination and investigation has been completed and the proper indorsement has been made on such certificate or claim, deliver the same to the state board of examiners for allowance or disallowance.

History: En. Sec. 6, Ch. 109, L. 1925.

46-1911. (3417.10) Indorsement of claims by board of examiners—warrants. If the state board of examiners approve and allow any such certificate or claim, they must indorse thereon over their signatures, "Approved for the sum of dollars" and transmit the same to the office of the state auditor, and the auditor must draw his warrant on the state bounty fund for the amount so approved or allowed, in favor of the claimant, or his assigns, in the order in which the same is approved.

History: En. Sec. 7, Ch. 109, L. 1925.

46-1912. (3417.11) Use of funds remaining after payment of bounties—sale of furs, skins and specimens—presentation to museums. If, at the end of any bounty paying season, there shall be a surplus in the state bounty fund, such surplus may be used to hire salaried hunters and trap-

pers to hunt and trap predatory animals and to purchase and supply poison to be used for a poison campaign on predatory animals.

All furs, skins and specimens, taken by hunters or trappers, whose salaries may be paid in whole or in part out of the fund herein created, shall be sold by the livestock commission, and the proceeds from such sales shall be credited to the bounty fund, the same to be used in the further carrying out of the provisions of this act, provided that any specimens so taken may be presented, free of charge to any state museum or institution.

History: En. Sec. 8, Ch. 109, L. 1925.

46-1913. (3417.12) Falsifying certificates or affidavits constitutes perjury—penalty. Any person who shall falsely make, alter, forge, or counterfeit any of said certificates or orders shall be deemed guilty of forgery, and any person who shall falsely swear to any affidavit provided for by this act, or procure the same to be done by another, with the intent of obtaining any one of said certificates or orders, shall be deemed guilty of perjury, and any person convicted of any of the offenses declared in this section shall be punished by imprisonment in the state's prison for a term of not less than one year nor more than ten years.

History: En. Sec. 9, Ch. 109, L. 1925.

Collateral References

Forgery \hookrightarrow 7(5); Perjury \hookrightarrow 7.
37 C.J.S. Forgery §§ 26, 32; 70 C.J.S.
Perjury § 23.

46-1914. (3417.13) Bounty fund—levy of tax for—limitation on levy—use of fund. There is hereby created a fund, to be known as the "bounty fund." The tax commission, or the department of state whose duty it is to fix tax levies, shall annually prescribe the levy recommended by the livestock commission to be made against livestock of all classes, for the purpose of paying for the destruction of wild animals killed within the state, which tax in any one year shall not exceed one and one-half ($1\frac{1}{2}$) mills on a dollar upon the assessed valuation of such livestock, and such moneys so received shall be used and applied only to the payment of claims for the destruction of wild animals and to the administration of the provisions of this act, approved by the livestock commission, and the moneys received for the taxes so levied shall be transmitted annually with other taxes for state purposes to the state treasurer by the county treasurer of each county, and when received by the state treasurer shall be placed to the credit of the bounty fund, and such moneys shall thereafter be paid out on claims approved as aforesaid, duly and regularly presented to the state board of examiners, in accordance with the law governing the payment of claims allowed by said board, and all moneys in said fund are hereby appropriated for such purposes.

History: En. Sec. 10, Ch. 109, L. 1925.

Collateral References

Taxation \hookrightarrow 70.
84 C.J.S. Taxation § 83.

46-1915. (3417.14) Penalty for fraudulent claims. Any person or persons who shall patch up any skin or scalp, or who shall present any punched or patched skin or scalp, or who shall bring in any skin or skins

from other states or territory, with the intent to obtain the bounty on the same fraudulently, or any officer who shall sign any certificate herein provided for without first counting the skins and examining the same to determine the kind of skins, and to see that the skin from the scalp or head is properly severed and preserved as hereinbefore provided or shall evade or violate any provision of any law of the state of Montana relative to bounties or bounty claims, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment, and that two-thirds of the fine, if the same be collected, or can be collected, shall be given to the informer, and the balance be converted into the state bounty fund.

History: En. Sec. 11, Ch. 109, L. 1925.

Collateral References

Fraud ⇨ 68.

37 C.J.S. Fraud § 154.

46-1916. (3417.15) Killing of dogs destroying or injuring stock—notice to owner. Any dog, whether licensed or not, which, while off the premises owned or under control of its owner, shall kill, wound or injure any livestock not belonging to the master of such dog, shall be deemed to be a public nuisance and may be killed forthwith by any person, or the owner, when notified, shall kill such dog within twenty-four (24) hours and if he fails to do so an officer may be notified and shall kill or cause to be killed such dog; provided, that nothing contained herein shall apply to any dog acting under the direction of its master, or the agents or employees of such master.

History: En. Sec. 1, Ch. 142, L. 1933.

Cross-Reference

Chasing livestock with dogs, penalty, sec. 94-3567.

Application of Section

This section applies to any dog regardless of its value. *Granier v. Chagnon*, 122 M 327, 203 P 2d 982, 989.

"Livestock" Defined

"Livestock" as employed in this section means domestic animals or beasts generally collected, used or raised on a farm or ranch such as cattle, sheep, swine, goats, horses, mules, donkeys and similar stock. *Granier v. Chagnon*, 122 M 327, 203 P 2d 982, 988.

Sufficiency of Evidence

In action for damages for killing of dog, evidence that defendant had suffered the loss of several sheep due to unidentified raiders and that on one occasion when there was a disturbance among the sheep, the defendant with others went to the place from which the sheep came and finding a dog tearing at a freshly killed sheep, killed the dog, was sufficient to sustain a verdict in favor of defendant although there was no evidence that anyone had seen the dog kill the sheep. *Granier v. Chagnon*, 122 M 327, 203 P 2d 982, 987.

Collateral References

Animals ⇨ 81.

3 C.J.S. Animals § 216.

46-1917. (3417.16) Liability of owner for damages by dog. When it has been proven that a dog has killed, wounded, or injured any livestock, the owner of such dog shall be civilly liable to the owner of such livestock, in a civil suit for damages in a sum equal to the amount of the damages incurred.

History: En. Sec. 2, Ch. 142, L. 1933.

Collateral References

Animals ⇨ 81.

3 C.J.S. Animals § 156.

CHAPTER 20

IMPOUNDING LIVESTOCK OR DOMESTIC ANIMALS

- Section 46-2001. Impounding animals—duties of cities and towns.
 46-2002. Contents of notice.
 46-2003. Service upon owner.
 46-2004. Service upon secretary of livestock commission.
 46-2005. Service by registered mail.
 46-2006. Duty of officers to ascertain brands.
 46-2007. Secretary of livestock commission to ascertain owner—notice.
 46-2008. Provisions of act mandatory.

46-2001. (5175) Impounding animals—duties of cities and towns. Hereafter, when any livestock or domestic animals of any kind are impounded, seized, restrained or held by any city or town, or its officers or agents, it shall be the duty of such city or town, its officers or agents, to give notice to the owner of such livestock or domestic animals so impounded, seized, restrained or held by such city or town, if the owner is known, in the manner hereinafter provided.

History: En. Sec. 1, Ch. 161, L. 1921;
 re-en. Sec. 5175, R. C. M. 1921.

Collateral References

Animals 51.
 3 C.J.S. Animals § 136.
 2 Am. Jur. 796, Animals, §§ 142 et seq.

46-2002. (5176) Contents of notice. Said notice shall be in writing and shall give the number, description, marks and brands of such stock when impounded, seized, restrained or held, with the reasons therefor, together with the amount of charges, if any, which shall be reasonable, and in no case exceed the actual cost of holding, and costs in event of sale, and what disposition will be made of said stock if such charges are not paid, and when and where such disposition shall be made.

History: En. Sec. 2, Ch. 161, L. 1921;
 re-en. Sec. 5176, R. C. M. 1921; amd. Sec.
 1, Ch. 69, L. 1927.

46-2003. (5177) Service upon owner. If such owner be known, and if his postoffice address shall be known as hereinbefore specified, such notice shall be served upon him or her personally.

History: En. Sec. 3, Ch. 161, L. 1921;
 re-en. Sec. 5177, R. C. M. 1921.

46-2004. (5178) Service upon secretary of livestock commission. If such owner be unknown or if such owner is known but his postoffice address is unknown, such notice shall be served upon the secretary of the Montana livestock commission.

History: En. Sec. 4, Ch. 161, L. 1921;
 re-en. Sec. 5178, R. C. M. 1921.

46-2005. (5179) Service by registered mail. Service of such notice may be made personally or by registered mail, postage prepaid, properly addressed and placed in the United States postoffice, and at least eight days before the day fixed for the disposition of said stock.

History: En. Sec. 5, Ch. 161, L. 1921;
 re-en. Sec. 5179, R. C. M. 1921.

46-2006. (5180) Duty of officers to ascertain brands. It shall be the duty of such city or town and its officers or agents to use reasonable diligence to ascertain any and all marks and brands on such stock, and in case such animals are not branded or marked, or the brand or marks are mutilated or undeterminable, such facts shall be noted in said notice.

History: En. Sec. 6, Ch. 161, L. 1921;
re-en. Sec. 5180, R. C. M. 1921.

46-2007. (5181) Secretary of livestock commission to ascertain owner—notice. It is hereby made the duty of the secretary of the Montana livestock commission, upon service upon him of such notice, to ascertain the owner of such stock, if possible, and when the owner is ascertained, to immediately furnish such owner with the information contained in said notice, and to notify the said city or town, its officers or agents, of the name and postoffice address of such owner.

History: En. Sec. 7, Ch. 161, L. 1921;
re-en. Sec. 5181, R. C. M. 1921.

46-2008. (5182) Provisions of act mandatory. The provisions hereof are mandatory and the owner of such livestock will not lose title or right of possession to his said stock unless the provisions hereof are strictly complied with.

History: En. Sec. 8, Ch. 161, L. 1921;
re-en. Sec. 5182, R. C. M. 1921.

CHAPTER 21

SHEEP—PROTECTION FROM PREDATORY ANIMALS—TAX

- Section 46-2101. County commissioners may conduct predatory animal control program for protection of sheep.
46-2102. County commissioners may require per capita license fee on sheep.
46-2103. Proceeds of furs and skins taken, how used.
46-2104. Duty of county commissioners—petition of sheep owners.

46-2101. County commissioners may conduct predatory animal control program for protection of sheep. For the protection of sheep against depredations peculiar to such animals, the board of county commissioners of any county shall upon the recommendation of organized associations of sheep growers in the county have power, either alone or in conjunction with other counties, to conduct a predatory animal control program for the protection of sheep in such county or counties.

History: En. Sec. 1, Ch. 206, L. 1943.

46-2102. County commissioners may require per capita license fee on sheep. To defray the expense of such protection the board of county commissioners of any county shall have the power to require all owners or persons in possession of any sheep, one year old or over, in the county on the first Monday of June in each year to secure a license and pay a license fee of not exceeding five cents (5c) per head of sheep so owned or possessed by him in the county. The assessor shall ascertain, in addition to the regular assessment for taxation purposes, on the first Monday in March, all sheep which will be one year old or over as of the first Monday in June within the county in said year, and shall keep such information in a separate record from the regular assessment, and shall include any sheep

that shall come into the county between the first Monday in March and the first Monday in June. Provided that any owner or person in possession who has removed any sheep from the county prior to the first Monday in June of such year and which will not be pastured in said county during the grazing season of said year, may have the same exempted from the license herein provided by presenting an affidavit of such facts to the assessor. The board of county commissioners shall then order a license fee to be levied against all sheep as provided in this act, which are not so exempted. Upon the order of the board of county commissioners such license fees may be imposed by the entry thereof in the name of the licensee upon the property tax rolls of the county by the county assessor or the county clerk and recorder and shall be payable to and collected by the county treasurer as and when county personal property taxes are by law payable and collected, and when so levied shall be a lien upon the property of the licensee enforceable under the laws provided for the collection of taxes on personal property, and when collected said fees shall be placed by the treasurer in the predatory animal control fund, and the moneys in said fund shall be expended on order of the board of county commissioners of the county for predatory animal control only.

History: En. Sec. 2, Ch. 206, L. 1943;
amd. Sec. 1, Ch. 123, L. 1949.

46-2103. Proceeds of furs and skins taken, how used. All furs, skins and so forth taken by the expenditure of license funds shall be sold and the proceeds of such sale deposited in said predatory animal control fund for the use in carrying out the purpose of this act.

History: En. Sec. 3, Ch. 206, L. 1943.

46-2104. Duty of county commissioners—petition of sheep owners. In conducting a predatory animal control program, the board of county commissioners shall give preference to recommendations for such program and its incidents as made by organized associations of sheep growers in the county. Upon petition of the owners of at least fifty-one percentum (51%) of the sheep in the county, as shown by the assessment rolls of the last preceding assessment, which petition shall be filed with the board of county commissioners on or before the first day of May in any year, such board shall establish the predatory animal control program, and cause said licenses to be secured and issued and the fees collected for such year in such amount, not exceeding the limits of five cents (5c) per head of sheep as shown by said assessment rolls, as will defray the cost of administering the program so established. The license fee determined and set by the board, within said limits, shall remain in full force and effect from year to year without change, unless there is filed with the board a petition subscribed by the owners of at least fifty-one percent (51%) of the sheep in the county, as shown by the assessment rolls of the last assessment preceding the filing of the petition, for repeal of said license fee in toto and disestablishment of the program, or for an increase in said license fee, subject to the limits herein, or for a decrease in said license fee, in either of which events, the board of county commissioners shall fix a new license fee to continue from year to year and that the program shall con-

tinue within the limits of the aggregate amount of the license fee as collected from year to year.

History: En. Sec. 4, Ch. 206, L. 1943;
amd. Sec. 1, Ch. 24, L. 1949.

CHAPTER 22

PUREBRED LIVESTOCK SHOWS AND SALES—EXPENDITURES FOR

Section 46-2201. Expenditures for purebred livestock shows and sales.

46-2202. Tax levy authorized.

46-2201. Expenditures for purebred livestock shows and sales. The boards of county commissioners of the several counties of the state of Montana may, and they are hereby authorized to expend annually from the general fund of the county, not to exceed a sum equal to a levy of one-fourth mill on the taxable property of the county, for the purpose of conducting special purebred livestock shows and special purebred livestock sales within the county.

History: En. Sec. 1, Ch. 60, L. 1945.

46-2202. Tax levy authorized. For the purpose of defraying the costs of such purebred livestock shows and such purebred livestock sales, the county commissioners are authorized and empowered to levy annually a tax not to exceed one-fourth mill on the taxable property of the county, in excess of the amount levied for county purposes, which taxes shall be paid into the general fund of the county.

History: En. Sec. 2, Ch. 60, L. 1945.

CHAPTER 23

GRASS CONSERVATION—GRAZING DISTRICTS

- Section 46-2301. Grass conservation act—cooperation with Taylor grazing act.
46-2302. Definitions.
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46-2304. Annual and special meetings.
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- 46-2330. State grass conservation fund.
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- 46-2332. Range for wild game animals.

46-2301. Grass conservation act—cooperation with Taylor grazing act.

This act may be cited as the "grass conservation act." Its purpose is to provide for the conservation, protection, restoration, and proper utilization of grass, forage and range resources of the state of Montana, to provide for the incorporation of cooperative nonprofit grazing districts, to provide a means of cooperation with the secretary of the interior as provided in the federal act known as the Taylor grazing act and any other governmental agency or department having jurisdiction over lands belonging to the United States or other state or federal agency as well as agencies having jurisdiction over federal lands, to permit the setting up of a form of grazing administration which will aid in the unification or control of all grazing lands within the state where the ownership is diverse and the lands intermingled and to provide for the stabilization of the livestock industry and the protection of dependent commensurate ranch properties as defined herein. This act provides a state grass conservation commission to assist in carrying out the purposes of this act, to act in an advisory capacity with the state land board and county commissioners, and to supervise and coordinate the formation and operation of districts which may be incorporated under this act.

History: En. Sec. 1, Ch. 208, L. 1939.

Constitutionality

This act is not in violation of the due process clauses of the state or federal constitutions. *Thompson v. Tobacco Root Co-op. State Grazing Dist.*, 121 M 445, 193 P 2d 811, 814.

Reasonable regulation of the grazing of livestock is proper under the police power of the state. *Thompson v. Tobacco Root Co-op. State Grazing Dist.*, 121 M 445, 193 P 2d 811, 817.

This act is not a local or special law in violation of Art. V, Sec. 26 of the state Constitution. *Thompson v. Tobacco Root Co-op. State Grazing Dist.*, 121 M 445, 193 P 2d 811, 817.

The privilege of grazing livestock on property not belonging to the owner of the cattle is not a vested property right but a revocable license. *Thompson v. Tobacco Root Co-op. State Grazing Dist.*, 121 M 445, 193 P 2d 811, 816.

This act does not treat nonmembers differently from members under like circumstances. *Thompson v. Tobacco Root Co-op.*

State Grazing Dist., 121 M 445, 193 P 2d 811, 817.

This act does not violate the Fourteenth Amendment to the United States Constitution by discriminating against small owners, by denying equal protection of the laws to nonmembers owning land in the district, by denying equal protection of the laws to operators owning land outside the district, or in being unreasonably discriminatory in providing for the cost of constructing and maintaining fences. *Thompson v. Tobacco Root Co-op. State Grazing Dist.*, 121 M 445, 193 P 2d 811, 816.

References

State ex rel. Engle v. District Court, 119 M 319, 174 P 2d 582; *Langen v. Badlands Cooperative State Grazing Dist.*, 125 M 302, 234 P 2d 467, 469.

Collateral References

Agriculture—1-3, 6.
3 C.J.S. *Agriculture* §§ 2, 6, 8, 9; 43 C.J.S. *Industrial Co-operative Societies* § 2.

46-2302. Definitions. The following words and phrases used in this act shall take the following interpretations:

1. "The commission" means "the Montana grass conservation commission."

2. "State district" means a nonprofit cooperative organization incorporated under the provisions of this act and its board of directors. "State district" also includes all lands, owned or controlled by the state district or its members.

3. "Range" is the land within a grazing district upon which grazing permits are granted to maintain livestock through the established grazing period.

4. "Permits" are evidence of grazing privileges granted by state districts.

5. "Grazing preference" is a right to obtain a grazing permit from a state district. It is attached to dependent commensurate property except as provided in this act.

6. "Secretary" means the state secretary to the state grass conservation commission appointed under this act.

7. "Person" means natural person or persons, unincorporated associations, partnerships, corporations and governmental departments or agencies.

8. "Commensurate property" means land privately owned or controlled which is not range as herein defined.

9. "Dependent commensurate property" is commensurate property which requires the use of range in connection with it to maintain its proper use, and which produces or whose owner furnishes as part of his past customary practice the proper feed necessary to maintain livestock during the time other than the established grazing period on the range, and which has been used in connection with the range for a period of any three years or for any two consecutive years in the five-year period immediately preceding June 28, 1934; or in the case of districts organized after March 15, 1945, for a five (5) year period immediately preceding the date of organization of such districts.

10. "Animal unit" means one cow, one horse, or five sheep, six months old or over.

11. "Assessment" means a special levy imposed on permittee members by the state district to raise funds for specific purposes as provided in paragraph 6, section 46-2312. "Assessment" does not include fees.

12. All other words used herein shall receive the usual and ordinary interpretation.

History: En. Sec. 2, Ch. 208, L. 1939;
amd. Sec. 1, Ch. 199, L. 1945.

References

State ex rel. Engle et al. v. District
Court, 119 M 319, 174 P 2d 582, 585.

46-2303. Montana grass conservation commission — membership and terms. There is hereby created the Montana grass conservation commission of the state of Montana which commission shall be composed of five members with the powers and duties specified in this act. Such members shall be appointed by the governor of the state and approved by the senate, for four-year terms or until their successors are appointed and qualified; provided, however, three members of the first five appointed after the passage and approval of this act shall serve for terms as follows: One for a one-

year term and one for a two-year term and one for a three-year term; at the expiration of these terms all subsequent appointments except those filling vacancies in unexpired terms, shall be for four years. All regular terms of such members shall begin upon April first. The governor, giving full consideration to representation to large and small operators, shall appoint one representative member and livestock operator who is either an officer or a director of an organized state grazing district, from each of the following groups:

- (1) One member from the Montana Stockgrowers Association;
 - (2) One member from the Montana Woolgrowers Association;
 - (3) One member from the County Commissioners Association;
 - (4) One member from one of the cooperative state grazing districts,
- and the fifth (5th) member to be a person representing the general public familiar with the livestock industry. If a vacancy occurs on the commission the governor shall, within thirty days, fill such vacancy for the unexpired term from the group from which said vacancy shall occur. Expired terms shall be filled by appointment from the group to which the retiring member belonged.

History: En. Sec. 3, Ch. 208, L. 1939.

46-2304. Annual and special meetings. The members of the commission shall meet annually at the state capitol on the third Monday in June at which meeting the commission shall select its officers who shall serve during the ensuing year, and may hold special meetings at such time and place as may be necessary, said meetings to be called by the chairman, or by a majority of the commission, upon at least five days notice to each commissioner and to the secretary, and to be held at the time and place specified in the call for the same. A majority of the members of the commission shall constitute a quorum for the transaction of any business which may come before it. The said commission shall keep a record of all business transacted by it. The chairman and the secretary of the commission shall sign all orders, minutes, or other documents of the commission.

History: En. Sec. 4, Ch. 208, L. 1939.

46-2305. Secretary—compensation. The commission shall select and appoint a secretary and said secretary shall be the executive officer of the commission and shall be controlled and directed by the rules and regulations established by the commission from time to time and applicable to the duties of his office. The commission shall fix the salary of the secretary not to exceed four hundred dollars (\$400.00) per month.

History: En. Sec. 5, Ch. 208, L. 1939;
amd. Sec. 1, Ch. 13, L. 1949; amd. Sec. 1,
Ch. 124, L. 1953.

46-2306. Compensation of members—auditing and payment of claims. The members of the commission shall receive no compensation for their services other than the actual amount of traveling expenses actually incurred in respect to the performance of their official duties in attendance at regular or special meetings of the board and ten dollars (\$10.00) per diem for each day actually in attendance at such board meetings. The per diem of each member of the board shall be limited to not exceed the

amount of five hundred dollars (\$500.00) per year, such per diem and expenses to be audited, allowed and paid as herein provided.

The commission shall audit all claims, accounts or bills for expenses, per diem, or expenditures incurred by it or its employees. If the commission approves them, they shall be certified to the board of examiners of the state of Montana. When approved by such board, said claims, accounts, or bills, shall be transmitted to the state auditor who shall thereupon draw a warrant upon the state grass conservation fund in payment thereof; provided that the board may by resolution authorize the secretary to audit and certify all expenses, salaries, and expense accounts of the commission, or its employees, and such audit shall be made a part of the commissioners' report to the governor, a copy of which shall be sent to all state districts coming under the provisions of this act.

History: En. Sec. 6, Ch. 203, L. 1939;
amd. Sec. 1, Ch. 61, L. 1945.

46-2307. Powers of commission—state districts and grazing associations.

The Montana grass conservation commission shall have the powers enumerated by the act, and shall have such other and further powers as shall be necessary and incidental to fully carry out such enumerated powers, and shall also have such other and further powers as shall be necessary and incidental to fully carry out the purpose and intent of this act. The powers of the Montana grass conservation commission shall include the power:

1. To prepare and standardize various forms to be used by the state districts. To supervise or regulate the organization and operation of all state districts incorporated under this act, or grazing associations incorporated under Chapter 66, Laws of 1933, or Chapter 195, Laws of 1935, in accordance with the provisions of this act. To require any grazing association claiming to be incorporated under Chapter 66, Laws of 1933, or Chapter 195, Laws of 1935, but which has not completed its internal organization or not functioning, to complete its organization under this act within a reasonable time. In default thereof the commission may declare the said association dissolved and same shall be thereupon dissolved. In the event that any state district or the directors of any state district shall fail to comply with an order of the commission, said commission may order a hearing thereon within the district or county and cite said directors of said district to appear before said board; and if upon said hearing it appears that said board members refuse to perform the duties of their office as herein defined and as set forth in the articles of incorporation and the by-laws of said association, or refuse to comply with a lawful order of said commission, the members of said board of directors may be summarily removed from office, and thereupon said district shall elect new officers. During such period until such new election the commission shall have the authority to operate and manage the affairs of such state district or to delegate such authority to the secretary or other suitable person or persons. The expense of operating and managing the affairs of a noncomplying state district shall be paid by such noncomplying state district before it can be reinstated.

In the event any state district organized under this act ceased to function and it appears to the commission that the reinstatement and future operation of such district is no longer feasible, beneficial and desirable to those

who own or control more than fifty per cent (50%) of the lands included in such district, the commission, upon thirty (30) days notice in writing, to be published for two (2) consecutive weeks in a newspaper of general circulation in or nearest to said district, may declare such district dissolved and same shall thereupon be dissolved. A notice of dissolution shall be filed by the commission with the secretary of state and the clerk and recorder of the county or counties in which said district is located.

2. To issue citations directed to any person requiring his attendance before the commission, and to subpoena witnesses and pay such expenses as would be allowed in a court action.

3. To require any officer or director of a state district to submit any or all records of such state district to the commission for the purpose of aiding any investigation conducted by or under the authority of the commission or the secretary.

4. To delegate to the secretary or any one or more of its members the power and authority to hold hearings on any matters affecting the commission. The secretary or any such members so delegated shall make a full report of such hearings to the commission.

5. To require state districts to furnish itemized financial reports annually.

6. The commission shall have the power to hire or discharge employees and legal counsel; to fix their wages or salaries and to designate their duties, and may incur such other expenses as may be necessary for the proper performance of its duties and the exercise of its powers.

7. To fully cooperate and enter into agreements on behalf of a state district, with its consent, with any governmental sub-division, department, or agency, in order to promote the purposes of this act.

History: En. Sec. 7, Ch. 208, L. 1939;
amd. Sec. 2, Ch. 199, L. 1945.

NOTE.—The statutes to which reference is made in part 1 of the above section were all repealed by Sec. 32, Ch. 208, Laws 1939.

46-2308. Appeals from decisions of state district to commission—from commission to district court. Notice of the decision of any state district shall be given in writing by the secretary of such state district, to the interested parties or their attorneys by registered mail at the address as may be shown on the records of said district.

Anyone affected by the decision of the state district may take an appeal therefrom to the commission which shall have jurisdiction to hear and decide all such appeals. An appeal from the decision of such district to the commission may be taken by filing written notice of such appeal with the secretary of the commission and by filing a copy of such notice of appeal with the secretary of said district and by serving a copy of such notice of appeal by registered mail upon the interested parties who have appeared, or their attorneys within sixty (60) days after receiving written notice of the decision of the said district. The appellant shall also file with the secretary of the commission proof by affidavit of such filing and service of said notice of appeal. The appeal to the commission shall be taken and review thereof had upon the record of the hearing conducted and considered by the state district, provided, however, the commission may, at its discretion, and for good cause shown, permit additional testimony to be

submitted, and the decisions of said commission shall contain findings of fact which shall be conclusive except for the right to a judicial review as hereinafter provided.

An appeal from the decision of said commission may be taken to the district court wherein a portion of lands in said district lies. An appeal to the district court may be taken by filing notice of appeal with said district court within thirty (30) days after the rendition of the decision by said commission and notice thereof given to the interested parties, or their attorneys, by registered mail, and executing and filing a bond to the commission in the sum of two hundred dollars (\$200.00), with the surety to be approved by the secretary of the commission, conditioned to prosecute such appeal and to pay all costs that may be adjudged against the appellant, costs to be taxed as in district court proceedings. Thereafter the said commission must file with the clerk of such district court a transcript of the record considered by the commission.

Any person who chooses to become a member of any state district is bound by all the provisions of the grass conservation act and is limited to the statutory remedies therein contained and no court shall have jurisdiction to consider any right claimed under such act excepting only by judicial review from the final decision of the commission as herein provided.

History: En. Sec. 8, Ch. 208, L. 1939; amd. Sec. 3, Ch. 199, L. 1945; amd. Sec. 1, Ch. 163, L. 1953.

Scope of Review by the District Court

On appeal to the district court, the court should limit its inquiry to determining

whether upon the evidence and the law the commission's action is based upon an error of law, or is wholly unsupported by the evidence, or is clearly arbitrary or capricious. *Langen v. Badlands Cooperative State Grazing Dist.*, 125 M 302, 234 P 2d 467, 470.

46-2309. Incorporation of state districts. Whenever three or more persons who own or control commensurate property and are livestock operators within the area proposed to be created into a state district, shall decide to incorporate a state district, they shall submit a statement in writing to the commission together with a plat showing the proposed boundaries of the area. Such statement shall set forth the name of the proposed state district; the county or counties in which such proposed state district is located; and the names and addresses of all operators of land and livestock units within said area. The commission may then require any additional information it may deem necessary. On receipt of said statement and plat and such additional information, the commission shall fix the time and place of a hearing for approval within the district or county, which shall not be less than thirty days or more than sixty days after receipt of said statement. The persons deciding to incorporate said state grazing district shall then cause notice of said hearing to be given by publishing a notice prescribed by the commission once a week for two consecutive weeks, the first publication to be at least thirty days prior to the date of hearing, in a newspaper of general circulation in such area. The secretary, for and on behalf of the commission, shall hear evidence offered in support of, or in opposition to the creation of said state district, and shall make a full inquiry into the advisability of the creation thereof; the record taken upon the hearing, together with the report of the secretary, shall be submitted to the commission. If the creation of said state district shall appear

feasible, beneficial and desirable to those who own or control more than fifty per cent of the lands to be included in such district the commission may issue a certificate of approval.

History: En. Sec. 9, Ch. 208, L. 1939;
amd. Sec. 4, Ch. 199, L. 1945.

Authority of Legislature

The legislature may provide for grazing districts applicable to the entire state or only to certain designated counties or portions if there be a reasonable ground for such classification and if the action is not arbitrary or capricious. *Thompson v. Tobacco Root Co-op. State Grazing Dist.*, 121 M 445, 193 P 2d 811, 816.

Constitutionality

Although the law permits three or more persons to initiate proceedings the discretion to create the district rests in the commission and there is no unconstitutional delegation of powers. *Thompson v. Tobacco Root Co-op. State Grazing Dist.*, 121 M 445, 193 P 2d 811, 817.

46-2310. Articles of incorporation, contents. Upon the issuance of the certificate of approval, three or more persons who own or control commensurate property and are livestock operators within or near the proposed state district may prepare articles of incorporation and file them in the offices of the secretary of state without payment of any fees; said articles to be accompanied by the said certificate of approval and to be signed, sealed, and acknowledged. Such articles as prescribed by the commission shall substantially state the following:

1. The name of the state district, the last four words of which shall be "cooperative state grazing district."
2. The county or counties in which said state district is located, and the place where the principal office and business of the state district will be conducted.
3. The membership fee for each member of the state district which shall not in any case be more than five dollars (\$5.00).
4. The term for which said state district is incorporated, which shall not exceed forty years.
5. The names and residences of the persons who subscribe together with a statement that each owns or controls commensurate property and is a livestock operator within the proposed state district.
6. The powers of the state district, which must not be inconsistent with the provisions of this act.
7. The officers of the state district, their principal duties, and the principal duties of the board of directors.
8. The purpose for which the state district is incorporated. If the said articles substantially comply with the requirements herein set forth and are accompanied by the certificate of approval, the secretary of state shall issue to such state district a certificate of incorporation. All amendments to articles of incorporation shall also be filed by the secretary of state without charge.

History: En. Sec. 10, Ch. 208, L. 1939.

46-2311. Map or plat of district to be filed. State grazing districts organized under this act shall, upon completion of their organization, file with the county clerk of each county in which their lands lie, a map or plat of the external boundaries of such state district so created and a copy of their articles of incorporation. Whenever the boundaries of a state

district shall be changed, and such change approved by the commission, the state district shall file with the county clerk or clerks a map or plat indicating such changed boundaries. Whenever the articles of incorporation shall be amended, such amendment shall be filed with said county clerk or clerks. It shall be the duty of any person herding or in control of any livestock in the approximate vicinity of any state districts to ascertain the boundary lines thereof.

History: En. Sec. 11, Ch. 208, L. 1939.

46-2312. Powers of state districts. Each state district organized under this act shall have the power:

1. To purchase or market livestock and livestock products, to purchase supplies and equipment. Such supplies may include among other things grass, grass seed, or forage, whether attached to and upon or severed from the land.

2. To sue or be sued in its corporate name.

3. To acquire forage producing lands by lease, purchase, cooperative agreements, or otherwise, either from the United States, the state of Montana, county or counties in which said lands are located, or from private owners. All lands to which a state district may acquire title may be disposed of by exchange, sale or otherwise.

4. To manage and control the use of its range. This power shall include the right to determine the size of preferences and permit according to a fixed method which shall be stated in the by-laws and which shall take into consideration the rating of dependent commensurate property and the carrying capacity of the range, and may be subject to reservations, regulations and limitations under the terms of agreements between the state district and any agency of the United States. It shall also include the power to allot range to members or non-members, and to decrease or increase the size of permits if the range carrying capacity changes.

5. To acquire or construct fences, reservoirs, or other facilities for the care of livestock, and to lease or purchase lands for such purposes.

6. To fix and determine the amount of grazing fees to be imposed on members or nonmembers for the purpose of paying leases, and operating expenses. To fix and determine assessments and the amount thereof, to be made on members on an animal unit basis for the purpose of acquiring lands by purchase, or for the purpose of constructing improvements in said state district.

7. To specify the breed, quality, and number of male breeding animals which each member must furnish when stock is grazing in common in the state district.

8. To employ and discharge employees, riders, and other persons necessary to properly manage the state district.

9. To set up and maintain a reasonable reserve fund.

10. To borrow money, and if necessary mortgage the physical assets of a state district to provide for operation and development, provided that at least eighty per cent of the permittee members of the state district consent in writing to such borrowing and such borrowing has been approved by the state grass conservation board; provided, however, that nothing

herein contained shall be implied as conferring power upon any state district to mortgage the property of the individual members of the district.

11. To change the boundaries of a district, to merge with another state district organized under this act, or to subdivide.

(a) No such merger shall be made unless consented to by a majority of the members of each merging state district, and approved by the commission.

(b) And no subdivision shall be made unless consented to by a majority of the members in the affected area and approved by the commission.

12. To regulate the driving of stock over, across, into, or through the range, and to collect fees therefor. To impose sanitary provisions, regulations and practices.

13. To undertake reseeding and other approved conservation and improvement practices of depleted range areas or abandon farm lands and enter into cooperative agreements with the federal government or an agency thereof or any other party or parties for such reseeding or conservation and improvement practices.

14. To do and perform any and all other acts in conformity with the provisions of this act, or incidental or necessary for the purpose of carrying out the full purpose and intent of this act.

History: En. Sec. 12, Ch. 208, L. 1939.

Operation and Effect

Where the action of a grazing district in classifying owners of grazing preferences was a clear violation of the grazing act and no question of administrative dis-

cretion was involved a proceeding in mandamus was proper as against contention that the court was taking over the duties of the district. State ex rel. Engle v. District Court, 119 M 319, 174 P 2d 582, 586.

46-2313. Powers and duties of directors. The directors of the state district shall manage and exercise the powers of such state district subject to its by-laws and to the regulation of the commission as provided in this act.

History: En. Sec. 13, Ch. 208, L. 1939.

46-2314. Membership in district. Membership in the district is limited to persons, partnerships, corporations and associations engaged in the livestock business who own or lease forage producing lands within or near the district except that the agent of any person, association, partnership or corporation entitled to membership in the district, may become a member in place of his principal. If any agent becomes a member his qualifications for membership and his obligations to end the privileges in the district shall be measured by those his principal would have had if he had elected to become a member. No agent and his principal shall both be members of the district unless such agent has individual qualifications for membership which are separable from and independent of those of his principal. Permittee members only shall be entitled to vote on all issues submitted to a vote of the members. No such member shall have more than one vote. Voting by proxy shall not be permitted. All members who possessed preferential grazing permits during the preceding grazing season or who possess such a permit at the time of voting shall be designated as permittee members.

When any member shall dispose of a part of the lands or leases owned by him so that another shall become the owner of such lands or leases and acquire the right to membership, then the rights and interest involved shall be determined by the directors of the state district with the approval of the commission.

Preferences or rights under this act through the creation of the district or the issuance of permits or preferences are statutory and shall not create any vested right, title, interest or estate in or to the lands owned or controlled by the district excepting as herein provided.

History: En. Sec. 14, Ch. 208, L. 1939; amd. Sec. 2, Ch. 163, L. 1953.

Constitutionality

Even if membership in the district would confer special privileges or immuni-

ties over nonmembers still no constitutional right is involved since small owners are privileged to become members of the district. *Thompson v. Tobacco Root Co-op. State Grazing Dist.*, 121 M 445, 193 P 2d 811, 816.

46-2315. By-laws. Each state district incorporated under this act shall within sixty (60) days after its incorporation adopt by-laws approved by the commission. Such by-laws may be amended or revised with the approval of the commission.

History: En. Sec. 15, Ch. 208, L. 1939.

46-2316. District must lease available state land. Any state land situated within the boundaries of any grazing district created by this act, not otherwise disposed of by the state board of land commissioners, must be leased by such grazing district at a reasonable rental, when offered for lease to the officers of such grazing district by the state board of land commissioners; provided, however, that the officers of such grazing district may appear or submit evidence in writing before the state board of land commissioners and show reason and cause for a change in such rental. If such cause there be, the state board of land commissioners may cause a reappraisal of the land in question. It shall be the duty of the grass conservation commission to require that all state districts comply with this section.

History: En. Sec. 16, Ch. 208, L. 1939.

46-2317. Commission to advise board of land commissioners and county commissioners. The Montana grass conservation commission may act in an advisory capacity to the state board of land commissioners and board of county commissioners for the purpose of working out uniform plans for the use of lands lying within or without the boundaries of grazing districts, in conformity with recognized conservation and stabilization policies.

History: En. Sec. 17, Ch. 208, L. 1939.

46-2318. Incorporated grazing associations must conform to this act—amending articles of incorporation. All grazing associations incorporated under Chapter 66, Laws of 1933, of Chapter 195, Laws of 1935, shall within six months amend their articles of incorporation and their by-laws to conform with the provisions of this act. Any district organized hereunder or any district or grazing association organized under prior laws as described in this section may amend its articles of incorporation by a two-thirds vote of all members present at any regular or special meeting of its members and the approval of the commission; the only notice of such meeting which is necessary is the notice of meetings of members as required by the by-laws

of such district or association. Such amended articles of incorporation and by-laws shall be submitted to the commission for approval. Upon approval, the commission shall issue its certificates of approval. Such amended articles of incorporation shall be filed by the secretary of state without charge, but shall not be filed unless accompanied by such certificate of approval.

Upon the filing of such amended articles with the secretary of state and the proper county clerk or clerks, such association or district shall possess the same powers and shall be subject to the same obligations as if incorporated under this act. Any association refusing to comply with the provisions of this section or failing to so comply within the time provided in this section may be dissolved by an order of the commission.

History: En. Sec. 18, Ch. 208, L. 1939.

NOTE.—The statutes to which reference is made in the above section were all repealed by Sec. 32, Ch. 208, Laws 1939.

46-2319. Mizpah Pumpkin Creek grazing district. No territory included within the Mizpah Pumpkin Creek grazing district shall be included within a state district unless such Mizpah Pumpkin Creek grazing district shall approve and recommend an application to such state grazing district for the inclusion of such territory.

History: En. Sec. 19, Ch. 208, L. 1939.

46-2320. Distribution of grazing preferences. When a state district is organized, grazing preferences shall be distributed in the following manner: Any member of a state district owning or controlling dependent commensurate property as heretofore defined may be given a grazing preference. If the carrying capacity of the range exceeds the reasonable needs of the members owning or controlling dependent commensurate property, members owning or controlling commensurate property shall have the preference. If the carrying capacity of the range exceeds the reasonable needs of the members owning or controlling dependent commensurate property or commensurate property, temporary grazing permits may be issued to nonmembers or members, preferring those that have used the range for any three or any two consecutive years in the five-year period immediately preceding June 28, 1934; or in the case of districts organized after March 15, 1945, preferring those that have used the range five (5) years immediately preceding the organization of such districts. When such temporary permit is utilized by a permittee in connection with forage producing lands owned or controlled by such permittee within or near the district for a period of any combination of four years out of five, then the forage producing lands owned or controlled by such permittee may be considered dependent commensurate property, and upon application, the district may accordingly grant such permittee membership and preference in the districts providing an application had been made for temporary rights for each of the five years. Provided, however, such temporary permits shall at all times be merely privileges granted from year to year, and their possession shall in no event establish a preference right unless such preference right be expressly granted by the district and in the manner herein provided.

If reductions in grazing privileges become necessary, operators with temporary permits will be reduced first on a proportionate basis. When the

extent of reduction of privileges exceeds that of temporary permits, then the rights of operators with both dependent commensurate property and commensurate property shall be reduced together on a proportionate basis.

History: En. Sec. 20, Ch. 208, L. 1939; amd. Sec. 5, Ch. 199, L. 1945; amd. Sec. 3, Ch. 163, L. 1953.

Operation and Effect

Action of grazing district in classifying all owners of classes 1 and 2 grazing preferences as temporary permittees and issuing 1946 grazing permits on that basis

so that plaintiffs who had a class 1 preference appurtenant to their land for the grazing of 206 animal units were granted only a temporary permit for grazing of 152 animal units for 1946, was a clear violation of the grazing act. State ex rel. Engle v. District Court, 119 M 319, 174 P 2d 582, 586.

46-2321. Application for grazing preferences. Any person entitled to grazing preferences within any state grazing district based on dependent commensurate property or commensurate property must make application one year after the passage of this act to qualify for said preference; or in the case of state districts hereafter organized, must make application within one year after said district shall have been organized to qualify for said preference; provided, however, all permittees shall be entitled to benefits accruing under amended section 46-2320.

History: En. Sec. 21, Ch. 208, L. 1939; amd. Sec. 6, Ch. 199, L. 1945.

Operation and Effect

The provisions of this section are mandatory. Langen v. Badlands Cooperative State Grazing Dist., 125 M 302, 234 P 2d 467, 469.

46-2322. Grazing preferences appurtenant to dependent commensurate property and commensurate property and method of transferring preferences to other lands. Grazing preferences shall run with and be appurtenant to, the dependent commensurate and commensurate property upon which they are based. They shall not be subject to devise, bequest, attachment, execution, lease, sale, exchange, transfer, pledge, mortgage, or other process, or transaction, except as provided in this section or in the by-laws of a state district. Upon application by a permittee, the state district with the approval of the grass conservation commission may allow a preference based on ownership or control of dependent commensurate or commensurate property to be transferred to other property owned or controlled by the permittee of sufficient commensurability, provided that in any transfer of preference from dependent commensurate or commensurate property controlled but not owned by applicant, the applicant must have had control and use of the dependent commensurate or commensurate property and the preference appurtenant thereto, for five (5) consecutive years and must have established and maintained the livestock operation upon which the dependency was established by use or priority immediately prior to the application for transfer. Provided further, that such transfer will not interfere with the stability of livestock operations or with proper range management and will not affect adversely the established local economy, and provided further, that no such transfer will be allowed without the written consent of the owner or owners and any encumbrances of the dependent commensurate or commensurate property from which the transfer is to be made and provided further, that such transfer shall not in any case become effective until approved by the grass conservation commission.

The provision of the section shall not be construed to apply to trespass violations.

When such application is presented to the board the secretary upon the direction of the board shall give notice thereof, setting forth in general said application and the time and place of hearing thereon as fixed by the board, and a copy of said notice shall be given or mailed to the applicant and shall be published for at least once a week for two successive weeks prior to such meeting in a newspaper published or generally circulated within the district, and said notice shall also be posted for at least two full weeks prior to such meeting in three (3) public places within said district, and the date of hearing must be at least fifteen (15) days from the first publication of said notice, and at such hearing the directors shall fully hear and determine such application and objections thereto if any.

Upon the allowance of a transfer under this section, the property from which the transfer is made shall lose its grazing preference to the extent of the preference transferred.

All expenses involved under the application shall be borne by the applicant.

When the land to which a preference is attached shall change its control or ownership such preference shall change with the land, provided, that the person to which such control or ownership changes shall secure a non-use permit or shall pay the usual grazing fees. If such person fails to secure such non-use permit or refuses to pay such grazing fees, the preferences may be revoked by the state district. If any person controls but does not own land and does not secure a non-use permit and refuses to pay grazing fees, the state district shall notify the owner of such land by registered mail that the preference attached to such land will be revoked unless such owners shall pay the usual grazing fees to the state district within sixty (60) days from the time of receipt of such notice. The state district may revoke such preference if the owner or mortgagor does not pay such fees or secure a non-use permit.

If any permittee fails to pay grazing fees or assessments levied by the state district, or fails to obtain a non-use permit or violates any of the rules and regulations of the state district, the state district may notify such permittee and owner of such land by registered mail that the preference attached to such land will be revoked unless such grazing fees or assessments are paid or such permittee ceases to violate the rules and regulations laid down by the district within sixty (60) days from the time of receipt of such notice. The state district may revoke such preference if the permittee or owner fails to pay such charges or make such compliance.

When a preference is revoked, it shall be detached from the dependent commensurate or commensurate property to which it was formerly appurtenant. The preference shall immediately shift to the state district. The state district may then allocate it to either dependent commensurate or commensurate property in the manner provided by its by-laws.

In all cases where notices are given permittees under this act by registered mail and addressed to the post office address of such permittee as shown by the records of such grazing district such notices shall be deemed

received by the permittee when deposited in the United States post office by the district or by the commission.

History: En. Sec. 22, Ch. 208, L. 1939;
amd. Sec. 4, Ch. 163, L. 1953.

Langen v. Badlands Cooperative State
Grazing Dist., 125 M 302, 234 P 2d 467,
469, 470.

References

State ex rel. Engle et al. v. District
Court, 119 M 319, 174 P 2d 582, 585;

46-2323. Subsequent lessees to compensate district for range improvements. Subsequent lessees or owners of land shall compensate a state district for the value of range improvements constructed with the consent of the owner, upon lands leased by the state district. Such value shall be the value at the expiration date of the lease. In the event that the owner and the state district cannot agree as to such value, the state district may either remove or abandon such improvement. In the event that the subsequent lessee and the state district cannot agree as to such value, it shall be fixed by the commission.

History: En. Sec. 23, Ch. 208, L. 1939.

46-2324. Permittee member receives share of surplus assets. Whenever a state district shall possess reserves the values of which are greater than its liabilities and the state district shall determine that a part of such reserves is in excess of its reasonable needs to operate the district, such state district may refund to the permittee members their proportionate share of such reserves as determined at the last annual accounting.

Whenever a state district shall possess reserves and physical assets, the values of which are greater than its liabilities, and a permittee member shall lose his grazing preference, he shall be entitled to receive his proportionate share of the value of such excess from the state district, as determined by the annual accounting of the state district. The state district may set off the amount of any claim it may have against such former member.

Whenever a new member shall receive a grazing preference, he shall, as a condition of receiving such preference, pay to the state district the value of the equitable interest in the physical assets and reserve fund which accrues to him by virtue of such membership. Such value shall be determined at the time of receiving such preference, and upon the basis of the determination of value of such physical assets and reserves made at the last annual accounting.

History: En. Sec. 24, Ch. 208, L. 1939;
amd. Sec. 5, Ch. 163, L. 1953.

46-2325. Dissolution of district. A state district with the written consent of three-fourths of its permittee members may at any time request the commission for the dissolution of the state district. When such consent has been given, the directors shall distribute the assets of the state district, either in items of property or in cash or in both. Distribution shall first be made to creditors up to the amount of their claims, providing that a distribution of any property must be with the consent of the commission. Distribution shall then be made to permittee members upon the basis of their proportionate interest in such assets, provided that a dis-

tribution of any property must be with the consent of the commission. If assets must be liquidated, the directors shall offer such assets for sale at public auction after publication of a notice of such sale once a week for two successive weeks in a newspaper of general circulation within the state district. A final report of all dissolution proceedings shall be made to the commission by the directors. Upon the approval of such report by the commission, it shall order such state district dissolved.

History: En. Sec. 25, Ch. 208, L. 1939;
amd. Sec. 6, Ch. 163, L. 1953.

46-2326. Running livestock at large or in herd without permit forbidden — liability of owner — penalty — procedure — release to owner. (1) No owner or person in control of livestock shall permit the same to run at large, or under herd, within the exterior boundaries of any state district, unless the owner or person in control of such livestock shall first obtain a grazing permit for same from such state district; and the owner or person in control of such livestock running at large, or under herd, within a state district, without a permit from the district, or in excess of such permit, shall be liable for all damages sustained thereby by any member, permittee or state district. If any such livestock wrongfully enters upon premises within such district, the owner or person in control of such trespassing livestock, who willfully or negligently permits same to run at large within the district, without first obtaining a permit therefor from the district, shall be guilty of a misdemeanor and upon conviction thereof, shall be punished by fine not less than ten dollars (\$10.00), nor more than five hundred dollars (\$500.00), and in addition to said punishment, shall be liable for all damages sustained thereby to the party entitled thereto; provided that this provision shall not require any person to obtain a grazing permit to graze livestock upon land owned or controlled by him within such state district, if the stock so grazed is restrained from running at large within such state district and from grazing upon any other lands within the state district.

(2) The state district or its duly authorized agent controlling the land upon which such wrongful entry is made by trespassing livestock, may taken into its possession such livestock and shall reasonably care for same while in its possession and may retain possession of said livestock and have a lien and claim thereon as security for payment of such damages and reasonable charges for the care of said livestock while in its possession and may retain possession of said livestock and have a lien and claim thereon as security for payment of such damages and reasonable charges for the care of said livestock while in its possession. The state district taking up such livestock shall, within seventy-two (72) hours after taking possession thereof, notify said owner, owners, or person in charge thereof, by a notice in writing, describing said livestock by number of animals and brands thereon, if any, the amount of damages claimed to date, and the charge per animal unit per day for caring for and feeding the same thereafter, such damages and charges not to exceed fifty cents (50c) per animal unit per day, and describing by general description, the location of the premises upon which said livestock is held, and requiring such owner or owners,

within ten (10) days after receiving said notice, to take said livestock away after making full payment of all damages and costs of said livestock.

(3) In case the parties do not agree as to the amount of damages, the state district taking up such livestock, may, at the expense of the owner, retain a sufficient amount of such livestock to cover the amount of damages claimed by the state district. Provided, however, that the owner may, upon furnishing a good and sufficient bond, conditioned for the payment to the state district of all sums, including costs that may be recovered by said state district in a civil action to foreclose its lien, have returned to him of all livestock held as aforesaid, and said state district shall be liable to such owner for any loss or injury to said livestock accruing through the state district's lack of reasonable care. If the state district taking up livestock shall fail to recover in a civil action a sum equal to that offered to the state district by the owner of the livestock, the former shall bear the expense of keeping and feeding same while in its possession. Such notice may be given by personal service on the said owner, owners or person in charge thereof, or by leaving said notice at his usual place of residence with some member of his family over the age of fourteen (14) years, or by sending said notice by prepaid registered mail, addressed to his last known place of residence. Said service by registered mail shall be deemed complete upon the deposit of said notice in the post office.

(4) Upon demand, the state district or its authorized agent controlling the land, or party in charge of such livestock, shall release and deliver possession of such livestock to the owner or person entitled thereto, upon payment of damages and charges; but said payment of damages and charges shall not act as a bar to the prosecution of said person, owner or persons in control of such livestock, as hereinbefore provided. If the amount of damages or costs demanded by the party taking up such livestock is in excess of the actual damage and actual costs, the owner or person in charge of such livestock, may pay same under protest and thereafter sue to recover the amount paid in excess of the actual damages and reasonable costs, provided suit to recover same is filed in the district court within sixty (60) days after payment.

(5) If after due diligence to discover the owner or possessor of such livestock, such owner or possessor can not be found, or the ownership of such livestock discovered, the state district taking up such livestock, or said owner or claimant shall refuse to pay the amount of damages or charges, or furnish bonds therefor, as herein provided, the party taking up such livestock shall, within ten (10) days from the time that said livestock was taken up, deliver to the sheriff or a constable of the county in which the livestock was taken up, a statement containing the information required to be given in the notice, hereinbefore set out, and in addition thereto, he shall mail, by prepaid registered mail, a copy of said statement addressed to the nearest state livestock inspector. Upon receipt of such statement, the sheriff or constable shall proceed to advertise and sell, at public auction, the livestock so taken up.

(6) Such livestock shall be sold on five (5) days' notice posted at the courthouse of each county in which any portion of the district lies and posted in three (3) public places in such county, one of which shall

be within the district. Provided, however, that such sheriff may require from the state district a good and sufficient bond, conditioned that the state district has used reasonable diligence to discover the owner of such stock and to notify him in the premises and that all requirements of law on the part of the state district to be performed in the premises have been performed and indemnifying the sheriff against all liability for the sale of said livestock except as to his own failure to perform the things required of him by law.

(7) The proceeds of the sale shall, by the sheriff, after first deducting his costs and expenses, be applied to the discharge of the claims and the costs of the proceedings in selling the property and to the payment of the damages, claims and costs of the party taking up such livestock, and the remainder, if any, may be paid over to the owner of such livestock, if known, and if the owner is not known, then such remainder shall be deposited with the county treasurer, who shall keep the same in a public fund to be designated state grazing district fund (giving the name of the district). A separate fund, styled as above, shall be kept by the county treasurer for each of said districts within his county. The county treasurer shall make a record of the number and type of animals sold and the brands on same, if any, the amount received for same and the amount of deductions, which record shall be open to public inspection; and any person making claim to the board of county commissioners at any time within one year from date of sale, of ownership of such livestock and submitting proof of ownership to such board, with such claim to the satisfaction of such board, shall be entitled to receive such excess received from the sale of such livestock. Any money received from the sale of any such livestock, which shall not be so claimed within one (1) year after such sale, shall, at the expiration of said period, be transferred to the general fund of the county.

(8) No officer, board or employee of any county or of any state district, nor any employee of such officer or board shall be liable for any act performed in good faith in discharging official duties under this act; and all such acts shall be presumed to have been in good faith and in conformity with this act.

(9) The state district, or the party taking up such trespassing livestock, may cause same to be impounded at any suitable place within the state district, or within five (5) miles from the exterior boundaries thereof, and such livestock shall be deemed legally impounded if placed in a corral or upon land enclosed by a legal fence or placed in charge of a herder or herders.

(10) Regarding fences within the external boundaries of state districts; the cost of construction and maintenance of fence enclosing lands controlled by any member, non-member or state district within the external boundaries of such state district, shall be borne by such member, non-member or state district, unless otherwise provided for in the duly approved by-laws of such state district.

(11) In the event of the adoption of provisions to the by-laws of a state district whereby the cost of construction and maintenance of fence is to be distributed proportionately among the parties affected by such

cost of construction and maintenance of fence, the state district's proportionate share of such costs and maintenance shall be financed only by assessments levied by the state district against the permittee members of the district upon consent thereto by fifty-five percentum (55%) of such permittee members.

History: En. Sec. 26, Ch. 208, L. 1939; amd. Sec. 7, Ch. 199, L. 1945.

Applies Where Livestock Wilfully Driven upon Lands

This subdivision applies to cases where livestock is wilfully driven upon the property within the external boundaries of the district, either for the purpose of grazing the stock there or for the purpose of crossing the land with the stock. *McKee v. Clark*, 115 M 438, 442, 144 P 2d 1000.

Authority of Legislature

Fact that the grazing district is exempted from building or paying for any part of partition fences, is a matter falling within legislative discretion. *Thompson v. Tobacco Root Co-op. State Grazing Dist.*, 121 M 445, 193 P 2d 811, 817.

Constitutionality

Whether or not this section is unconstitutional as denying due process of law to those owners who cannot be found cannot be raised by persons who do not fall in that class. *Thompson v. Tobacco Root Co-op. State Grazing Dist.*, 121 M 445, 193 P 2d 811, 814.

Contention that since statute makes no provision as to who shall determine sufficiency of bond it must of necessity be for the district to determine and is therefore unconstitutional cannot be raised by one who has not been adversely affected by the approval of the bond by the district. *Thompson v. Tobacco Root Co-op. State Grazing Dist.*, 121 M 445, 193 P 2d 811, 816.

This statute is not unconstitutional as denying due process in the matter of ascertaining the amount of damages and

costs due and also in ascertaining whether the statute applies in a particular case since all these issues can be determined judicially by depositing bond as security in lieu of the livestock taken. *Thompson v. Tobacco Root Co-op. State Grazing Dist.*, 121 M 445, 193 P 2d 811, 816.

Construction

This subdivision applies only when the grazing is done upon land owned or controlled by the district, without regard of whether or not the land is fenced or whether the animals merely stray thereon or are driven upon it; where animals trespass upon unfenced land of a non-member or permittee of a grazing district, and there is no evidence that they were herded upon the land or of overstocking of neighboring land and consequent trespass upon lands of others, the open range law applies. *McKee v. Clark*, 115 M 438, 442, 144 P 2d 1000.

Gives Right to Impound to District, Not to Individual

The owner of unfenced ranch lands located within the exterior boundaries of a state grazing district, who is neither a member nor a permittee of the district, and upon whose property livestock trespassed, has no right to impound the animals nor to recover damages for the trespass and compensation for their care and feed during the time impounded, in his action to foreclose the lien upon the animals granted by section 46-1410, this chapter giving the right to impound to the district, not to an individual placed as was plaintiff. *McKee v. Clark*, 115 M 438, 441, 144 P 2d 1000.

46-2327. Remedies are supplemental. This act shall not be interpreted to repeal or abolish any other legal remedies, which a member, a permittee, or a state district may now have against trespassing livestock, or the owner or persons in control thereof and the remedies provided by this act are additional and supplemental to the remedies provided by any other laws of the state of Montana.

History: En. Sec. 8, Ch. 199, L. 1945.

46-2328. Saving provision relative to those in armed services. Nothing contained in this act shall be held to suspend or remove any privileges and immunities which may be granted to those in the armed services of the United States as provided in what is commonly known as the soldiers and

sailors civil relief act of 1940, as amended, for the period of his or her service and for a period of six (6) months thereafter.

History: En. Sec. 9, Ch. 199, L. 1945.

46-2329. Grazing permits to owners of land not controlled by district.

When any land is situated within the boundaries of a state district and is not leased or controlled by said district and not surrounded by a legal fence, any person owning or controlling such lands shall have the right to obtain a grazing permit from the state district, the size of which shall be determined by the carrying capacity of such land, full consideration being given for location of necessary stock water. The use of such permit shall be subject to all regulations by the state district. If the person owning or controlling such land declines to secure such permit, or fails to lease such land to the state district at a fair lease rental and fails to fence such land at his own expense, he shall not be entitled to recover damages, for trespass by stock grazing under permit, but the state district shall not issue a permit to use the carrying capacity of such land. Farming lands lying within the external boundaries of a state district shall be protected by the owner or lessee to the extent of a legal fence as described in subsection (1) of section 46-1401. The state district or its members shall not be liable for damages unless such farming lands are protected by a sufficient fence as described in this section.

History: En. Sec. 27, Ch. 208, L. 1939.

Constitutionality

This act does not unreasonably discriminate against nonmembers who have lands in the district since they have ample opportunity to protect themselves and their

rights. *Thompson v. Tobacco Root Co-op. State Grazing Dist.*, 121 M 445, 193 P 2d 811, 816.

References

McKee v. Clark, 115 M 438, 441, 144 P 2d 1000.

46-2330. State grass conservation fund. There is hereby created a fund to be known as the state grass conservation fund, which shall consist of funds as may be appropriated by the state legislature and placed to the credit of such fund. Any funds in the state grazing fund as created by Chapter 194, Laws of 1935, are hereby transferred to the state grass conservation fund created by this act. However, upon application filed within twelve (12) months after the passage and approval of this act by any district electing not to come under the provisions of this act the proportionate part of the fees remaining within this present state grazing fund shall be refunded to said noncooperating grazing district.

History: En. Sec. 28, Ch. 208, L. 1939.

NOTE.—Chapter 194, Laws 1935, referred to above, was repealed by Sec. 32, Ch. 208, Laws 1939.

46-2331. Fees may be imposed by commission against districts. The state grass conservation commission shall have authority and right to impose such fees against the several state grazing districts of the state of Montana and in an amount not in excess of five cents (5c) per animal unit based upon the number of animal units per year for which the district grants permits, to defray any or all expenses created by the state grass conservation commission, and said state grass conservation commission shall from such fees and collections repay to the state treasurer of Montana any and all appropriations provided by the state of Montana for

the establishment of this commission and the administration of this act when so collected. When such appropriation by the state of Montana is repaid, the balance of such funds shall be held in the state grass conservation fund, herein created, to be expended by order and direction of the state grass conservation commission for the further administration of the commission, and thereafter said commission shall be maintained by funds obtained from the livestock fees hereinbefore provided. If any state district fails or refuses to pay such fee or fees on or before the first day of May of each year, and after such district shall have been provided with a full report from the commission of all moneys collected and expended by it for its fiscal year next preceeding that date, the commission shall have authority to compel and levy, collection and payment by writ of mandate or other appropriate remedy against said state district.

History: En. Sec. 29, Ch. 208, L. 1939.

46-2332. Range for wild game animals. In each state district a sufficient carrying capacity of range will be reserved for the maintenance of a reasonable number of wild game animals, to use the range in common with livestock grazing in the district. The Montana grass conservation commission may act in an advisory capacity to the state fish and game commission in the protection of wild-life within the boundaries of all grazing districts. The Montana grass conservation commission shall encourage the transfer of beaver from streams where they are doing damage to other streams where they are needed.

History: En. Sec. 30, Ch. 208, L. 1939.

CHAPTER 24

RENDERING OR DISPOSAL PLANTS—LICENSING—REGULATION

- Section 46-2401. Licensing of rendering or disposal plants.
 46-2402. Power and authority of the livestock sanitary board to promulgate and enforce reasonable rules and regulations.
 46-2403. Power of sanitary board to restrain operation of rendering plant.
 46-2404. Power of livestock sanitary board to revoke license of rendering plant.
 46-2405. Power to administer oaths, subpoena witnesses, and receive evidence.
 46-2406. Penalty for violation.
 46-2407. Dead or fallen animal rendering plants—definitions.
 46-2408. Identification tags.
 46-2409. Dead or fallen animal records.
 46-2410. Animals to be tagged.
 46-2411. Production of dead or fallen animal record on demand—animal not to be removed during transportation—investigation.
 46-2412. Disposal of hides—inspection—filing of dead or fallen animal record.
 46-2413. Penalty for violation of sections, 46-2407 to 46-2412.

46-2401. Licensing of rendering or disposal plants. It shall be unlawful for the following class of business to operate within the state of Montana without first securing a license from the livestock sanitary board, to-wit:

All rendering or disposal plants or establishments that are intended to be operated for the disposal of the bodies or parts of bodies of animals or fowl in any manner whatsoever, except for human consumption.

The license herein provided shall expire on the last day of December of the current year in which it is issued. A license fee of five dollars (\$5.00) shall be charged for all licenses issued under the provisions of this act.

All license fees collected shall be paid into the general fund of the state of Montana.

History: En. Sec. 1, Ch. 148, L. 1949.

Collateral References

Animals \Rightarrow 15.

3 C.J.S. Animals § 38.

46-2402. Power and authority of the livestock sanitary board to promulgate and enforce reasonable rules and regulations. The livestock sanitary board is hereby authorized and empowered to promulgate and enforce such reasonable rules, regulations or orders as said board may deem necessary or proper for the supervision, control and inspection of rendering or disposal plants or establishments, their standards and methods of operation and their sanitary conditions, and for the supervision, control and inspection of any and all equipment thereof, where said rendering or disposal plants or establishments are intended to be operated for the disposal of bodies, or parts of bodies, of dead animals or fowl in any manner whatsoever, except for human consumption. All vehicles, and all equipment appertaining thereto, used for the transportation of such bodies, or parts of bodies, shall be subject to such rules, regulations or orders, or parts thereof, promulgated by the livestock sanitary board, as are applicable thereto. Provided, however, that nothing in this act shall be construed to apply to the slaughtering and handling of animals or fowl for human consumption.

History: En. Sec. 2, Ch. 148, L. 1949.

46-2403. Power of sanitary board to restrain operation of rendering plant. The livestock sanitary board or its agent is hereby authorized and empowered to restrain the operation of any rendering or disposal plant or establishment engaged in the collection or handling of the bodies, or parts of bodies, of dead animals or fowl, where such operation is carried on in violation of the laws of Montana, or the rules, regulations or orders of the livestock sanitary board, after a hearing held on five (5) days' written notice of such hearing to the licensee. Provided, however, such restraining order may be issued without notice of hearing where, in the discretion of the livestock sanitary board or its agent, the violation constitutes a menace to public health requiring immediate and summary abatement. Such licensee shall have the right of appeal to the district court, upon giving written notice of appeal to the restraining authority within ten (10) days after service of the restraining order, whether such order be made upon hearing or summarily. Such written notice of appeal shall not stay execution of the restraining order when such restraining order is issued without hearing to restrain a menace to public health requiring immediate and summary abatement. Where the restraining order is issued after hearing, the hearing before the district court shall be upon the record, together with any other or additional evidence which may be adduced. Where the order is issued without hearing, the hearing before the district court shall be upon evidence adduced thereat. Where the appeal is from

an order issued after hearing, appellant shall pay the cost of the transcript, which must be filed not more than thirty (30) days from the date of filing notice of appeal, provided, however, the court may extend the time for filing the transcript in its discretion.

History: En. Sec. 3, Ch. 148, L. 1949.

46-2404. Power of livestock sanitary board to revoke license of rendering plant. Such licenses to operate rendering or disposal plants may be revoked at any time by the livestock sanitary board or the state veterinary surgeon when they, or he, shall determine that a person to whom the license is issued has failed to comply with any statute of the state of Montana, or any rules, regulations or orders of the livestock sanitary board, and upon hearing before the revoking authority, after ten (10) days' written notice. Such licensee shall have the right of appeal to the district court, upon giving written notice of appeal to the revoking authority within ten (10) days after service of the order of the revoking authority. Service and filing of such notice of appeal shall stay execution of the order. The hearing before the district court shall be upon the record together with any other or additional evidence which may be adduced. Appellant shall pay the costs of the transcript, which must be filed not more than thirty (30) days from the date of filing notice of appeal, provided, however, the court may extend the time for filing the transcript, in its discretion.

History: En. Sec. 4, Ch. 148, L. 1949.

46-2405. Power to administer oaths, subpoena witnesses, and receive evidence. Hearings held under this act, for either revocation of licenses or to restrain operation, shall be held by the livestock sanitary board or its duly authorized agent; and the livestock sanitary board or its agent is hereby authorized to administer oaths, subpoena witnesses, and receive evidence in order to carry out the provisions of this act.

History: En. Sec. 5, Ch. 148, L. 1949.

46-2406. Penalty for violation. Operation of a rendering or disposal plant or establishment without a license from the livestock sanitary board, or operation of a rendering or disposal plant or establishment in violation of a restraining order or after revocation of license shall constitute a misdemeanor, punishable by a fine of not less than fifty dollars (\$50.00) nor more than two hundred fifty dollars (\$250.00) for each day of such operation.

History: En. Sec. 6, Ch. 148, L. 1949.

46-2407. Dead or fallen animal rendering plants—definitions. When used in this act:

(a) "Dead or fallen animal" has a restricted meaning and means the carcass or dead body of any cow, ox, bull, stag, calf, steer, heifer, horse, mule, mare, colt, foal or filly, the continued existence of which would create a public nuisance and constitute a hazard to the public health, which is not killed for human consumption, and is to be salvaged for the purpose of obtaining the hide and grease or fat from such animal.

(b) "Licensed rendering plant" and "licensed renderer" mean a person, co-partnership, association or corporation, which is engaged in the

disposal of dead or fallen animals and which is licensed by the livestock sanitary board of the state of Montana.

History: En. Sec. 1, Ch. 87, L. 1949.

46-2408. Identification tags. Licensed rendering plants shall provide themselves with serially-numbered metal identification tags of a size and design to be prescribed by the livestock commission of the state of Montana and in a number series to be assigned by the secretary of the livestock commission.

History: En. Sec. 2, Ch. 87, L. 1949.

46-2409. Dead or fallen animal records. When a licensed renderer or his agent receives a dead or fallen animal, he shall present to the person or persons, corporation, or association which has requested him to remove such dead or fallen animal, the following dead or fallen animal record for execution in quadruplicate, the original copy of which shall accompany the carcass and hide until the hide is officially inspected for marks and brands, the duplicate of which shall be retained by the licensed renderer for such time as the livestock commission shall in its discretion require, the triplicate of which shall be filed within seven (7) days after its execution and without cost in the office of the county clerk and recorder of the county wherein the animal is received by the licensed renderer or his agent, and the quadruplicate of which shall be retained by the person or persons, corporation, or association which requested removal of such dead or fallen animal:

DEAD OR FALLEN ANIMAL RECORD

Original accompanies carcass and hide until officially inspected.

Duplicate to be retained by licensed renderer.

Triplicate to be filed in office of county clerk and recorder of county from which dead animal is removed.

Quadruplicate to be retained by person or persons, corporation, or association requesting removal of dead or fallen animals.

This certifies that I _____,
of _____, Montana, have this _____ day of _____,
19____, requested and authorized the _____

(Name of Licensed Renderer)

to remove the following described dead animals from _____

(Location of dead animal, including county)

No. Of Head	Description	Brands	Position	Renderer's Tag Number	Inspector's Tag Number
				(To be filled in by renderer)	(To be filled in by inspector)

I have checked the following appropriate statement:

- ☐ I am the owner of the above-described animal(s).
- ☐ I do not know who is the owner of the above-described animal(s).
- ☐ I am not the owner of the above-described animal(s), but I know
the owner to be

(Signed)

To be executed by licensed renderer or his agent:

The above dead animal record was executed in my presence and at my request this day of, 19.....

.....
(Signature)

.....
(Company)

.....
(Truck No.)

History: En. Sec. 3, Ch. 87, L. 1949.

Cross-Reference

Duty of rendering plants with respect
to animals killed by railroad, sec. 72-409.

46-2410. Animals to be tagged. At the time of the execution of the dead or fallen animal record, provided for above, the licensed renderer or his agent who receives a dead or fallen animal shall tag such animal with one of the serially numbered identification tags provided in section 46-2408, and shall at the same time record the number of said tag in the proper space provided therefor on the dead or fallen animal record.

History: En. Sec. 4, Ch. 87, L. 1949.

46-2411. Production of dead or fallen animal record on demand—animal not to be removed during transportation—investigation. A licensed renderer or his agent who has received a dead or fallen animal shall, upon demand of any livestock inspector, sheriff, undersheriff, deputy sheriff, or other peace officer, produce for inspection of such officer an executed dead or fallen animal record identifying each dead or fallen animal he may be transporting when such demand is made, and failure to produce such executed dead or fallen animal record upon such demand shall constitute a misdemeanor punishable, upon conviction, as hereinafter provided; provided, however, that under no circumstances shall a licensed renderer or his agent endanger the public health by removing or being required to remove any dead or fallen animals from the vehicle in which they are being transported until such vehicle arrives at a licensed rendering plant where the dead or fallen animal shall be handled and disposed of in conformity to the rules and regulations of the livestock sanitary board; provided further, however, that if any livestock inspector, sheriff, undersheriff, deputy sheriff, or other peace officer has reasonable and probable cause to believe the dead or fallen animals being transported by a licensed renderer or his agent were obtained by a commission of a felony, he may take the licensed renderer or his agent, as well as the vehicle, into custody and proceed with such licensed renderer or his agent to the rendering plant of such licensed renderer, where inspection of marks and brands and immediate investigation shall be made.

History: En. Sec. 5, Ch. 87, L. 1949.

46-2412. Disposal of hides—inspection—filing of dead or fallen animal record. When a licensed renderer or his agent disposes of the hides from such dead or fallen animals, such hides shall be handled and inspected for marks and brands in conformity to the provisions of sections 46-1101, 46-1102, 46-1106 to 46-1111. The sheriff, deputy sheriff, or person designated by the board of county commissioners or the livestock commission who makes such inspection for marks and brands in conformity to sections 46-1101, 46-1102, 46-1106 to 46-1111 shall complete the original dead or fallen animal record which accompanies the hide by inserting thereon, in the proper space provided therefor, his inspector's tag number; and he shall file the completed original dead or fallen animal record without cost in the office of the county clerk and recorder, together with the duplicate certificate of inspection required to be filed by said sections 46-1101 46-1102, 46-1106 to 46-1111.

History: En. Sec. 6, Ch. 87, L. 1949.

46-2413. Penalty for violation of sections 46-2407 to 46-2412. Any person or persons who violate any of the provisions of this act, or who wilfully falsifies any of the records required by this act to be kept, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than fifty dollars (\$50.00), nor more than two hundred fifty dollars (\$250.00), or by imprisonment in the county jail for a period of not less than thirty (30) days nor more than ninety (90) days, or by both such fine and imprisonment.

History: En. Sec. 7, Ch. 87, L. 1949.

CHAPTER 25

ARTIFICIAL INSEMINATION OF ANIMALS AND POULTRY

- Section 46-2501. Statement of purpose.
 46-2502. Definition of "sire."
 46-2503. Definition of "artificial insemination."
 46-2504. License necessary to practice artificial insemination.
 46-2505. Act to be administered by Montana livestock sanitary board.
 46-2506. Applicant's character and qualifications.
 46-2507. Application for license—fees.
 46-2508. Examination.
 46-2509. Annual expiration of license—right of livestock sanitary board to require examination on renewal of license—effect of delinquency of license.
 46-2510. Revocation or suspension of licenses.
 46-2511. Livestock sanitary board to maintain register.
 46-2512. Licensees to maintain certain records.
 46-2513. Penalties.
 46-2514. Artificial inseminators from other states.
 46-2515. Only certain sires to be used for artificial insemination.

46-2501. Statement of purpose. The practice of artificial insemination of animals and poultry in the state of Montana is hereby declared to be subject to regulation by the Montana livestock sanitary board, as prescribed in this act. Nothing herein shall be interpreted so as to require veterinarians duly licensed by the state of Montana to acquire the license hereinafter provided, but all such veterinarians shall be subject to all other provisions of this act. Nothing herein shall be interpreted to permit persons who practice artificial insemination who are not duly licensed as veteri-

narians to use or prescribe medicine, including chemical drugs, perform surgical operations, practice obstetrics, or otherwise practice veterinary medicine in any of its phases, other than as specifically permitted by this act.

History: En. Sec. 1, Ch. 37, L. 1953.

Collateral References

Animals 17.

3 C.J.S. Animals § 40.

46-2502. Definition of "sire." "Sire," as used herein, shall mean the male animal of any species, including, but not limited to, bulls, stallions, rams, boars, studs, bucks and cocks.

History: En. Sec. 2, Ch. 37, L. 1953.

46-2503. Definition of "artificial insemination." "Artificial insemination," as used herein shall mean the fertilization of or the attempt to fertilize the ova of the female animal by placing and implanting by artificial means in the genital tract of the female animal the seminal fluid obtained from the male animal.

History: En. Sec. 3, Ch. 37, L. 1953.

46-2504. License necessary to practice artificial insemination. It is unlawful for any person to practice artificial insemination of animals except as otherwise provided herein, unless he shall first obtain a license so to do as provided in this act. No license shall be required of or by any person to perform artificial insemination upon his own domestic animals.

History: En. Sec. 4, Ch. 37, L. 1953.

46-2505. Act to be administered by Montana livestock sanitary board. This act shall be administered by the livestock sanitary board and in addition to any powers now conferred by law the livestock sanitary board shall have the following powers and duties:

(a) To conduct examinations to ascertain the qualifications and fitness of applicants to practice artificial insemination in the state of Montana.

(b) To prescribe rules and regulations for a fair and wholly impartial examination of candidates to practice artificial insemination.

(c) To prescribe rules and regulations defining a course on artificial insemination and sanitation and to determine the sufficiency of any such course for the purpose of qualifying persons to be licensed under this act.

(d) To conduct hearings or proceedings to revoke licenses of persons practicing under this act and to revoke such licenses for due cause, or upon such hearing to refuse, for due cause, a renewal of license to any person practicing artificial insemination.

(e) To promulgate such reasonable rules, regulations, and orders not contrary to the provisions of this act, when required, as may be necessary for the proper administration of this act, specifically including, but not limited to, rules, regulations, and orders relating to the means for preservation of semen and the use of semen imported into the state of Montana from other states, territories, and possessions of the United States and foreign countries.

History: En. Sec. 5, Ch. 37, L. 1953.

46-2506. Applicant's character and qualifications. Every applicant for a license to practice artificial insemination as in this act defined shall be a person of good moral character and a graduate of such a course in artificial insemination and sanitation, as may be prescribed by the livestock sanitary board or any equivalent course.

History: En. Sec. 6, Ch. 37, L. 1953.

46-2507. Application for license—fees. Application for a license shall be made in writing by the applicant at such time, in such form and accompanied by such proof of applicant's fitness to practice as the livestock sanitary board may from time to time prescribe. The livestock sanitary board is authorized to charge every applicant a license fee of ten dollars (\$10.00) which shall accompany the application; provided that those persons actually engaged in the practice of artificial insemination within the state of Montana at the time of the passage and approval of this act shall be exempted from the payment of the \$10.00 application fee. The request of each person so licensed for annual renewal license shall be accompanied by a fee of two dollars and fifty cents (\$2.50). All receipts from the above-mentioned license payments shall be placed in the general fund.

History: En. Sec. 7, Ch. 37, L. 1953.

46-2508. Examination. Each applicant shall be examined in writing by a duly appointed employee, or an officer of the livestock sanitary board. Such written examination shall be given to determine the knowledge of such applicant of the practice of artificial insemination. Such examination shall consist of such questions and cover such phases of the practice as may be prescribed from time to time by the said livestock sanitary board.

No applicant shall be granted a license who shall fail to satisfactorily pass the examination.

In addition to such written examination, the applicant shall be examined in the art and skill of artificial insemination in such a manner and by such methods as shall reveal applicant's ability to practice artificial insemination.

Should an applicant who is required to procure a license as a prerequisite for engaging in the practice of artificial insemination fail to pass the required examination, the applicant may be re-examined at any regular or special examination thereafter upon the payment of ten dollars (\$10.00) re-examination fee.

History: En. Sec. 8, Ch. 37, L. 1953.

46-2509. Annual expiration of license—right of livestock sanitary board to require examination on renewal of license—effect of delinquency of license. If the applicant shall pass such examination, as is herein provided to be given, and shall show that he is a person of good moral character, and that he possesses the qualifications required by this act to entitle him to a license to practice artificial insemination, he shall be entitled to a license authorizing him to practice such artificial insemination within the state of Montana.

If the applicant shall satisfactorily pass the examination required, has made all other requirements provided for, and has shown himself to be

otherwise possessed of the necessary qualifications, he shall have issued to him a license to practice artificial insemination in the state of Montana. All licenses shall expire prior to the fifteenth (15th) day of January of each and every year at which time all licenses shall have been renewed. No examination shall be required on the renewal of a license, provided that the livestock sanitary board may require, if it deems it advisable, that any applicant for a renewal license shall take and pass an examination before his license be renewed to him. If the license has not been renewed on or before the first (1st) day of July next following the prescribed date for renewal, it will be necessary for such an applicant to take and satisfactorily pass an examination and meet all other requirements provided for by these rules and regulations before a license can be issued to him.

History: En. Sec. 9, Ch. 37, L. 1953.

46-2510. Revocation or suspension of licenses. The livestock sanitary board may either refuse to issue or refuse to renew or suspend or revoke any license upon any of the following grounds:

- (a) Fraud or deception in procuring the license.
- (b) The publication or use of any untruthful or improper statement, or representation with the view of deceiving the public, or any client or customer in connection with the practice of artificial insemination.
- (c) The conviction of a felony as shown by a certified copy of the record of the court of conviction.
- (d) Habitual intemperance in the use of intoxicating liquors, or habitual addiction to the use of morphine, cocaine, or other habit forming drugs.
- (e) Immoral, unprofessional, or dishonorable conduct manifestly disqualifying the licensee from practicing artificial insemination.
- (f) Gross malpractice.
- (g) Continued practice by a person knowingly having an infectious or contagious disease communicable to animals.
- (h) Violation of any of the provisions of this act or of any of the rules, regulations or orders promulgated by the livestock sanitary board to carry out the provisions of this act.

The livestock sanitary board may neither refuse to issue, nor refuse to renew, nor suspend, nor revoke any license, however, for any such cause, unless the person accused has been given at least twenty (20) days' notice in writing of the charge against him, and a public hearing by the livestock sanitary board is first had.

Such hearing shall be held by the livestock sanitary board or its duly authorized agent; and the livestock sanitary board or its duly authorized agent is hereby authorized to administer oaths, subpoena witnesses and compel the production of relevant books and papers and receive evidence in order to carry out the provisions of this act.

History: En. Sec. 10, Ch. 37, L. 1953.

46-2511. Livestock sanitary board to maintain register. The livestock sanitary board shall keep on file a register for all applicants for licenses, rejected applicants, and persons permitted to practice under this act.

History: En. Sec. 11, Ch. 37, L. 1953.

46-2512. Licensees to maintain certain records. Every person practicing artificial insemination, as herein defined, in the state of Montana must make and keep a record showing each artificial insemination performed by him, the date thereof, the owner of the animal so inseminated, and the source of the semen used by him for such purpose, and such other data as may, from time to time, be required by the livestock sanitary board or respective livestock breed associations where registered livestock are inseminated. Such records shall, at all times, be open to the livestock sanitary board or its duly authorized representatives for examination and inspection, and in addition thereto the method and procedure used by any person in the practice of artificial insemination under this act may be examined, inspected, and investigated by the livestock sanitary board or its duly authorized representative at any time.

History: En. Sec. 12, Ch. 37, L. 1953.

46-2513. Penalties. Any person who practices or attempts to practice artificial insemination, who publicly advertises for the purpose of practicing artificial insemination, or who uses any word or designation, title, or abbreviation calculated to induce belief that he is qualified to practice artificial insemination, without a license as provided in this act, shall be guilty of a misdemeanor, and shall be punished by a fine of not less than one hundred dollars (\$100.00) or by imprisonment in the county jail for not less than thirty (30) days, or by both such fine and imprisonment.

History: En. Sec. 13, Ch. 37, L. 1953.

46-2514. Artificial inseminators from other states. Artificial inseminators coming from other states, who have passed the requirements of their respective states, may be permitted to practice in the state of Montana, subject to the payment of the necessary fees, but the standards and examinations conducted by the other states must first be passed upon and approved by the livestock sanitary board.

History: En. Sec. 14, Ch. 37, L. 1953.

46-2515. Only certain sires to be used for artificial insemination. All sires used for artificial insemination must be free from brucellosis, vibriosis, trichomoniasis, dourine, posthitis, pullorum disease and all other transmissible, infectious, contagious diseases and all transmissible hereditary malformations and other detrimental or undesirable characteristics. Proof of fitness and purity of breed of such sires shall be provided to the livestock sanitary board by the owner or parties providing such sires for artificial insemination.

Semen imported into the state of Montana from other states, territories and possessions of the United States or from foreign countries shall not be used by any artificial inseminator until proof is made to the satisfaction of the livestock sanitary board that the sire from which such semen was taken was free from the above-mentioned diseases.

History: En. Sec. 15, Ch. 37, L. 1953.

CHAPTER 26

REGULATION OF INDUSTRY TREATING OR FEEDING GARBAGE
TO SWINE AND OTHER ANIMALS

- Section 46-2601. Definitions when used in this act.
46-2602. Licenses.
46-2603. Applications for licenses.
46-2604. Power and authority of livestock sanitary board to promulgate and enforce reasonable rules and regulations.
46-2605. Entry of premises for inspection—keeping of records.
46-2606. Power of sanitary board to restrain operation of garbage feeder.
46-2607. Power of sanitary board to revoke license of garbage feeder.
46-2608. Power to administer oaths, subpoena witnesses, and receive evidence.
46-2609. Cooking or other treatment of garbage.
46-2610. Garbage originating on or removed from airplanes shall not be treated or fed.
46-2611. Penalties.

46-2601. Definitions when used in this act. (a) "Garbage" means putrescible animal and vegetable wastes resulting from the handling, preparation, cooking and consumption of foods, including animal carcasses or parts thereof. (b) "Person" means the state, any municipality, political subdivision, school district, institution, public or private corporation, individual, partnership, or other entity. (c) "Garbage feeder" means a person who handles, prepares, cooks, or otherwise treats garbage to feed to swine or other animals, as well as a person who feeds garbage to swine or other animals.

History: En. Sec. 1, Ch. 63, L. 1953.

46-2602. Licenses. (a) It shall be unlawful for any person to handle, prepare, cook or otherwise treat garbage to feed to swine or other animals, or to feed garbage to swine or other animals, without first securing a license therefor from the livestock sanitary board, provided, however, that one license, issued to the entrepreneur, corporation or individual responsible for a particular garbage feeding enterprise shall cover all garbage feeders concerned with enterprise. The license herein provided shall expire on the last day of December of the current year in which it is issued. A license fee of five dollars (\$5.00) shall be charged for all licenses issued under the provisions of this act. All license fees collected shall be paid into the general fund of the state of Montana. (b) This act shall not apply to any person who feeds only his own household garbage to swine or other animals.

History: En. Sec. 2, Ch. 63, L. 1953.

Collateral References

Licenses—11(1).
53 C.J.S. Licenses § 30.

46-2603. Applications for licenses. Any person desiring to obtain a license to feed garbage to swine or other animals shall make written application therefor to the livestock sanitary board in accordance with the rules, regulations or orders prescribed by said board applying to such applications.

History: En. Sec. 3, Ch. 63, L. 1953.

46-2604. Power and authority of livestock sanitary board to promulgate and enforce reasonable rules and regulations. The livestock sanitary

board is hereby charged with administration and enforcement of the provisions of this act, and is hereby authorized and empowered to promulgate and enforce such reasonable rules, regulations or orders as said board may deem necessary or proper for the supervision, control and inspection of persons who handle, prepare, cook, or otherwise treat garbage to feed to swine or other animals or who feed garbage to swine or other animals. Such rules, regulations or orders shall apply to and govern the method of applying for a license, standards and methods of operation, sanitary conditions of premises where garbage is treated for feeding or fed, the control and inspection of any and all equipment used to store, treat, or feed garbage and any and all equipment, including all vehicles, used for the transportation of garbage.

History: En. Sec. 4, Ch. 63, L. 1953.

46-2605. Entry of premises for inspection—keeping of records. (a) Any authorized representative of the livestock sanitary board shall have the power, and is hereby authorized, to enter at reasonable times upon any private or public property for the purpose of inspecting and investigating conditions relating to the treating of garbage to be fed to swine or other animals or the feeding of garbage to swine or other animals. (b) Any authorized representative of the livestock sanitary board may examine any records or memoranda pertaining to the treatment or feeding of garbage to swine or other animals. The livestock sanitary board may require maintenance of such records as it determines in its discretion to be necessary, relating to the operation of equipment for and procedure of treating or feeding garbage to swine or other animals, and may require copies of such records to be submitted to the said board periodically.

History: En. Sec. 5, Ch. 63, L. 1953.

46-2606. Power of sanitary board to restrain operation of garbage feeder. The livestock sanitary board or its authorized agent is hereby authorized and empowered to restrain the operation of any licensed garbage feeder whose operation is carried on in violation of the laws of Montana or the rules, regulations, or orders of the livestock sanitary board, after a hearing held on five (5) days' written notice of such hearing to the licensee. Provided, however, such restraining order may be issued without notice of hearing where, in the discretion of the livestock sanitary board or its agent, the violation constitutes a menace to public or animal health requiring immediate and summary abatement. Such licensee shall have the right of appeal to the district court, upon giving written notice of appeal to the restraining authority within ten (10) days after service of the restraining order, whether such order be made upon hearing or summarily. Such written notice of appeal shall not stay execution of the restraining order when such restraining order is issued without hearing to restrain a menace to public health requiring immediate and summary abatement. Where the restraining order is issued after hearing, the hearing before the district court shall be upon the record, together with any other or additional evidence which may be adduced. Where the order is issued without hearing, the hearing before the district court shall be upon evidence adduced thereat. Where the appeal is from an order issued after hearing,

appellant shall pay the costs of the transcript, which must be filed not more than thirty (30) days from the date of filing notice of appeal, provided, however, the court may extend the time for filing the transcript in its discretion. Such cost of transcript shall be paid to such appellant in the same manner as other court costs if such appellant ultimately prevails in such appeal.

History: En. Sec. 6, Ch. 63, L. 1953.

46-2607. Power of sanitary board to revoke license of garbage feeder.

Such licenses to feed garbage to swine or other animals may be revoked, at any time by the livestock sanitary board or the state veterinary surgeon when they, or he, shall determine that a person to whom the license is issued has failed to comply with any statute of the state of Montana, or any rules, regulations or orders of the livestock sanitary board, and upon hearing before the revoking authority, after ten (10) days' written notice. Such licensee shall have the right of appeal to the district court, upon giving written notice of appeal to the revoking authority within ten (10) days after service of the order of the revoking authority. Service and filing of such notice of appeal shall stay execution of the order. The hearing before the district court shall be upon the record together with any other or additional evidence which may be adduced. Appellant shall pay the costs of the transcript, which must be filed not more than thirty (30) days from the date of filing notice of appeal, provided, however, the court may extend the time for filing the transcript, in its discretion. Such cost of transcript shall be paid to such appellant in the same manner as other court costs if such appellant ultimately prevails in such appeal.

History: En. Sec. 7, Ch. 63, L. 1953.

46-2608. Power to administer oaths, subpoena witnesses, and receive evidence. Hearings held under this act, for either revocation of licenses or to restrain operation, shall be held by the livestock sanitary board or its duly authorized agent; and the livestock sanitary board or its agent is hereby authorized to administer oaths, subpoena witnesses, and receive evidence in order to carry out the provisions of this act.

History: En. Sec. 8, Ch. 63, L. 1953.

46-2609. Cooking or other treatment of garbage. All garbage, regardless of previous processing, shall, before being fed to swine or other animals, be thoroughly heated to at least 212°F. for at least thirty (30) minutes, unless treated in some other manner which shall be approved in writing by the livestock sanitary board as being equally effective for the protection of public and animal health.

History: En. Sec. 9, Ch. 63, L. 1953.

46-2610. Garbage originating on or removed from airplanes shall not be treated or fed. No garbage originating on or removed from airplanes landing within the state of Montana shall be treated for feeding or be fed to swine or other animals. The powers granted in section 46-2605 to representatives of the livestock sanitary board to enter upon private or public property for the purpose of inspecting and investigating conditions relating to the treating of garbage to be fed to swine or other animals or

the feeding of garbage to swine or other animals are hereby specifically declared to extend to and include the inspection and investigation of garbage disposal methods employed at airports and all facilities thereon and aircraft.

History: En. Sec. 10, Ch. 63, L. 1953.

46-2611. Penalties. Any person who shall violate any of the provisions of, or who fails to perform any duty imposed by this act shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty dollars (\$50.00) nor more than two hundred fifty dollars (\$250.00), or by imprisonment for a term of not more than six (6) months, or by both such fine and imprisonment. In addition thereto, such person may be enjoined from continuing such violation. Each day upon which such violation occurs shall constitute a separate violation.

History: En. Sec. 11, Ch. 63, L. 1953.

CHAPTER 27

COUNTY LIVESTOCK PROTECTIVE COMMITTEES

- Section 46-2701. Petition for county livestock protective committee—members—term—definitions.
 46-2702. Organization of committee—officers—meetings.
 46-2703. Powers and duties of committee.
 46-2704. Tax levy—special fund.
 46-2705. Special livestock deputy—duties—compensation.
 46-2706. Discontinuing county livestock protective committee.
 46-2707. Co-operation with committee by adjoining county.
 46-2708. County may defray part of expenses of administering the act.

46-2701. Petition for county livestock protective committee—members—term—definitions. The board of county commissioners must, upon receipt of a petition or petitions to do so, signed by at least fifty-one per cent (51%) of the owners of cattle in the county, and such petitioners owning at least fifty-five per cent (55%) of the cattle as shown by the most recent completed assessment records of the county assessor, set up a county livestock protective committee of three (3) members. Members appointed to serve on such committee shall be residents of the county engaged in the business of raising cattle. If there be in the county any organization of cattle growers the county commissioners shall give preference to names submitted by any such group for appointment to such committee. The term for which said committee members shall be appointed shall be two (2) years with two (2) members of the first committee named to serve for two (2) years, one (1) member to serve for one (1) year. Members of such committee shall receive no remuneration or reimbursement for expenses for serving on said committee. By "organization of cattle growers" as used in this section is meant any group or organization holding regular meetings at least annually, having officers, and composed predominantly of cattle growers resident in the county, with its membership open to cattle growers willing to abide by its governing rules or by-laws, and its general purpose being the promotion of the interests of its members in matters pertaining to the cattle or livestock industry, provided, however, that if owners of sheep in the county desire to come

under the provisions of this act in co-operation with owners of cattle, they shall file a like petition to that set out herein for owners of cattle, and in such case at least one member of said livestock protective committee shall be a sheep grower, and where the word "cattle" appears in this act it shall be deemed to comprehend also the word "sheep"; provided, that owners of sheep alone may form a county livestock protective committee, in which case the word "cattle" as in this act contained shall be considered as if it were the word "sheep"; and provided further, that the levy as provided in section 46-2704 hereof shall, in the case of sheep, not exceed five cents (5c) per head.

History: En. Sec. 1, Ch. 168, L. 1953.

Collateral References

Counties \Rightarrow 21½.

20 C.J.S. Counties § 49.

46-2702. Organization of committee—officers—meetings. Said county livestock protective committee shall upon appointment, and annually thereafter, organize by election of a chairman and a secretary. Meetings of the committee shall be held at the call of the chairman or any two members of the committee. Minutes of all meetings of the committee shall be kept by the secretary. Such minutes shall be presented at the ensuing meeting of the committee and upon approval thereof shall be signed by the chairman and secretary, and immediately thereafter deposited with the county clerk and recorder, and kept available for public inspection.

History: En. Sec. 2, Ch. 168, L. 1953.

46-2703. Powers and duties of committee. Said county livestock protective committee shall have power, and it is hereby made the duty of such committee, to advise, assist and cooperate with the Montana livestock commission, the board of county commissioners, the sheriff and all other public officials or police officers having duties pertaining to hide and brand inspection, apprehension of livestock rustlers and the prevention of rustling, enforcement of laws governing the movement and sale of livestock, the treatment and prevention of livestock diseases and such other matters as are of interest and value to the livestock industry in the county.

History: En. Sec. 3, Ch. 168, L. 1953.

46-2704. Tax levy—special fund. Said county livestock protective committee may recommend to the board of county commissioners the levy of a tax in an amount not to exceed twenty-five cents (25c) per head on all cattle in the county over one (1) year old on the first Monday of March and the board of county commissioners shall thereupon be empowered to levy such tax, to be collected as other taxes on personal property, and when collected to be deposited by the county treasurer in a special fund to be known as the stockmen's special deputy fund, together with any other funds made available from county, state, federal or private sources for the purposes of this act.

History: En. Sec. 4, Ch. 168, L. 1953.

46-2705. Special livestock deputy—duties—compensation. Said county livestock protective committee may recommend to the board of county commissioners the appointment of a special livestock deputy, satisfactory to the Montana livestock commission and the sheriff, whose duties shall be

to assist said Montana livestock commission and said sheriff in the enforcement of hide and brand inspection laws, and laws governing the movement and sale of livestock and the treatment and prevention of livestock diseases, laws pertaining to the apprehension of livestock rustlers and the prevention of rustling, and such other laws as may exist of particular concern to the livestock industry of the county, particularly as to cattle. Such special livestock deputy may receive a commission from the Montana livestock commission and appointment as a deputy from the sheriff of the county, and shall give such bond for the faithful performance of his duties as may be required from officers performing similar duties. Such special livestock deputy shall receive compensation for his services and for mileage traveled in the performance of his duties in an amount set by the board of county commissioners, upon the recommendation of the committee, to be paid from said stockmen's special deputy fund and from the county general fund in the proportions set by the board of county commissioners.

History: En. Sec. 5, Ch. 168, L. 1953.

46-2706. Discontinuing county livestock protective committee. Upon receipt of a petition or petitions signed as provided in section 46-2701, the board of county commissioners may discontinue said county livestock protective committee, provided, however, that such action in discontinuing said committee shall not affect any levy made prior to the receipt of such petition or petitions, and the proceeds of any levy made shall be used for the purposes as in this act set out.

History: En. Sec. 6, Ch. 168, L. 1953.

46-2707. Co-operation with committee by adjoining county. The board of county commissioners of any county adjoining a county availing itself of the provisions of this act may co-operate in the administration of this act.

History: En. Sec. 7, Ch. 168, L. 1953.

46-2708. County may defray part of expenses of administering the act. Nothing in this act shall be construed to limit or deprive the board of county commissioners to participate in defraying a part of the expense of the administration of this act.

History: En. Sec. 8, Ch. 168, L. 1953.

TITLE 47

LOANS

Chapter 1. Loans for use or exchange—loan of money, 47-101 to 47-128.

CHAPTER 1

LOANS FOR USE OR EXCHANGE—LOAN OF MONEY

- Section 47-101. Loan defined.
47-102. Title to property lent.
47-103. Care required of borrower.
47-104. Same—of animal for use.
47-105. Degree of skill.
47-106. Borrower—when to repair injuries.
47-107. Use of thing lent.
47-108. Relending forbidden.
47-109. Borrower—when to bear expenses.
47-110. Lender liable for defects.
47-111. Lender may require return of thing lent.
47-112. When returnable without demand.
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47-115. Same—optional loan.
47-116. Title to property lent—expenses—increase.
47-117. Contract cannot be modified by lender.
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47-119. Loan of money, what constitutes.
47-120. Loan to be repaid in current money.
47-121. Loan presumed to be on interest.
47-122. Interest defined.
47-123. Annual rate.
47-124. Legal interest.
47-125. Same—any rate not exceeding ten per cent allowed by agreement.
47-126. Penalty for usury—action to recover excessive interest.
47-127. Interest becomes part of principal, when.
47-128. Interest—judgment.

47-101. (7702) Loan defined. A loan for use is a contract by which one gives to another the temporary use and possession of personal property, and the latter agrees to return the same thing to him at a future time, without reward for its use.

History: En. Sec. 2550, Civ. C. 1895; re-en. Sec. 5188, Rev. C. 1907; re-en. Sec. 7702, R. C. M. 1921. Cal. Civ. C. Sec. 1884. Field Civ. C. Sec. 948.

benefit of the wife for an indefinite period, a loan within the meaning of this section. *Viers v. Webb*, 76 M 38, 42, 245 P 257.

Operation and Effect

Where under a separation agreement the wife accepted certain real property in full satisfaction of her rights in the property of the husband, and the latter granted her permission to use household furniture owned by him until he should want it, the transaction constituted a bailment for the

References

Ferry & Co. v. Forquer, 61 M 336, 342, 202 P 193.

Collateral References

Bailment².
8 C.J.S. Bailments § 7.
See 6 Am. Jur. 127, Bailments.

47-102. (7703) Title to property lent. A loan for use does not transfer the title to the thing; and all its increase during the period of the loan belongs to the lender.

History: En. Sec. 2551, Civ. C. 1895; re-en. Sec. 5189, Rev. C. 1907; re-en. Sec. 7703, R. C. M. 1921. Cal. Civ. C. Sec. 1885. Field Civ. C. Sec. 949.

References

Ferry & Co. v. Forquer, 61 M 336, 342, 202 P 193.

Collateral References

Accession⇒1; Bailment⇒2, 7.
1 C.J.S. Accession § 2; 8 C.J.S. Bailments §§ 7, 20.
6 Am. Jur. 211, Bailments, §§ 88 et seq.

47-103. (7704) Care required of borrower. A borrower for use must use great care for the preservation in safety and in good condition of the thing lent.

History: En. Sec. 2552, Civ. C. 1895; re-en. Sec. 5190, Rev. C. 1907; re-en. Sec. 7704, R. C. M. 1921. Cal. Civ. C. Sec. 1886. Field Civ. C. Sec. 950.

Collateral References

Bailment⇒11.
8 C.J.S. Bailments § 26.
6 Am. Jur. 324, Bailments, §§ 240 et seq.

47-104. (7705) Same—of animal for use. One who borrows a living animal for use must treat it with great kindness, and provide everything necessary and suitable for it.

History: En. Sec. 2553, Civ. C. 1895; re-en. Sec. 5191, Rev. C. 1907; re-en. Sec. 7705, R. C. M. 1921. Cal. Civ. C. Sec. 1887. Field Civ. C. Sec. 951.

Collateral References

2 Am. Jur. 706, Animals, § 19.

47-105. (7706) Degree of skill. A borrower for use is bound to have and to exercise such skill in the care of the thing lent as he causes the lender to believe him to possess.

History: En. Sec. 2554, Civ. C. 1895; re-en. Sec. 5192, Rev. C. 1907; re-en. Sec.

7706, R. C. M. 1921. Cal. Civ. C. Sec. 1888. Field Civ. C. Sec. 952.

47-106. (7707) Borrower—when to repair injuries. A borrower for use must repair all deteriorations or injuries to the thing lent, which are occasioned by his negligence, however slight.

History: En. Sec. 2555, Civ. C. 1895; re-en. Sec. 5193, Rev. C. 1907; re-en. Sec. 7707, R. C. M. 1921. Cal. Civ. C. Sec. 1889. Field Civ. C. Sec. 953.

Collateral References

6 Am. Jur. 291, Bailments, §§ 200-207.

47-107. (7708) Use of thing lent. The borrower of a thing for use may use it for such purposes only as the lender might reasonably anticipate at the time of lending.

History: En. Sec. 2556, Civ. C. 1895; re-en. Sec. 5194, Rev. C. 1907; re-en. Sec.

7708, R. C. M. 1921. Cal. Civ. C. Sec. 1890. Field Civ. C. Sec. 954.

47-108. (7709) Relending forbidden. The borrower of a thing for use must not part with it to a third person, without the consent of the lender.

History: En. Sec. 2557, Civ. C. 1895; re-en. Sec. 5195, Rev. C. 1907; re-en. Sec. 7709, R. C. M. 1921. Cal. Civ. C. Sec. 1891. Field Civ. C. Sec. 955.

Collateral References

Bailment⇒17.
8 C.J.S. Bailments § 38.

47-109. (7710) Borrower—when to bear expenses. The borrower of a thing for use must bear all its expenses during the loan, except such as are necessarily incurred by him to preserve it from unexpected and unusual injury. For such expenses he is entitled to compensation from the lender,

who may, however, exonerate himself by surrendering the thing to the borrower.

History: En. Sec. 2558, Civ. C. 1895; re-en. Sec. 5196, Rev. C. 1907; re-en. Sec. 7710, R. C. M. 1921. Cal. Civ. C. Sec. 1892. Field Civ. C. Sec. 956.

Collateral References
Bailment[Ⓒ] 19.
8 C.J.S. Bailments § 34.

47-110. (7711) Lender liable for defects. The lender of a thing for use must indemnify the borrower for damage caused by defects or vices in it, which he knew at the time of lending, and concealed from the borrower.

History: En. Sec. 2559, Civ. C. 1895; re-en. Sec. 5197, Rev. C. 1907; re-en. Sec. 7711, R. C. M. 1921. Cal. Civ. C. Sec. 1893. Field Civ. C. Sec. 957.

Operation and Effect

Under this section the lender of a thing for use is liable to the borrower only for damage caused by a defect therein of which he knew at the time of the lending but concealed from the borrower; and under that rule, held, in an action for damages for personal injuries sustained by the borrower of an automobile by reason of a defect in the steering-gear, that it was incumbent upon plaintiff to charge in un-

qualified terms that defendant, the lender, knew of such defect and failed to warn the borrower thereof, and that the allegation that the former knew or in the exercise of ordinary care should have known thereof was insufficient to charge a breach of legal duty on the part of the latter, rendering the complaint subject to a general demurrer. *Dickason v. Dickason*, 84 M 52, 59, 274 P 145.

Collateral References
Bailment[Ⓒ] 9.
8 C.J.S. Bailments § 25.
6 Am. Jur. 286, Bailments, §§ 192 et seq.

47-111. (7712) Lender may require return of thing lent. The lender of a thing for use may at any time require its return, even though he lent it for a specified time or purpose. But if, on the faith of such an agreement, the borrower has made such arrangements that a return of the thing before the period agreed upon would cause him loss, exceeding the benefit derived by him from the loan, the lender must indemnify him for such loss, if he compels such return, the borrower not having in any manner violated his duty.

History: En. Sec. 2560, Civ. C. 1895; re-en. Sec. 5198, Rev. C. 1907; re-en. Sec. 7712, R. C. M. 1921. Cal. Civ. C. Sec. 1894. Field Civ. C. Sec. 958.

Collateral References
Bailment[Ⓒ] 23.
8 C.J.S. Bailments § 37.

47-112. (7713) When returnable without demand. If a thing is lent for use for a specified time or purpose, it must be returned to the lender without demand as soon as the time has expired, or the purpose has been accomplished. In other cases it need not be returned until demanded.

History: En. Sec. 2561, Civ. C. 1895; re-en. Sec. 5199, Rev. C. 1907; re-en. Sec.

7713, R. C. M. 1921. Cal. Civ. C. Sec. 1895. Field Civ. C. Sec. 959.

47-113. (7714) Place of return. The borrower of a thing for use must return it to the lender, at the place contemplated by the parties at the time of lending; or if no particular place was so contemplated by them, then at the place where it was at that time.

History: En. Sec. 2562, Civ. C. 1895; re-en. Sec. 5200, Rev. C. 1907; re-en. Sec.

7714, R. C. M. 1921. Cal. Civ. C. Sec. 1896. Field Civ. C. Sec. 960.

47-114. (7715) Loan for exchange defined. A loan for exchange is a contract by which one delivers personal property to another, and the latter agrees to return to the lender a similar thing at a future time, without reward for its use.

History: En. Sec. 2570, Civ. C. 1895; re-en. Sec. 5201, Rev. C. 1907; re-en. Sec. 7715, R. C. M. 1921. Cal. Civ. C. Sec. 1902. Field Civ. C. Sec. 961.

Operation and Effect

Where a party let defendant have a check on the agreement that he should use the proceeds for cashing checks and repay the amount on a certain day, defendant was not guilty of larceny as

bailee where he used it for other purposes and did not repay it, as the transaction was a loan for exchange and the title passed to defendant. *State v. Karri*, 51 M 157, 161, 149 P 956.

Collateral References

Bailment⊖2; Exchange of Property⊖1.
8 C.J.S. Bailments § 7; 32 C.J.S. Exchange of Property § 1.

47-115. (7716) Same—optional loan. A loan, which the borrower is allowed by the lender to treat as a loan for use, or for exchange, at his option, is subject to all of the provisions of this chapter.

History: En. Sec. 2571, Civ. C. 1895; re-en. Sec. 5202, Rev. C. 1907; re-en. Sec. 7716, R. C. M. 1921. Cal. Civ. C. Sec. 1903. Field Civ. C. Sec. 962.

47-116. (7717) Title to property lent—expenses—increase. By a loan for exchange the title to the thing lent is transferred to the borrower, and he must bear all its expenses, and is entitled to all its increase.

History: En. Sec. 2572, Civ. C. 1895; re-en. Sec. 5203, Rev. C. 1907; re-en. Sec. 7717, R. C. M. 1921. Cal. Civ. C. Sec. 1904.

References

Cited or applied as section 5203, Revised Codes, in *State v. Karri*, 51 M 157, 161, 149 P 956.

Collateral References

Accession⊖1; Bailment⊖7; Exchange of Property⊖10.
1 C.J.S. Accession § 2; 8 C.J.S. Bailment § 20; 32 C.J.S. Exchange of Property § 6.

47-117. (7718) Contract cannot be modified by lender. A lender for exchange cannot require the borrower to fulfil his obligations at a time, or in a manner, different from that which was originally agreed upon.

History: En. Sec. 2573, Civ. C. 1895; re-en. Sec. 5204, Rev. C. 1907; re-en. Sec. 7718, R. C. M. 1921. Cal. Civ. C. Sec. 1905. Field Civ. C. Sec. 964.

Collateral References

Bailment⊖1; Exchange of Property⊖5.
8 C.J.S. Bailments § 22; 32 C.J.S. Exchange of Property § 8.

47-118. (7719) Certain sections applicable. Sections 47-110, 47-111 and 47-112 apply to a loan for exchange.

History: En. Sec. 2574, Civ. C. 1895; re-en. Sec. 5205, Rev. C. 1907; re-en. Sec. 7720, R. C. M. 1921. Cal. Civ. C. Sec. 1906. Field Civ. C. Sec. 965.

Collateral References

Bailment⊖9, 19, 23.
8 C.J.S. Bailments §§ 25, 34, 37.

47-119. (7720) Loan of money, what constitutes. A loan of money is a contract by which one delivers a sum of money to another, and the latter agrees to return at a future time a sum equivalent to that which he borrowed. A loan for mere use is governed by the chapter on loan for use.

History: En. Sec. 2580, Civ. C. 1895; re-en. Sec. 5206, Rev. C. 1907; re-en. Sec. 7720, R. C. M. 1921. Cal. Civ. C. Sec. 1912. Field Civ. C. Sec. 966.

References

Cited or applied as section 5206, Revised Codes, in *Eisenberg v. Goldsmith*, 42 M 563, 576, 113 P 1127.

Cross-Reference

False statements to obtain loans, sec. 94-1803.

Collateral References

Money Lent⊖1.
58 C.J.S. Money Lent § 1.
Generally, see 40 Am. Jur. 689, Pawn Brokers and Money Lenders.

47-120. (7721) Loan to be repaid in current money. A borrower of money, unless there is an express contract to the contrary, must pay the amount due in such money as is current at the time when the loan becomes due, whether such money is worth more or less than the actual money lent.

History: En. Sec. 2581, Civ. C. 1895; 7721, R. C. M. 1921. Cal. Civ. C. Sec. 1913. re-en. Sec. 5207, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 967.

47-121. (7722) Loan presumed to be on interest. Whenever a loan of money is made, it is presumed to be made upon interest unless it is otherwise expressly stipulated at the time in writing.

History: En. Sec. 2582, Civ. C. 1895; re-en. Sec. 5208, Rev. C. 1907; re-en. Sec. 7722, R. C. M. 1921. Cal. Civ. C. Sec. 1914. Based on Field Civ. C. Sec. 968.

Collateral References

Interest \hookrightarrow 67.
47 C.J.S. Interest § 78.

47-122. (7723) Interest defined. Interest is the compensation allowed by law or fixed by the parties for the use, or forbearance, or detention of money.

History: En. Sec. 2583, Civ. C. 1895; re-en. Sec. 5209, Rev. C. 1907; re-en. Sec. 7723, R. C. M. 1921. Cal. Civ. C. Sec. 1915. Based on Field Civ. C. Sec. 969.

payment of such yearly amounts was interest and not an annuity. In re Harper's Estate, 124 M 52, 218 P 2d 927, 928.

References

Eskestrand v. Wunder, 94 M 57, 65, 20 P 2d 622; Bowden v. Gabel, 105 M 477, 484, 76 P 2d 334.

Collateral References

Interest \hookrightarrow 1.
47 C.J.S. Interest § 3.
Generally, see 30 Am. Jur. 3, Interest.

47-123. (7724) Annual rate. When a rate of interest is prescribed by a law or contract, without specifying the period of time by which such rate is to be calculated, it is to be deemed an annual rate.

History: En. Sec. 2584, Civ. C. 1895; re-en. Sec. 5210, Rev. C. 1907; re-en. Sec. 7724, R. C. M. 1921. Cal. Civ. C. Sec. 1916. Field Civ. C. Sec. 970.

Collateral References

Interest \hookrightarrow 57.
47 C.J.S. Interest § 64.

References

Mercer v. Mercer, 120 M 132, 180 P 2d 248, 250.

47-124. (7725) Legal interest. Unless there is an express contract in writing, fixing a different rate, interest is payable on all moneys at the rate of six per cent. (6%) per annum after they become due on any instrument of writing, except a judgment, on an account stated, and on moneys lent or due on any settlement of accounts from the date on which the balance is ascertained, and on moneys received to the use of another and detained from him. In the computation of interest for a period of less than one (1) year, three hundred and sixty-five (365) days are deemed to constitute a year.

History: En. Sec. 2585, Civ. C. 1895; amd. Sec. 1, p. 125, L. 1899; re-en. Sec. 5211, Rev. C. 1907; re-en. Sec. 7725, R. C. M. 1921; amd. Sec. 1, Ch. 144, L. 1933. Cal. Civ. C. Sec. 1917.

Cross-References

Acceptance of principal waives claim to interest, sec. 17-207.
Damage claims, interest, sec. 17-204.
Legacies, interest, sec. 91-313.

Offer of performance stops running of interest, sec. 58-427.

Redemptions from tax sales, sec. 84-4154.

No Demand Necessary When Debtor Knows His Obligations

When a debtor knows what he is to pay, and when he is to pay it, no demand is necessary to start the running of interest from the date the payment should have been made. *W. J. Lake & Co. v. Montana Horse Products Co.*, 109 M 434, 443, 97 P 2d 590.

Operation and Effect

This section, insofar as it relates to accounts, applies when the amount due the creditor is determined—when a balance is ascertained. From such time a certain sum of money is due the creditor. *Hefferlin v. Karlman*, 29 M 139, 147, 74 P 201.

A promissory note payable with interest without, however, specifying the rate thereof, carries interest at the legal rate. *Burnett v. Burnett*, 68 M 546, 549, 219 P 831.

Id. Under the rule that in the absence of fraud or mistake a written contract supersedes all prior oral negotiations and agreements with relation thereto, parol testimony to show that the understanding of the parties to a promissory note which provided for the payment of interest but did not specify the rate per cent. to be paid was that no interest at all was payable was properly excluded.

In an action such as this, the creditor, on establishing his preferred claim, is entitled to interest thereon from the date of the closing of the bank, under this section, providing that interest is payable on moneys received to the use of another and detained from him, interest being payable out of the general assets of the bank, where the receiver was justified in rejecting the claim as one proper to be passed upon by the courts. *McDonald v. American Bank etc. Co. et al.*, 79 M 233, 242 et seq., 255 P 733.

Past due interest coupons bear interest and where the bonds to which they are attached are county bonds, the holder is not required to first file a claim with the county for such interest, the amount of the demand—eight per cent. per annum, being fixed by law (this section before amendment by Ch. 144, Laws 1933). *Kalman v. Treasure County et al.*, 84 M 285, 295, 275 P 743.

Where a mechanic's lien claimant considerably overstated the amount of his claim in the lien filed, so that it required the judgment of the court in an action to foreclose the lien to decide the correct amount due, interest—a creature of stat-

ute, was allowable only from the date of the decision, and the court in allowing it from the date of the completion of the work committed error. *Eskestrand v. Wunder*, 94 M 57, 65, 20 P 2d 622.

Where ordered by court to sell for cash, but administrator sold on credit and without security after unnecessary delay, held that he is chargeable with interest at legal rate of six per cent. from date money should have been received. *In re Astibia's Estate*, 100 M 224, 236, 46 P 2d 712.

When Court May Add Interest to Judgment

Where plaintiff (in an action for breach of contract) is entitled to interest under statutory authority as a legal incident to his claim and he asks for interest in his complaint, and his claim is one which is certain or capable of being made certain by calculation, then the court may add the interest to the judgment when there is no controversy on the facts giving rise to the right to interest which should have been, but was not, submitted to the jury. *W. J. Lake & Co. v. Montana Horse Products Co.*, 109 M 434, 441, 97 P 2d 590.

Where Court Corrected Verdict to Include Interest

Where, in an action for breach of contract of sale of sheep, it appeared that plaintiff buyer had made a down payment and one of the issues was whether he, in addition to the recovery of damages, was entitled to recover such payment, and contrary to the court's instructions the jury's verdict made no mention of recovery of the down payment, it was competent for the trial court to correct the verdict by including recovery of the advance payment with interest, and had it not been done the supreme court could have ordered the correction to carry out the evident intention of the jury. *Gilmore v. Mulvihill*, 109 M 601, 614, 98 P 2d 335.

References

In re Rodgers' Estate, 68 M 46, 53, 217 P 678; *State v. Banking Corp. of Montana*, 74 M 491, 508, 241 P 626; *In re Bielenberg's Estate*, 98 M 546, 40 P 2d 49.

Collateral References

Interest—29.

47 C.J.S. Interest § 32.

30 Am. Jur. 8 et seq., Interest.

Waiver of usury by renewal or other executory agreement. 13 ALR 1213 and 74 ALR 1184.

Usury: expenses or charges (including taxes) incident to loan of money. 21 ALR 797; 53 ALR 743; 63 ALR 823 and 105 ALR 795.

Validity of agreement to pay interest on interest. 37 ALR 325 and 76 ALR 1484.

Advance in price on credit sale as compared with cash sale as usury. 57 ALR 880.

Statutes in relation to interest as obnoxious to constitutional provision against impairing obligation of contracts. 87 ALR at p. 462.

47-125. (7726) Same—any rate not exceeding ten per cent. allowed by agreement. Parties may agree in writing for the payment of any rate of interest not exceeding the rate of ten per cent. per annum, and such interest shall be allowed, according to the terms of the agreement, until the entry of judgment.

History: En. Sec. 2586, Civ. C. 1895; re-en. Sec. 5212, Rev. C. 1907; amd. Sec. 1, Ch. 36, L. 1913; amd. Sec. 1, Ch. 62, L. 1919; re-en. Sec. 7726, R. C. M. 1921. Cal. Civ. C. Sec. 1918.

Cross-References

Building and loan associations, rate, sec. 7-113.

Limit of rate by contract, sec. 17-206. Pawnbrokers, interest, secs. 66-1601, 94-3703.

Wage brokers, rate, sec. 41-1505.

Contracts to Pay More Than Amount Loaned

A contract for the payment of a sum of money larger than that actually lent to the debtor is usurious if the difference between the face amount of the obligation and the sum actually received by the debtor, when added to the interest stipulated for in the contract, exceeds the return permitted by law under this section upon the sum actually so received or due. Bowden v. Gabel, 105 M 477, 485, 76 P 2d 334.

Fee for Services—Usurious Intent

A lender may exact reasonable fees for services in connection with the loan, such

Right to have usurious payments of interest applied as credit on principal as affected by statute of limitations. 101 ALR 741.

Right of junior mortgagee to attack senior mortgage for usury. 121 ALR 879.

Retrospective application and effect of statutory provision for interest or charged rate of interest. 4 ALR 2d 932.

as examination of title, inspection or preparation of papers, traveling expenses and the like, but cannot take a bonus or premium by way of compensation where no services were rendered; adjudicated cases hold that a lender may charge whatever price he may obtain for loaning or selling his credit, but in the instant case the facts do not warrant that conclusion; the only intent necessary is the intent to take more than the law allows, it being of no consequence that there is no specific intent knowingly to violate the law. Bowden v. Gabel, 105 M 477, 485, 76 P 2d 334.

References

Cited or applied as Laws of 1913, chapter 36, p. 51, before amendment, in Farr v. Stein, 54 M 529, 531, 172 P 135; United States Bldg. etc. Assn. v. Gardiner, 87 M 586, 593, 289 P 555; Shubat v. Glacier County et al., 93 M 160, 165, 18 P 2d 614.

Collateral References

Interest—33.

47 C.J.S. Interest § 36.

Rate of interest after maturity on obligation which fixes rate of interest expressly till maturity. 16 ALR 2d 902.

47-126. (7727) Penalty for usury—action to recover excessive interest. The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section shall be deemed a forfeiture of a sum double the amount of interest which the note, bill, or other evidence of debt carries, or which has been agreed to be paid thereon.

When a greater rate of interest has been paid, the person by whom it has been paid, his heirs, assigns, executors, or administrators, may recover from the person, firm, or corporation taking, receiving, reserving, or charging same a sum double the amount of interest so paid; provided, that such action shall be brought within two years after the payment of said interest; and provided, that before any suit may be brought to recover such usurious interest, the party bringing suit must make written demand for return of said interest so paid.

History: En. Sec. 2, Ch. 36, L. 1913; re-en. Sec. 7727, R. C. M. 1921.

Construction

Where relief is sought under the second paragraph of this section, demand must be made within two years after payment of usurious interest, but such demand need not be made and such limitation does not apply to obtain relief under the first paragraph thereof. *Bowden v. Gabel*, 105 M 477, 488, 76 P 2d 334.

Operation and Effect

If a borrower from a building and loan association may maintain a common-law action to recover back usurious interest paid, in view of the provisions of this section, declaring the remedy of the borrower to be an action to recover the penalty, to-wit, forfeiture of double the

amount of interest which the note or other evidence of debt carries, he must specially plead usury by allegations clearly showing the amount of such usurious interest claimed. *United States Bldg. etc. Assn. v. Gardiner*, 87 M 586, 593, 289 P 555.

Collateral References

Usury—138.

66 C. J. Usury § 388.

55 Am. Jur. 418, Usury, §§ 137 et seq.

Who other than borrower may avail himself of latter's right to recover back usurious payments or penalties therefor. 82 ALR 1008 and 134 ALR 1335.

When does limitation commence to run against action, defense, or counterclaim based on usury. 108 ALR 622.

Conflict of laws as to usury. 125 ALR 482.

47-127. (7728) Interest becomes part of principal, when. The parties may, in any contract in writing whereby any debt is secured to be paid, agree that if the interest on such debt is not punctually paid, it shall become a part of the principal, and thereafter bear the same rate of interest as the principal debt.

History: En. Sec. 2587, Civ. C. 1895; re-en. Sec. 5213, Rev. C. 1907; re-en. Sec. 7728, R. C. M. 1921. Cal. Civ. C. Sec. 1919.

Operation and Effect

This section does not affect notes or agreements made before its adoption in 1895, when there was no statute on the subject of usury, and parties were at lib-

erty to fix the rate of interest. *Stanford v. Coram*, 26 M 285, 294, 67 P 1005.

References

Mercer v. Mercer, 120 M 132, 180 P 2d 248, 250.

Collateral References

Interest—60.

47 C.J.S. Interest § 68.

47-128. (7729) Interest—judgment. Interest is payable on judgments recovered in the courts of this state at the rate of six per cent. per annum, and no greater rate, but such interest must not be compounded in any manner or form.

History: En. Sec. 2588, Civ. C. 1895; amd. Sec. 1, p. 125, L. 1899; re-en. Sec. 5214, Rev. C. 1907; re-en. Sec. 7729, R. C. M. 1921; amd. Sec. 1, Ch. 143, L. 1933. Cal. Civ. C. Sec. 1920.

Conversion

Where, in action for conversion, plaintiff elected to accept value of property at time of conversion, and in addition to value of property special damages were allowed for time and money expended in pursuit of property, interest on the value of the property would run from time of conversion but interest on the special damages should be assessed after verdict under this section. *Galbreath v. Armstrong*, 121 M 387, 193 P 2d 630, 634.

Operation and Effect

A judgment rendered prior to the date when the amendment to this section went

into effect bore interest at the rate of ten per cent. until that date, and only eight per cent. thereafter. *Stanford v. Coram*, 28 M 288, 291, 72 P 655.

Id. This section is not unconstitutional as affecting a contract right.

After decree in a foreclosure suit the mortgage debt became merged in the judgment, and in a subsequent action, looking to the redemption of the property, interest was properly allowed at eight per cent. per annum. *Toole v. Weirick*, 39 M 359, 365, 102 P 590.

Where a mechanic's lien claimant considerably overstated the amount of his claim in the lien filed, so that it required the judgment of the court in an action to foreclose the lien to decide the correct amount due, interest—a creature of statute—was allowable only from the date of the decision, and the court in allowing it from the date of the completion of the

work committed error. *Eskestrand v. Wunder*, 94 M 57, 66, 20 P 2d 622.

An order made in an estate matter allowing an attorney's fee for services rendered to a special administrator held not a "judgment" within the meaning of this section, allowing interest on judgments, such an order being no more than a settlement of one of the matters arising in a probate proceeding preparatory to a final judgment. (Mr. Justice Angstman dissent-

ing.) *In re Bielenberg's Estate*, 98 M 546, 548, 40 P 2d 49.

References

Cited or applied as section 5214, Revised Codes, in *Gallatin Valley Electric Ry. v. Neible et al.*, 57 M 27-40, 186 P 689; *Shubat v. Glacier County et al.*, 93 M 160, 18 P 2d 614; *Little v. Little*, — M —, 259 P 2d 343, 345.

TITLE 48

MARRIAGE

- Chapter 1. Marriage defined—how and by whom contracted and authenticated, 48-101 to 48-141.
2. Annulling marriage, 48-201 to 48-206.
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CHAPTER 1

MARRIAGE DEFINED—HOW AND BY WHOM CONTRACTED AND AUTHENTICATED

- Section 48-101. What constitutes marriage.
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48-138. Examination by county physician or health officer.
48-139. Penalties.
48-140. Expense of administering act.
48-141. Separability clause.

48-101. (5695) What constitutes marriage. Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, or by mutual and public assumption of the marital relation.

History: Ap. p. Sec. 1, p. 408, Bannack Stat.; re-en. Sec. 1, p. 520, Cod. Stat. 1871; re-en. Sec. 854, 5th Div. Rev. Stat. 1879; amd. Sec. 1411, 5th Div. Comp. Stat. 1887;

amd. Sec. 50, Civ. C. 1895; re-en. Sec. 3607, Rev. C. 1907; re-en. Sec. 5695, R. C. M. 1921. Cal. Civ. C. Sec. 55.

Cross-References

Abduction to compel marriage, penalty, sec. 94-4105.

Agreements in consideration of marriage to be in writing, sec. 13-606, 93-1401-7.

Breach of promise, damages, sec. 17-319.

Conditions concerning property in restraint of marriage, validity, sec. 67-404.

Contracts in restraint of marriage, validity, sec. 13-810.

Marriage settlements, secs. 36-122 to 36-126.

Marriage under false personation, penalty, sec. 94-1801.

Burden of Proof

While the right of dower is favored in the law, the burden of establishing the existence of a valid marriage as the basis of that right rests upon the person asserting it. *Shepherd & Pierson Co. v. Baker*, 81 M 185, 196, 262 P 887.

Where the parties defendant in a proceeding to establish heirship alleged that a common-law marriage took place in 1873 between their mother and the decedent under whom they claimed to be entitled to share in his estate, but the mother in 1884 under oath declared that one of the defendants was born in 1869 and the other in 1871, the burden was upon defendants to show that the unlawful relationship between the parties existing at the time of their birth was changed to a lawful one. *Welch v. All Persons*, 85 M 114, 133, 278 P 110.

Common-law Marriage—Essentials

The so-called "common-law marriage" is recognized as valid in this state, but, to be effective, there must be a mutual consent of parties able to consent and competent to enter into a ceremonial marriage, and an assumption of such relationship by consent and agreement as of a time certain, followed by cohabitation and repute. *Stevens v. Woodmen Of The world*, 105 M 121, 141, 71 P 2d 898.

Disputable Presumption

One of the disputable presumptions in this state is that a man and woman holding themselves out as husband and wife have entered into a contract of lawful marriage (sec. 93-1301-7, subd. 30). *Stevens v. Woodmen Of The World*, 105 M 121, 141, 71 P 2d 898.

Evidence of Marital Relation

Where the question whether parties were husband and wife is at issue their conduct

during the entire time they were shown to have cohabited is part of the *res gestae*; and whatever they did or said during that time, which sheds light upon the matter and aids in disclosing the relations they sustained toward each other must be construed as part of the *res gestae*. *Welch v. All Persons*, 85 M 114, 133, 278 P 110.

General Requisites

An indispensable element to the existence of a common-law marriage, or of the "mutual and public assumption of the marital relation," is cohabitation. *O'Malley v. O'Malley*, 46 M 549, 558, 129 P 501.

Where it appeared that the cohabitation of the parties was clandestine, the evidence was insufficient to show that "public assumption of the marital relation" which this section demands, in the absence of a solemnization, in order to constitute a valid marriage. In *re Huston's Estate*, 48 M 524, 531, 139 P 458.

Proof of consent, followed by cohabitation and the bearing of children, coupled with reputation as man and wife, are not alone sufficient to establish marriage, but the parties must have been capable of contracting a marriage; hence where the woman at the time of an alleged common-law marriage had a husband living she was incapable of entering into the second contract. *Shepherd & Pierson Co. v. Baker*, 81 M 185, 196, 262 P 887.

Marriage cannot arise from the mere cohabitation of two persons reputed to be husband and wife, such cohabitation and reputation being merely evidence of the existence and reality of their consent; the fact that children have been born to them is not enough, and while the law will imply consent from the conduct of the parties when the facts will permit, and will presume that a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage, such presumption disappears in the face of contrary facts. *Welch v. All Persons*, 85 M 114, 133, 278 P 110.

Mutual Consent

As marriage is defined by this section to be a personal relation arising out of a civil contract to which the consent of parties capable of making it is necessary, the consent of the parties thereto must be mutual; while the consent need not be expressed in any particular form, it must be given with such an intent on the part of each of them that marriage cannot be said to steal upon them unawares. *Welch v. All Persons*, 85 M 114, 133, 278 P 110.

Presumption of Marriage

While the presumption of law is in favor of matrimony and against concubinage,

the presumption is a disputable one and is only indulged in where the court is not in possession of all the facts upon which the alleged marriage relation depends. *State v. Newman*, 66 M 180, 188 et seq., 213 P 805.

Where a second marriage is attacked as invalid, the presumption is that the prior one was dissolved by death or a decree of divorce, and the burden of showing the contrary rests upon him who makes the attack, such presumption, however, being rebuttable. *Shepherd & Pierson Co. v. Baker*, 81 M 185, 196, 262 P 887.

Where a prior marriage, undissolved, of one of two parties cohabiting as man and wife, is shown, the shadow of illegitimacy is cast upon their relationship, and the law's presumption in favor of marriage disappears; that of wrongdoing takes its place, and the burden rests upon those asserting legitimacy to show a subsequent marriage. *Welch v. All Persons*, 85 M 114, 133, 278 P 110.

Public Assumption of Marital Relation

The state makes itself a party to every marriage, in that it requires the contract to be entered into before officers designated by itself, or by mutual and public assumption by the parties of the marriage relation. *Franklin v. Franklin*, 40 M 348, 350, 106 P 353.

To constitute a marriage the parties must contemplate a present assumption of the relation as distinguished from a future union. *State v. Newman*, 66 M 180, 188 et seq., 213 P 805.

48-102. (5696) Age of Consent. Any unmarried male of the age of eighteen years or upwards, and any unmarried female of the age of sixteen years or upwards, and not otherwise disqualified, is capable of consenting to and consummating marriage.

History: En. Sec. 51, Civ. C. 1895; re-en. Sec. 3608, Rev. C. 1907; re-en. Sec. 5696, R. C. M. 1921. Cal. Civ. C. Sec. 56.

Operation and Effect

Marriage of a female minor who had attained the age of legal consent, but not majority, and who was not otherwise disqualified, contracted without consent of

Id. Held, that since there is no common law in Montana where the law is declared by the codes or the statutes, and under this section, consent of the parties to marry is not alone sufficient to bring about the relation but in the absence of a solemnization there must be a public assumption of the relation, there is no common-law marriage in this state where such public assumption was absent.

Where Relations Illicit in Their Inception

Where the relations between a man and a woman are shown to have been illicit in their inception, they are presumed to have continued so until the contrary is shown, and the burden rests upon one asserting the validity of a marriage between them that the illicit relation was thus changed to a lawful one. *Stevens v. Woodmen Of The World*, 105 M 121, 141, 71 P 2d 898.

References

Conley v. Conley, 92 M 425, 434, 15 P 2d 922; *State v. Crighton*, 97 M 387, 399, 34 P 2d 511.

Collateral References

Marriage⊕1.
55 C.J.S. Marriage § 1.

Validity of marriage as affected by intention of the parties that it should be only matter of form or jest. 14 ALR 2d 624.

Any unmarried male of the age of eighteen years or upwards, and any unmarried female of the age of sixteen years or upwards, and not otherwise disqualified, is capable of consenting to and consummating marriage.

parent or guardian, was not subject to annulment irrespective of cohabitation. *Teague v. Allred*, 119 M 193, 173 P 2d 117, 118.

Collateral References

Marriage⊕5.
55 C.J.S. Marriage § 11.
35 Am. Jur. 189, Marriage, § 16.

48-103. (5697) Marriage—how manifested and proved. Consent to and subsequent consummation of marriage may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases.

History: En. Sec. 52, Civ. C. 1895; re-en. Sec. 3609, Rev. C. 1907; re-en. Sec. 5697, R. C. M. 1921. Cal. Civ. C. Sec. 57.

Cross-Reference

Presumption of marriage, sec. 93-1301-7.

Operation and Effect

The necessary consent need not be expressed in any particular form. In a proper case it may even be implied from the conduct of the parties. But the consent, whether in express words, or implied from the conduct, must always be

given with such an intent on the part of each of the parties that marriage cannot be said to steal upon them unawares. One cannot become married unwittingly or accidentally. *State v. Newman*, 66 M 180, 188, 213 P 805.

Collateral References

Marriage↔42-49.
55 C.J.S. Marriage § 44.

48-104. (5698) Certain marriages voidable. If either party to a marriage be incapable from physical causes of entering into the marriage state, or if the consent of either be obtained by fraud or force, the marriage is voidable.

History: En. Sec. 53, Civ. C. 1895; re-en. Sec. 3610, Rev. C. 1907; re-en. Sec. 5698, R. C. M. 1921. Cal. Civ. C. Sec. 58.

Collateral References

Marriage↔6, 34, 35.
55 C.J.S. Marriage §§ 13, 34.
35 Am. Jur. 188, Marriage, §§ 13 et seq.

Validity of marriage entered into in jest. 11 ALR 215.

Mental capacity to marry. 28 ALR 635.

Validity of common-law marriage in American jurisdictions. 39 ALR 538.

Marriage to which consent of one of parties was obtained by duress as void or only voidable. 91 ALR 414.

Validity of marriage celebrated while spouse by former marriage of one of the

35 Am. Jur. 303, Marriage, §§ 190 et seq.

Inference or presumption of marriage from continued cohabitation following removal of impediment. 104 ALR 6.

Validity of marriage as affected by intention of the parties that it should be only matter of form or jest. 14 ALR 2d 624.

parties was living and undivorced, in reliance upon presumption from lapse of time of death of such spouse. 93 ALR 345.

Perjury as predicated upon statements upon application for marriage license. 101 ALR 1263.

Inference or presumption of marriage from continued cohabitation following removal of impediment. 104 ALR 6.

Power of attorney to apply for or receive marriage license for another. 135 ALR 800.

Ratification of marriage by one under age, upon obtaining marriageable age. 159 ALR 104.

48-105. (5699) Incompetency of parties to. Marriages between parents and children, ancestors and descendants of every degree, and between brothers and sisters of the half as well as the whole blood, and between nieces and uncles, and between aunts and nephews, and between first cousins, and between persons, either of whom is feeble-minded, are incestuous and void from the beginning, whether the relationship is legitimate or illegitimate.

History: En. Sec. 54, Civ. C. 1895; re-en. Sec. 3611, Rev. C. 1907; amd. Sec. 1, Ch. 6, L. 1919; re-en. Sec. 5699, R. C. M. 1921. Cal. Civ. C. Sec. 59.

Cross-References

Penalty for incestuous marriage, sec. 94-705.

Solemnizing marriage when forbidden, penalty, sec. 94-3539.

Operation and Effect

To justify annulment of a marriage contract because of mental incompetency of one of the parties, there must be clear and convincing proof that such party was so incompetent at the time the contract was entered into. *Murphy v. La Chapelle*, 95 M 36, 38, 24 P 2d 131.

Collateral References

Marriage↔7, 10.

55 C.J.S. Marriage §§ 12, 16.

35 Am. Jur. 265, Marriage, §§ 140 et seq. See generally 27 Am. Jur. 287 et seq., Incest.

Facts preventing valid marriage between prosecutrix and defendant as defense in criminal or civil action for seduction. 85 ALR 126.

Recognition of foreign marriage as affected by policy in respect of incestuous marriages. 117 ALR 186.

Relationship created by adoption as within statute prohibiting marriage between parties in relationships, or statute regarding incest. 151 ALR 1146.

48-106 to 48-110. (5700 to 5704) Repealed—Chapter 4, Laws of 1953.**Repeal**

These sections (Secs. 1 to 5, Ch. 49, L. 1909), relating to miscegenous marriages

and the effects thereof, were repealed by Sec. 1, Ch. 4, Laws 1953 effective February 2, 1953.

48-111. (5705) Subsequent marriage—when illegal and void. A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any other person than such former husband or wife, is illegal and void from the beginning, unless:

1. The former marriage has been annulled or dissolved.
2. Unless such former husband or wife was absent, and not known to such person to be living for the space of five successive years immediately preceding such subsequent marriage, or was generally reputed and was believed by such person to be dead at the time such subsequent marriage was contracted; in either of which cases the subsequent marriage is valid until its nullity is adjudged by a competent tribunal.

History: En. Sec. 55, Civ. C. 1895; re-en. Sec. 3612, Rev. C. 1907; re-en. Sec. 5705, R. C. M. 1921. Cal. Civ. C. Sec. 61.

Cross-Reference

Bigamy, penalty, secs. 94-701 to 94-703.

Operation and Effect

A marriage contracted while the man had a wife living with whom he was at the time in correspondence relative to a divorce, of which fact, however, the woman was ignorant, was void. In re Huston's Estate, 48 M 524, 530, 139 P 458.

Proof of consent, followed by cohabitation and the bearing of children, coupled with reputation as man and wife, are not alone sufficient to establish marriage, but the parties must have been capable of contracting a marriage; hence where the woman at the time of an alleged common-

law marriage had a husband living she was incapable of entering into the second contract. *Shepherd & Pierson Co. v. Baker*, 81 M 185, 196, 262 P 887.

Id. Where a second marriage is attacked as invalid, the presumption is that the prior one was dissolved by death or a decree of divorce, and the burden of showing the contrary rests upon him who makes the attack, such presumption, however, being rebuttable.

Collateral References

Marriage—11.

55 C.J.S. Marriage § 17.

Validity of marriage celebrated while spouse by former marriage of one of the parties was living and undivorced, in reliance upon presumption from lapse of time of death of such spouse. 93 ALR 345.

48-112. (5706) Released from marriage contract, when. Neither party to a contract to marry is bound by a promise made in ignorance of the other's want of personal chastity, and either is released therefrom by unchaste conduct on the part of the other, unless both parties participate therein.

History: En. Sec. 56, Civ. C. 1895; re-en. Sec. 3613, Rev. C. 1907; re-en. Sec. 5706, R. C. M. 1921. Cal. Civ. C. Sec. 62. Field Civ. C. Sec. 44.

Collateral References

Breach of Marriage Promise—6, 13.

11 C.J.S. Breach of Marriage Promise §§ 5, 14.

48-113. (5707) Marriages contracted without the state. All marriages contracted without the state, which would be valid by the laws of the country in which the same were contracted, are valid in this state.

History: En. Sec. 1428, 5th Div. Comp. Stat. 1887; re-en. Sec. 57, Civ. C. 1895; re-en. Sec. 3614, Rev. C. 1907; re-en. Sec. 5707, R. C. M. 1921. Cal. Civ. C. Sec. 63.

Marriage Between Japanese and Whites

Though under this section all marriages contracted without the state which are valid where contracted or solemnized are

valid, marriage between Japanese and whites are by sections 48-108 and 48-109 (now repealed) taken out of that general rule, when in violation thereof, and residents of this state may not circumvent the provisions of these sections by marrying without its borders. In re Takahashi's Estate, 113 M 490, 495, 129 P 2d 217.

Operation and Effect

Though the evidence is insufficient to show that public assumption of the marital relation which our statute demands, to constitute a valid marriage, yet, if there is enough to create a foundation for the presumption that the parties are married according to the laws of another state, the courts of this state will recognize the relationship, although it is such a marriage as that, if contracted in this state, it would not be valid under our laws. In *re* Huston's Estate, 48 M 524, 531, 139 P 458.

Jurisdiction of a suit for annulment of a marriage solemnized in another state, depends upon the residence or domicile

of the plaintiff, in absence of statutory provision otherwise; hence where the domicile of both parties was in Montana and the marriage was solemnized in Idaho, the marriage could be attacked in this state by the mother of one of the contracting parties, although under this section the validity of the marriage had to be determined by requirements of Idaho. *Cross v. Cross*, 110 M 300, 302, 102 P 2d 829.

Collateral References

Marriage↔3, 17.
55 C.J.S. Marriage §§ 4, 8.

48-114. (5708) Certain parts of code not applicable. The provisions of other portions of this code in relation to contracts, and the capacity of persons to enter into them, have no application to the contract of marriage.

History: En. Sec. 58, Civ. C. 1895; re-en. Sec. 3615, Rev. C. 1907; re-en. Sec. 5708, R. C. M. 1921. Field Civ. C. Sec. 43.

Collateral References

Marriage↔14.
55 C.J.S. Marriage § 5.

48-115. (5709) Marriage—procedure required for authentication. Marriage must be licensed, solemnized, authenticated, and recorded as provided in this chapter; but non-compliance with its provisions does not invalidate any lawful marriage.

History: En. Sec. 70, Civ. C. 1895; re-en. Sec. 3616, Rev. C. 1907; re-en. Sec. 5709, R. C. M. 1921. Cal. Civ. C. Sec. 68.

Collateral References

Marriage↔26-29, 54.
55 C.J.S. Marriage §§ 28, 35.

48-116. (5710) By whom marriages may be solemnized. Marriage may be solemnized by either a justice of the supreme court, judge of the district court, justice of the peace, priest, or minister of the gospel of any denomination, or the mayor of any city. Marriages may also be solemnized by religious societies according to the usage of such societies.

History: Ap. p. Sec. 3, p. 409, Bannack Stat.; re-en. Sec. 3, p. 520, Cod. Stat. 1871; re-en. Sec. 856, 5th Div. Rev. Stat. 1879; amd. Sec. 1413, 5th Div. Comp. Stat. 1887; amd. Sec. 71, Civ. C. 1895; re-en. Sec. 3617, Rev. C. 1907; re-en. Sec. 5710, R. C. M. 1921. Cal. Civ. C. Sec. 70.

Cross-Reference

Fee of justice of the peace performing marriage, sec. 25-304.

Collateral References

Marriage↔27, 29.
55 C.J.S. Marriage §§ 29, 32.
35 Am. Jur. 197, Marriage, § 26.

48-117. (5711) License must be obtained. Previous to the solemnization of any marriage in this state, a license for that purpose must be obtained from the clerk of the district court of the county wherein the marriage is to take place.

History: En. Sec. 1414, 5th Div. Comp. Stat. 1887; re-en. Sec. 72, Civ. C. 1895; re-en. Sec. 3618, Rev. C. 1907; re-en. Sec. 5711, R. C. M. 1921. Cal. Civ. C. Sec. 69.

Cross-Reference

Marriage license fee, sec. 25-232.

Collateral References

Marriage↔25(1, 3).
55 C.J.S. Marriage § 24.
35 Am. Jur. 195, Marriage, § 23.

48-118. (5712) Consent of parent or guardian. Where either party is a minor, no license shall be granted without the written consent of the

NOTE.—See also secs. 48-134 to 48-141.

father, if living; if not, then of the mother of such minor or of the guardian, or person under whose care and government such minor may be, which written consent shall be proved by the testimony of at least one competent witness.

History: En. Sec. 1415, 5th Div. Comp. Stat. 1887; re-en. Sec. 73, Civ. C. 1895; re-en. Sec. 3619, Rev. C. 1907; re-en. Sec. 5712, R. C. M. 1921. Cal. Civ. C. Sec. 69.

Operation and Effect

Marriage of a female minor who had attained age of legal consent, but not majority, and who was not otherwise disqualified, contracted without consent of parent or guardian, was not subject to annulment irrespective of cohabitation.

Teague v. Allred, 119 M 193, 173 P 2d 117, 118.

References

Cross v. Cross, 110 M 300, 304, 102 P 2d 529.

Collateral References

Marriage↔19.
55 C.J.S. Marriage § 23.
35 Am. Jur. 193, Marriage, § 21.

48-119. (5713) License—what to contain. When application shall be made for a license to the clerk of the district court, he shall, upon the granting of such license, state therein the Christian and surnames of the fathers of both parties; the Christian and maiden names of the mothers of both parties; the Christian and surnames of both parties; the residence of both parties, their places of birth, their respective ages, their color, and whether previously married or divorced; which license shall, prior to the issuing thereof, be entered of record in the office of the clerk of the district court, in a suitable book to be provided for that purpose.

History: En. Sec. 1416, 5th Div. Comp. Stat. 1887; re-en. Sec. 74, Civ. C. 1895; re-en. Sec. 3620, Rev. C. 1907; re-en. Sec. 5713, R. C. M. 1921. Cal. Civ. C. Sec. 69.

Collateral References

Marriage↔25(2).
55 C.J.S. Marriage § 25.

48-120. (5714) License—when refused. If, on such testimony being given, it shall appear that either of the parties is legally incompetent to enter into such a contract, or that there is any impediment in the way, or if either party is a minor, and the consent mentioned in section 48-118 shall not be given, the said county clerk shall refuse to grant a license.

History: En. Sec. 1417, 5th Div. Comp. Stat. 1887; re-en. Sec. 75, Civ. C. 1895; re-en. Sec. 3621, Rev. C. 1907; re-en. Sec. 5714, R. C. M. 1921; amd. Sec. 1, Ch. 72, L. 1935. Amendment by Ch. 72, L. 1935 was suspended by referendum petition of the people. Law appears as it was before amendment in 1935.

NOTE.—See also secs. 48-134 to 48-141.

References

Cited or applied as section 3621, Revised Codes, in State ex rel. Cotter v. District Court, 49 M 146, 153, 140 P 732.

48-121. (5715) Clerk may require evidence. In case of application for a marriage license, which may be made by either party, or his or her agent or attorney, the clerk of the district court may, in his discretion, require that the necessary information be given under oath, and he is hereby authorized to administer oaths to such applicants for such purpose. When parties apply by mail for such license, their statement of the facts necessary to properly make out such license must be accompanied by an affidavit as to the correctness thereof, taken before a justice of the peace or notary public, or some other person authorized to administer oaths; and in case of a minor, the consent of the parent or guardian must be given in the same manner.

History: En. Sec. 1418, 5th Div. Comp. Stat. 1887; re-en. Sec. 76, Civ. C. 1895; re-en. Sec. 3622, Rev. C. 1907; re-en. Sec. 5715, R. C. M. 1921.

48-122. (5716) Duty of person solemnizing—return of certificate. No person authorized to solemnize marriages shall perform such ceremony until the parties have given him the license issued by the clerk of the district court for their marriage; and when he has completed any such ceremony he shall enter upon such license a certificate of such marriage, showing when and where it occurred, and such certificate shall be attested by two witnesses to such ceremony; he shall, within thirty days after such marriage has been solemnized, return said license and certificate to the clerk of the district court, who shall record the certificate in the same book where the said marriage license is recorded.

History: En. Sec. 1419, 5th Div. Comp. Stat. 1887; amd. Sec. 77, Civ. C. 1895; re-en. Sec. 3623, Rev. C. 1907; re-en. Sec. 5716, R. C. M. 1921.

Cross-References

Index of certificates kept by county clerk, sec. 16-2905.

Information certified to registrar, sec. 69-534.

References

Cited or applied as section 3623, Revised Codes, in O'Malley v. O'Malley, 46 M 549, 557, 129 P 501.

Collateral References

Marriage—31, 32.
55 C.J.S. Marriage § 33.
35 Am. Jur. 197, Marriage, § 27.

Validity of common-law marriage in American jurisdictions. 39 ALR 538.

48-123. (5717) Form of certificate. The certificate mentioned in the next preceding section shall be substantially in the following form:

The State of Montana, }
 } ss.
County of }

This is to certify that the undersigned, a justice of the peace of said county (minister of the gospel, judge, etc., as the case may be), did, on the day of, A. D. 19....., join in lawful wedlock and, with their mutual consent, in the presence of and, witnesses.

Witness my hand this day of, 19.....

History: En. Sec. 5, p. 409, Bannack Stat.; re-en. Sec. 5, p. 520, Cod. Stat. 1871; re-en. Sec. 858, 5th Div. Rev. Stat. 1879; repealed Sec. 1430, 5th Div. Comp. Stat. 1887; re-en. Sec. 78, Civ. C. 1895; re-en. Sec. 3624, Rev. C. 1907; re-en. Sec. 5717, R. C. M. 1921.

Collateral References

Marriage—31.
55 C.J.S. Marriage § 33.

48-124. (5718) Penalty for failure to return or record. Every person solemnizing a marriage who shall neglect to make and deliver to the clerk of the district court a certificate thereof, within thirty days after having solemnized such marriage, shall forfeit for such neglect a sum not less than ten nor more than fifty dollars; and any clerk of the district court who shall neglect to record such certificate so delivered, within one month after its delivery, shall forfeit the like penalty.

History: En. Sec. 7, p. 409, Bannack Stat.; re-en. Sec. 7, p. 520, Cod. Stat. 1871; re-en. Sec. 860, 5th Div. Rev. Stat. 1879; re-en. Sec. 1421, 5th Div. Comp.

Stat. 1887; amd. Sec. 79, Civ. C. 1895;
re-en. Sec. 3625, Rev. C. 1907; re-en. Sec.
5718, R. C. M. 1921.

Collateral References

Marriage⊕30.
55 C.J.S. Marriage § 30.

48-125. (5719) Want of authority in person officiating—effect. No marriage solemnized before any person professing to have authority shall be deemed or regarded void, nor shall the validity thereof be in any way affected on account of any want of jurisdiction or authority, provided it be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage.

History: En. Sec. 9, p. 410, Bannack Stat.; re-en. Sec. 9, p. 521, Cod. Stat. 1871; re-en. Sec. 862, 5th Div. Rev. Stat. 1879; re-en. Sec. 1423, 5th Div. Comp. Stat. 1887; amd. Sec. 80, Civ. C. 1895; re-en. Sec. 3626, Rev. C. 1907; re-en. Sec. 5719, R. C. M. 1921.

Collateral References

Marriage⊕54.
55 C.J.S. Marriage § 35.

48-126. (5720) Certificate and copy prima facie evidence. The original certificate of marriage, made as prescribed in this chapter, and the record thereof by the clerk of the district court, or a copy of such record duly certified by the clerk of the district court, shall be received by all courts in all places as presumptive evidence of such marriage.

History: En. Sec. 10, p. 410, Bannack Stat.; re-en. Sec. 10, p. 521, Cod. Stat. 1871; re-en. Sec. 863, 5th Div. Rev. Stat. 1879; re-en. Sec. 1424, 5th Div. Comp. Stat. 1887; amd. Sec. 81, Civ. C. 1895; re-en. Sec. 3627, Rev. C. 1907; re-en. Sec. 5720, R. C. M. 1921.

Collateral References

Marriage⊕45.
55 C.J.S. Marriage § 44.

48-127. (5721) Certificates of marriage to be given. Whenever a marriage shall have been solemnized pursuant to the provisions of this chapter, the person who solemnized the same shall give to each of the parties, on request, a certificate under his hand, specifying the names, ages, and places of residence of the parties married, the names and residence of at least two witnesses who were at such marriage, and the time and place thereof.

History: En. Sec. 1426, 5th Div. Comp. Stat. 1887; re-en. Sec. 82, Civ. C. 1895; re-en. Sec. 3628, Rev. C. 1907; re-en. Sec. 5721, R. C. M. 1921.

Collateral References

Marriage⊕31.
55 C.J.S. Marriage § 33.

48-128. (5722) No particular form of solemnization. In the solemnization of marriage no particular form shall be required, except that the parties shall solemnly declare, in the presence of the magistrate or minister, or of attending witnesses, that they take each other as husband and wife, and in any case there shall be at least two witnesses present at the ceremony.

History: En. Sec. 1426, 5th Div. Comp. Stat. 1887; re-en. Sec. 83, Civ. C. 1895; re-en. Sec. 3629, Rev. C. 1907; re-en. Sec. 5722, R. C. M. 1921. Cal. Civ. C. Sec. 71.

Collateral References

Marriage⊕28.
55 C.J.S. Marriage § 32.

48-129. (5723) Fines for benefit of schools. All fines arising under this chapter in consequence of a breach thereof shall be paid into the county treasury for the use of the common schools.

History: En. Sec. 1429, 5th Div. Comp. re-en. Sec. 3630, Rev. C. 1907; re-en. Sec. Stat. 1887; re-en. Sec. 84, Civ. C. 1895; 5723, R. C. M. 1921.

48-130. (5724) Declaration of marriage—how made. Persons married without the solemnization provided for in section 48-116 must jointly make a declaration of marriage, substantially showing:

1. The names, ages, and residences of the parties;
2. The fact of marriage;
3. The time of marriage;
4. That the marriage has not been solemnized.

History: En. Sec. 85, Civ. C. 1895; re-en. Sec. 3631, Rev. C. 1907; re-en. Sec. 5724, R. C. M. 1921. Cal. Civ. C. Sec. 75.

Collateral References
Marriage ⇨ 21.
55 C.J.S. Marriage § 21.

References

State v. Newman, 66 M 180, 195, 213
P 805.

48-131. (5725) Contents of declaration. If no record of the solemnization of a marriage heretofore contracted be known to exist, the parties may join in a written declaration of such marriage, substantially showing:

1. The names, ages, and residences of the parties;
2. The fact of marriage;
3. That no record of such marriage is known to exist.

Such declaration must be subscribed by the parties and attested by at least three witnesses.

History: En. Sec. 86, Civ. C. 1895; re-en. Sec. 3632, Rev. C. 1907; re-en. Sec. 5725, R. C. M. 1921. Cal. Civ. C. Sec. 76.

48-132. (5726) Declaration to be acknowledged and recorded. Declarations of marriages must be acknowledged and recorded in a like manner as marriage certificates.

History: En. Sec. 87, Civ. C. 1895; re-en. Sec. 3633, Rev. C. 1907; re-en. Sec. 5726, R. C. M. 1921. Cal. Civ. C. Sec. 77.

Cross-Reference
Recording of marriage certificates, sec. 48-122.

48-133. (5727) Action to determine validity. If either party to any marriage denies the same, or refuses to join in a declaration thereof, the other may proceed, by action in the district court, to have the validity of the marriage determined and declared.

History: En. Sec. 88, Civ. C. 1895; re-en. Sec. 3634, Rev. C. 1907; re-en. Sec. 5727, R. C. M. 1921. Cal. Civ. C. Sec. 78.

existence of the right of action for jactitation of marriage. Sell v. Sell, 58 M 329, 334, 193 P 561.

Operation and Effect

The protection of the marital relation provided for by this section negatives the

Collateral References

Marriage ⇨ 55.
55 C.J.S. Marriage § 41.

48-134. Premarital test certificate required of applicants for marriage license. Before any person, who is or may hereafter be authorized by law to issue marriage licenses, shall issue a marriage license, each applicant therefor shall file with him a certificate from a duly qualified physician, licensed to practice medicine and surgery in any state or United States territory, or any other person authorized by the laws of Montana to make such a certificate, which certificate shall state that the applicant has been given such an examination, including a standard serological test, as may

be necessary for the discovery of syphilis, made not more than twenty (20) days prior to the date of issuance of such license, and that the report of the results of such serological test has been exhibited to the applicant and that each party to the proposed marriage contract has examined the report of the serological test of the other party to said proposed contract.

Any person who by law is validly able to obtain a marriage license in the state of Montana is also validly able to give his or her consent to any examinations and tests required by this act. In submitting the blood specimen to the laboratory, the physician, or any other person authorized by the laws of Montana to make such a certificate, shall designate that it is a premarital test.

History: En. Sec. 1, Ch. 208, L. 1947.

48-135. Contents and form of certificate. The certificate shall contain a statement, from the person in charge of the laboratory making the test or authorized to make such reports, setting forth the name of the test, the date it was made, the name and address of the physician, or to any other person authorized under the laws of Montana to make the test, to whom the test was sent and the name and address of the person whose blood was tested. In the event that an error is discovered in the results of the test, such results will be expunged from the records of the Montana state board of health. The said certificate and statement shall be on a form to be provided and distributed by the Montana state board of health to all county clerks of the court in the state and to laboratories in this state approved by the Montana state board of health. This form is hereinafter referred to in this act as "the certificate form."

History: En. Sec. 2, Ch. 208, L. 1947.

48-136. Certificates from other state or for military personnel, when acceptable. Certificate forms provided by other states having comparable laws will be accepted for persons who have been examined and who have received serological tests for syphilis outside of Montana; provided, such examinations and tests are performed not more than twenty (20) days prior to the issuance of a marriage license. Certificates provided by the United States army or navy will be accepted for military personnel; provided, such certificates are signed by a medical officer commissioned in the United States army or United States navy or United States public health service; and provided, the certificates state the examinations are serological tests for syphilis and were performed not more than twenty (20) days prior to the issuance of the marriage license.

History: En. Sec. 3, Ch. 208, L. 1947.

48-137. Definition of test—rules and regulations. For the purpose of this act, a standard serological test shall be a test for syphilis approved by the Montana state board of health and an approved laboratory shall be the laboratory of the Montana state board of health or a laboratory approved by said board. Any other state, United States public health service or United States army or navy laboratory shall be considered approved, for the purposes of this act. Such laboratory test may be made on request, without charge at the laboratory of the state board of health. Reasonable rules and regulations for reports to be submitted by any

laboratory making tests and the manner of furnishing same to the certifying physician and the state shall be promulgated by the state board of health.

History: En. Sec. 4, Ch. 208, L. 1947.

48-138. Examination by county physician or health officer. Any applicant for a marriage license may, if he so chooses be examined free of charge by the county physician or county health officer.

History: En. Sec. 5, Ch. 208, L. 1947.

48-139. Penalties. Any applicant for a marriage license, physician, or other person authorized by the laws of Montana to make such a certificate, any person in charge of, or authorized to make such reports or statements for a laboratory who shall misrepresent his identity or any of the facts called for by the certificate form prescribed by this act; or any licensing officer who shall issue a marriage license without having received the certificate form or who shall have reason to believe that any of the facts on the certificate form have been misrepresented, and shall nevertheless issue a marriage license; or any person who shall otherwise fail to comply with the provisions of this act shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not more than one hundred dollars (\$100.00).

Certificates, laboratory statements or reports, and applications, in this act referred to and the information therein contained, shall be confidential and shall not be divulged to or open to inspection by any person other than state or local health officers or their duly authorized representatives. Any person who shall divulge such information or open to inspection such certificates, statements or reports, without authority, to any person not by law entitled to the same, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not more than one hundred dollars (\$100.00).

History: En. Sec. 6, Ch. 208, L. 1947.

48-140. Expense of administering act. The state board of health shall provide the necessary printing and pay the necessary expenses relative to the checking and approval of laboratories, clerical and technical assistance, involved in the administration of this act, and other expenditures necessary in carrying out the provisions and purposes of this act. All claims for such expenses shall be submitted for approval and audit to the state board of health, and shall be paid in accordance with law.

History: En. Sec. 7, Ch. 208, L. 1947.

48-141. Separability clause. If any division, section, subsection, sentence, clause, phrase or requirement of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions thereof. The legislature declares that it would have passed this act and each and every division, section, subsection, sentence, clause, phrase or requirement thereof, irrespective of the fact that any one or more other divisions, sections, subsections, clauses, sentences, phrases or requirements be declared unconstitutional.

History: En. Sec. 8, Ch. 208, L. 1947.

CHAPTER 2

ANNULLING MARRIAGE

- Section 48-201. Void marriages.
 48-202. Causes for annulling marriages.
 48-203. Actions therefor—when and by whom commenced.
 48-204. Children of annulled marriage.
 48-205. Custody of children.
 48-206. Effect of judgment of nullity.

48-201. (5728) Void marriages. Either party to an incestuous or void marriage may proceed, by action in the district court, to have the same so declared.

History: En. Sec. 100, Civ. C. 1895;
 re-en. Sec. 3635, Rev. C. 1907; re-en. Sec.
 5728, R. C. M. 1921. Cal. Civ. C. Sec. 80.

Collateral References

Marriage §§ 57, 60(1).
 55 C.J.S. Marriage §§ 48, 54.
 35 Am. Jur. 219, Marriage, §§ 56 et seq.

48-202. (5729) Causes for annulling marriages. A marriage may be annulled for any of the following causes, existing at the time of the marriage:

1. That the party in whose behalf it is sought to have the marriage annulled was under the age of legal consent, and such marriage was contracted without the consent of his or her parents or guardian, or person having charge of him or her; unless, after attaining the age of consent, such party for any time freely cohabited with the other as husband or wife.

2. That the former husband or wife of either party was living, and the marriage with such former husband or wife was then in force.

3. That either party was of unsound mind, unless such party, after coming to reason, freely cohabited with the other as husband or wife.

4. That the consent of either party was obtained by fraud, unless such party afterward, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband or wife.

5. That the consent of either party was obtained by force, unless such party afterwards freely cohabited with the other as husband or wife.

6. That either party was, at the time of marriage, physically incapable of entering into the married state, and such incapacity continues, and appears to be incurable.

History: En. Sec. 110, Civ. C. 1895;
 re-en. Sec. 3636, Rev. C. 1907; re-en. Sec.
 5729, R. C. M. 1921. Cal. Civ. C. Sec. 82.
 Based on Field Civ. C. Sec. 54.

NOTE.—See note to section 21-103 for earlier history and State ex rel. Wooten v. District Court, 57 M 517, 189 P 233.

Cross-Reference

Divorce, secs. 21-101 to 21-149.

Subd. 1. Consent of Parents Not Required To Be in Writing

Held, in an action for the annulment of a marriage contracted in the state of Idaho, on the ground that the son of plaintiff was not of statutory age at the time of its solemnization, and did not have the necessary parental consent, that consent

to the marriage was given by both parents, and held further, that the statutes of neither Idaho nor of Montana require that such consent shall be in writing and acknowledged, but refer to lack of consent, no matter how expressed. Cross v. Cross, 110 M 300, 303, 102 P 2d 829.

Operation and Effect

To justify annulment of a marriage contract because of mental incompetency of one of the parties, there must be clear and convincing proof that such party was so incompetent at the time the contract was entered into. Murphy v. La Chapelle, 95 M 36, 38, 24 P 2d 131.

Marriage of a female minor who had attained the age of legal consent, but not majority, and who was not otherwise disqualified, contracted without consent of

parent or guardian, was not subject to annulment irrespective of cohabitation. *Teague v. Allred*, 119 M 193, 173 P 2d 117, 118.

References

Lommasson v. Hall, 111 M 142, 150, 106 P 2d 1089.

Collateral References

Marriage 58.

55 C.J.S. *Marriage* § 50.

35 Am. Jur. 234, *Marriage*, § 84-166.

Avoidance of procreation of children as ground for annulment. 4 ALR 2d 228.

Cohabitation of persons ceremonially married, after learning facts negating dissolution of previous marriage of one, as affecting right to annulment. 4 ALR 2d 542.

Antenuptial knowledge relating to alleged grounds as barring right to annulment. 15 ALR 2d 706.

What constitutes duress sufficient to warrant divorce or annulment of marriage. 16 ALR 2d 1430.

Refusal of sexual intercourse as ground for annulment. 28 ALR 2d 499.

48-203. (5730) Actions therefor—when and by whom commenced.

An action to obtain a decree of nullity of marriage, for causes mentioned in the preceding section, must be commenced within the periods and by the parties, as follows:

1. For causes mentioned in subdivision 1: By the party to the marriage who was married under the age of legal consent within two years after arriving at the age of consent; or by a parent, guardian, or other person having charge of such non-aged male or female, at any time before such married minor has arrived at the age of legal consent.

2. For causes mentioned in subdivision 2: By either party during the life of the other, or by such former husband or wife.

3. For causes mentioned in subdivision 3: By the party injured, or relative or guardian of the party of unsound mind, at any time before the death of either party.

4. For causes mentioned in subdivision 4: By the party injured, within two years after the discovery of the facts constituting the fraud.

5. For causes mentioned in subdivision 5: By the injured party, within two years after the marriage.

6. For causes mentioned in subdivision 6: By the injured party, within four years after the marriage.

History: En. Sec. 111, Civ. C. 1895; re-en. Sec. 3637, Rev. C. 1907; re-en. Sec. 5730, R. C. M. 1921. Cal. Civ. C. Sec. 83.

Collateral References

Marriage 60(2).

55 C.J.S. *Marriage* § 53.

48-204. (5731) Children of annulled marriage. Where marriage is annulled, on the ground that a former husband or wife was living, and it is adjudged that the subsequent marriage was contracted in good faith, and with the full belief of the parties, or either of them, that the former husband or wife was dead, or where a marriage is annulled on the ground of insanity, children begotten before the judgment must be specified in the judgment, and are legitimate and entitled to succeed in the same manner as legitimate children to the estate of both parents.

History: En. Sec. 112, Civ. C. 1895; re-en. Sec. 3638, Rev. C. 1907; re-en. Sec. 5731, R. C. M. 1921. Cal. Civ. C. Sec. 84. Based on Field Civ. C. Sec. 56.

Collateral References

Bastards 100.

10 C.J.S. *Bastards* § 24.

48-205. (5732) Custody of children. The court must award the custody of the children of a marriage annulled on the ground of fraud or force to

the innocent parent, and may also provide for their education and maintenance out of the property of the guilty party.

History: En. Sec. 113, Civ. C. 1895;
re-en. Sec. 3639, Rev. C. 1907; re-en. Sec.
5732, R. C. M. 1921. Cal. Civ. C. Sec. 85.
Field Civ. C. Sec. 57.

Collateral References

Marriage 64.
55 C.J.S. Marriage § 64.
35 Am. Jur. 228, Marriage, § 73.

48-206. (5733) Effect of judgment of nullity. A judgment of nullity of marriage rendered is conclusive only as against the parties to the action and those claiming under them.

History: En. Sec. 114, Civ. C. 1895;
re-en. Sec. 3640, Rev. C. 1907; re-en. Sec.
5733, R. C. M. 1921. Cal. Civ. C. Sec. 86.

Effect of annulment of marriage on
rights arising out of acts of or transac-
tions between parties prior thereto. 2 ALR
2d 637.

Collateral References

Marriage 67
55 C.J.S. Marriage § 68.
35 Am. Jur. 233, Marriage, § 83.

TITLE 49

MAXIMS OF JURISPRUDENCE

Chapter 1. Maxims of jurisprudence, 49-101 to 49-135.

CHAPTER 1

MAXIMS OF JURISPRUDENCE

49-101. (8738) The maxims of jurisprudence hereinafter set forth are intended not to qualify any of the foregoing provisions of this code, but to aid in their just application.

History: En. Sec. 4600, Civ. C. 1895; re-en. Sec. 6177, Rev. C. 1907; re-en. Sec. 8738, R. C. M. 1921. Cal. Civ. C. Sec. 3509. Field Civ. C. Sec. 1964.

References

In re Irvine's Estate, 114 M 577, 581, 139 P 2d 489.

49-102. (8739) When the reason of a rule ceases, so should the rule itself.

History: En. Sec. 4601, Civ. C. 1895; re-en. Sec. 6178, Rev. C. 1907; re-en. Sec. 8739, R. C. M. 1921. Cal. Civ. C. Sec. 3510. Field Civ. C. Sec. 1965.

Operation and Effect

Where a judge, other than the one who presided at the trial, passes upon a motion for a new trial, the same presumption does not attach, on appeal, to his ruling; this section and the next succeeding section apply. Gibson v. Morris State Bank, 49 M 60, 72, 140 P 76.

References

Cited or applied as section 6178, Revised Codes, in State ex rel. Jerry v. District Court, 57 M 328, 331, 188 P 365; State v.

Vandervoort, 57 M 540, 547, 189 P 764; Morgan v. Butte Central Min. Co. 58 M 633, 640, 194 P 496; State v. District Court et al., 76 M 143, 150, 245 P 529; Holt v. Sather, 81 M 442, 451, 264 P 108; Sunburst Oil & Refining Co. v. Callender, 84 M 178, 188, 274 P 834; Laundreville v. Mero et al., 86 M 43, 55, 281 P 749; Mitchell v. Thomas, 91 M 370, 382, 8 P 2d 639; Leffek v. Luedeman, 95 M 457, 476, 27 P 2d 511; State ex rel. Whitlock v. State Board of Equalization, 100 M 72, 85, 45 P 2d 684; Osnes Livestock Co. v. Warren, 103 M 284, 294, 62 P 2d 206; Tuttle v. Union Bank and Trust Co., 112 M 568, 577, 119 P 2d 884; In re Irvine's Estate, 114 M 577, 591, 139 P 2d 489; Little v. Little, — M —, 259 P 2d 343, 345.

49-103. (8740) Where the reason is the same, the rule should be the same.

History: En. Sec. 4602, Civ. C. 1895; re-en. Sec. 6179, Rev. C. 1907; re-en. Sec. 8740, R. C. M. 1921. Cal. Civ. C. Sec. 3511. Field Civ. C. Sec. 1966.

Operation and Effect

A bona fide purchaser of property for value from a pledgee of the same, who sold it in violation of the pledge, succeeds to all the rights of the pledgee, and under this section, which makes the rule the same when the reason is the same, a purchaser from a chattel mortgagee will likewise succeed to the rights of his grantor

with respect to the property purchased, on the principle of subrogation, although there is no contract of assignment between him and his grantee. Potter v. Lohse, 31 M 91, 96, 77 P 419.

References

Cited or applied as section 6179, Revised Codes, in Gibson v. Morris State Bank, 49 M 60, 72, 140 P 76; Johnson v. Kaiser, 104 M 261, 275, 65 P 2d 1179; Norwegian Lutheran Church of America v. Armstrong, 112 M 528, 533, 118 P 2d 380.

49-104. (8741) One must not change his purpose to the injury of another.

History: En. Sec. 4603, Civ. C. 1895; re-en. Sec. 6180, Rev. C. 1907; re-en. Sec. 8741, R. C. M. 1921. Cal. Civ. C. Sec. 3512. Field Civ. C. Sec. 1967.

49-105. (8742) Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.

History: En. Sec. 4604, Civ. C. 1895; re-en. Sec. 6181, Rev. C. 1907; re-en. Sec. 8742, R. C. M. 1921. Cal. Civ. C. Sec. 3513. Field Civ. C. Sec. 1968.

Operation and Effect

A provision in a note that it is negotiable at a particular bank is not a waiver of the effect of a stipulation for payment of attorney's fees in case of suit, which under other statutory provisions, renders the note non-negotiable. *Stadler v. First National Bank*, 22 M 190, 204, 56 P 111.

The right to require the sureties on the undertaking on appeal to justify is personal to the exceptant, and may therefore be waived by him. *Bush v. Baker*, 46 M 535, 545, 129 P 550.

The prior right conferred upon those most interested in an estate to administer it may be waived. In *re Blackburn's Estate*, 48 M 179, 188, 137 P 381.

A stipulation in a contract, waiving the benefit of the statute of limitations, is binding for a reasonable time; at least until the expiration of an additional period equal to that prescribed by the statute for the particular cause of action. *Parchen v. Chessman*, 49 M 326, 335, 142 P 631.

Id. This section does not prescribe the time when nor the mode by which the waiver may be made effective, nor does it impose any restriction or limitation upon the right of waiver. It must therefore be assumed that the party desiring to waive his right is free to do so in any way and at any time he chooses.

A party may waive the benefit of the statute of limitations, either before or after the expiration of the prescribed limit, not only by either of the acts mentioned in section 93-2716 but also by express agreement based upon a consideration, though made contemporaneously with, and as a part of, the principal agreement or obligation out of which the action has arisen. *Parchen v. Chessman*, 49 M 326, 335, 142 P 631. See *Shea v. North-Butte Min. Co.*, 55 M 522, 536, 179 P 499.

Even as to the surviving husband or wife, the benefit of section 91-1601 may be waived, not only by express assent, but also by refusal or failure to claim, or by unreasonable delay in claiming, the advantage given by that section. *Melzner v. Trucano*, 51 M 18, 24, 149 P 365.

The party intending to move for a new

References

Gilna v. Barker et al., 78 M 357, 369, 254 P 174; *Federal Land Bk. of Spokane v. Gallatin Co.*, 84 M 98, 110, 274 P 288.

trial may waive formal notice of entry of judgment and serve his notice of intention without it. *State ex rel. Brown v. District Court*, 55 M 158, 161, 174 P 601.

An employee may waive the advantage of any provision of law that was intended solely for his benefit, so long as the waiver does not violate public policy. *Shea v. North-Butte Min. Co.*, 55 M 522, 535, 179 P 499.

Under this section one may waive, by implication or by agreement, the advantage of a law intended solely for his benefit. *Anaconda Copper Min. Co. v. Ravalli County et al.*, 56 M 530, 186 P 332.

Under the following maxims of jurisprudence plaintiff in the above action, who did nothing toward having the decree of foreclosure amended for a period of more than six months and whose action was not filed for more than a year after foreclosure sale, was not entitled to relief: The law does not aid one who sleeps on his rights; one may waive the advantage of a law intended solely for his benefit; he who consents to an act is not wronged thereby; acquiescence in error takes away the right of objecting to it; where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened, must be the sufferer, etc. *Federal Land Bk. of Spokane v. Gallatin Co.*, 84 M 98, 111, 274 P 288.

Waiver May Be by Agreement or Implication

Under this section one may by implication or agreement waive the advantage of a law intended solely for his benefit. *H. Earl Clack Co. v. Staunton et al.*, 105 M 375, 383, 72 P 2d 1022.

References

Cited or applied as section 4604, Civil Code, in *Bullard v. Smith*, 28 M 387, 399, 72 P 761; as section 6181, Revised Codes, in *Washoe Copper Co. v. Hickey*, 46 M 363, 366, 128 P 584; *Bush v. Baker*, 46 M 535, 545, 129 P 550; *Stair v. Lunke*, 56 M 130, 133, 180 P 569; *State ex rel. Matt v. District Court et al.*, 86 M 193, 199, 282 P 1042; *Thielbar Realities, Inc. v. Insurance Co.*, 91 M 525, 533, 9 P 2d 469; *Pierce v. Pierce*, 108 M 42, 50, 89 P 2d 269; *State ex rel. Eden v. District Court*, 109 M 263, 272, 95 P 2d 447; *Commercial Credit Co. v. O'Brien*, 115 M 199, 216, 146 P 2d 637; *Hames v. Polson*, 123 M 469, 215 P 2d 950.

49-106. (8743) One must so use his own rights as not to infringe upon the rights of another.

History: En. Sec. 4605, Civ. C. 1895; re-en. Sec. 6182, Rev. C. 1907; re-en. Sec. 8743, R. C. M. 1921. Cal. Civ. C. Sec. 3514. Field Civ. C. Sec. 1969.

Operation and Effect

An appropriator of an upper water right who, in a contract to deliver it to a lower owner of land at a certain place, has reserved the right to use the water for placer mining purposes, acquires no title to the water itself, or any right to pollute the water to any greater extent than is permitted by law. *Lincoln v. Rodgers*, 1 M 217, 221; *Nelson v. O'Neal*, 1 M 284, 286; *Fitzpatrick v. Montgomery*, 20 M 181, 187, 50 P 416; *Chessman v. Hale*, 31 M 577, 583, 584, 79 P 254.

Flood waters of a river, which become severed from the main current, still form a part of the river, and may not be obstructed by a railroad company by a fill along its right-of-way without openings, so as to injure the property of another. *Fordham v. Northern Pacific Ry. Co.*, 30 M 421, 432, 76 P 1040. See *Wine v. Northern Pacific Ry. Co.*, 48 M 200, 207, 136 P 387; *Eastern Oregon Land Co. v. Willow River L. & I. Co.*, 201 Fed 203.

The maxim of jurisprudence announced in this section is a principle of substantive law, peculiarly applicable to equity actions. *Quinlan v. Calvert*, 31 M 115, 119, 77 P 428.

One who has a prior right to the use of the waters of one creek cannot let those waters run to waste, and use the full amount of his appropriation of the waters of another creek to the detriment of a junior appropriator on the latter creek. *Norman v. Corbley*, 32 M 195, 205, 79 P 1059.

The doctrine of the maxim, *sic utere tuo ut alienum non laedas*, is not inconsistent with the rule of law that a man may use his own property as he pleases, for all purposes for which it is adaptable, without being answerable for the consequences, if he is not an active agent in designedly causing injury, if he does not create a nuisance, or if he exercises due care and caution to prevent injury. *Fleming v. Lockwood*, 36 M 384, 388, 389, 92 P 962.

49-107. (8744) He who consents to an act is not wronged by it.

History: En. Sec. 4606, Civ. C. 1895; re-en. Sec. 6183, Rev. C. 1907; re-en. Sec. 8744, R. C. M. 1921. Cal. Civ. C. Sec. 3515. Field Civ. C. Sec. 1970.

Not Applicable When Owner Has No Rights to Waive

Where a tax deed was invalid for fail-

A landowner who lets a contract for the repair of a skylight on the roof of his building is liable for damages caused by the negligent leaving of waste material on the roof in such manner that it was blown off and injured a near-by building, irrespective of whether or not the contractor was required to remove such waste material. *A. M. Holter Hardware Co. v. Western Mtg. etc. Co.*, 51 M 94, 99, 149 P 489.

The police power is not restricted to the regulation or supervision of what is offensive, disorderly or insanitary, but embraces regulation designed to promote the public convenience and the peace and good order of society, i. e., it may be exercised in aid of what is sanctioned by usage, or held by the prevailing morality and preponderant opinion to be necessary to the public welfare, and has its foundation in the maxim, *sic utere tuo ut alienum non laedas*. *State v. Loomis*, 75 M 88, 99, 242 P 344.

One may use his own property, as he sees fit, for all purposes to which it is adaptable, without being answerable for the consequences, if he is not an active agent in designedly causing injury, if he does not create a nuisance, or if he exercises due care and caution to prevent injury, but must so use his right as not to infringe upon the rights of another. *Purcell et al. v. Davis et al.*, 100 M 480, 492, 50 P 2d 255.

Citing this section, held, that the law does not countenance the principle that one tract of land may be reclaimed at the expense of the destruction of another without compensation. *O'Hare v. Johnson*, 116 M 410, 418, 153 P 2d 888.

References

Jeffers v. Montana Power Co. et al., 68 M 114, 142, 217 P 652; *Calvert et al. v. Anderson et al.*, 73 M 551, 558, 236 P 847; *Missoula P. S. Co. v. Bitter Root Irr. Dist.*, 80 M 64, 69, 257 P 1038; *Neyman et al. v. Pineus et al.*, 82 M 467, 486, 267 P 805; *Sunburst Oil & Refining Co. v. Callender*, 84 M 178, 192, 274 P 834.

ure to give the owner the statutory notice of application therefor, such owner could not be held to have waived his right to question the validity of the deed nor acquiesced in the taking of his property by being represented at the county's public auction sale by an agent who bid on it, because he had no rights to waive by

bidding on the property. *Kerr v. Small*, 112 M 490, 494, 117 P 2d 271.

Operation and Effect

Where officers searching the home of defendant, with his consent, found a quantity of mash in the process of manufacture into beer, they were properly permitted to give evidence as to what they found, since one who consents to a search cannot complain that his constitutional rights

were invaded by the search. *State v. Roop*, 73 M 177, 179, 235 P 336.

References

Swords v. Occident Elevator Co., 72 M 189, 194, 232 P 189; *Federal Land Bk. of Spokane v. Gallatin Co.*, 84 M 98, 111, 274 P 288; *State ex rel. Boorman v. State Board of Land Commissioners*, 109 M 127, 134, 94 P 2d 201.

49-108. (8745) Acquiescence in error takes away the right of objecting to it.

History: En. Sec. 4607, Civ. C. 1895; re-en. Sec. 6184, Rev. C. 1907; re-en. Sec. 8745, R. C. M. 1921. Cal. Civ. C. Sec. 3516. Field Civ. C. Sec. 1971.

Estoppel by Acquiescence—Implied Acquiescence

A party seeking reformation of a contract on the ground of mistake in its execution, after becoming aware of the mistake or the circumstances are such that he will be presumed to have known of it, acquiesces in the instrument, he loses his right to reformation; acquiescence may be implied from an unreasonable delay in applying for redress after getting notice of the mistake. *Cook-Reynolds Co. v. Beyer*, 107 M 1, 9, 79 P 2d 658.

When Acquiescence in Contract Destroys Right of Reformation

Acquiescence in a contract after learning that it does not represent the actual agreement, destroys the right of reformation, under this section; such acquiescence may be implied from an unreasonable delay in applying for redress after notice of the mistake; the rule applying not only where reformation is asked for on the ground of mistake but also on the ground of fraud. *Krueger v. Morris*, 110 M 559, 567, 107 P 2d 142.

References

Federal Land Bk. of Spokane v. Gallatin Co., 84 M 98, 111, 274 P 288; *Beebe et al. v. James*, 91 M 403, 416, 8 P 2d 803; *State ex rel. Boorman v. State Board of Land Commissioners*, 109 M 127, 134, 94 P 2d 201.

49-109. (8746) No one can take advantage of his own wrong.

History: En. Sec. 4608, Civ. C. 1895; re-en. Sec. 6185, Rev. C. 1907; re-en. Sec. 8746, R. C. M. 1921. Cal. Civ. C. Sec. 3517. Field Civ. C. Sec. 1972.

Operation and Effect

A telegraph company cannot urge the public character of its business as a justification for its trespass, when, without first resorting to eminent domain proceedings, it erects poles on, and strings its wires across, private property, the owner not consenting. *Postal Telegraph-Cable Co. v. Nolan*, 53 M 129, 136, 162 P 169.

The provision of section 2, chapter 11, Extraordinary Session of 1919, that a police officer can recover salary only for services actually rendered, did not apply where he was unlawfully discharged and, though offering to perform them, was thereafter prevented from so doing, since the city could not take advantage of its own wrong. *Sweeney v. City of Butte*, 64 M 230, 242, 208 P 943.

If a district court did not have authority to accept Liberty bonds in lieu of money as bail, plaintiff upon whose solicitations the court accepted them, having been in *pari delicto*, was estopped to assert

lack of authority in the court to receive them as bail, since she could not take advantage of her own wrong. *Kirschbaum v. Mayn*, 76 M 320, 329, 246 P 953.

A subcontractor, failing to provide all materials and perform all work necessary to complete subcontract with federal public building contractor or to pay for materials furnished subcontractor by others, with result that surety on contractor's bond completed work and paid less than contract prices for such materials, was not entitled to credit for difference between sums agreed to be paid therefor and sums actually paid by surety in action on such bond. *United States, to Use of Watsbaugh & Co. v. Seaboard Co.*, 26 F Supp 681, 687.

Where Mortgage Obtained by Fraud and Deceit

Where plaintiff's mortgage was valueless through defendant's misrepresentations that it was a first mortgage when in fact it was a second, and plaintiff without first foreclosing, attached, it was error for court to dissolve the attachment without plaintiff's foreclosing first to prove the mortgage valueless, (under the re-

quirements of sec. 93-6001, i. e. to exhaust the security before resorting to general assets); to so hold would be to award a prize for fraud and deceit, and permit a party to take advantage of his own wrong, contrary to this section. *Bailey v. Hansen*, 105 M 552, 558, 74 P 2d 438.

References

Cited or applied as section 6185, Revised Codes, in *Butte Miners' Union v. City of*

Butte, 58 M 391, 401, 194 P 149; *Gilna v. Barker et al.*, 78 M 357, 369, 254 P 174, *State ex rel. Boorman v. State Board of Land Commissioners*, 109 M 127, 134, 94 P 2d 201; *Peterson v. Livestock Commission*, 120 M 140, 181 P 2d 152, 158; *Mitchell v. Pestal*, 123 M 142, 208 P 2d 807, 811; *Rieckhoff v. Consolidated Gas Co.*, 123 M 555, 217 P 2d 1076, 1081; dissenting opinion in *State ex rel. Hill v. District Court*, 126 M 1, 242 P 2d 850, 853.

49-110. (8747) He who has fraudulently dispossessed himself of a thing may be treated as if he still had possession.

History: En. Sec. 4609, Civ. C. 1895; 8747, R. C. M. 1921. Cal. Civ. C. Sec. re-en. Sec. 6186, Rev. C. 1907; re-en. Sec. 3518. Field Civ. C. Sec. 1973.

49-111. (8748) He who can and does not forbid that which is done on his behalf is deemed to have bidden it.

History: En. Sec. 4610, Civ. C. 1895; re-en. Sec. 6187, Rev. C. 1907; re-en. Sec. 8748, R. C. M. 1921. Cal. Civ. C. Sec. 3519. Field Civ. C. Sec. 1974. *tin Co.*, 84 M 98, 111, 274 P 288; *Brown v. Columbia Amusement Co.*, 91 M 174, 6 P 2d 874; *State ex rel. Boorman v. State Board of Land Commissioners*, 109 M 127, 134, 94 P 2d 201.

References

Federal Land Bk. of Spokane v. Galla-

49-112. (8749) No one should suffer for the act of another.

History: En. Sec. 4611, Civ. C. 1895; 8749, R. C. M. 1921. Cal. Civ. C. Sec. re-en. Sec. 6188, Rev. C. 1907; re-en. Sec. 3520. Field Civ. C. Sec. 1975.

49-113. (8750) He who takes the benefit must bear the burden.

History: En. Sec. 4612, Civ. C. 1895; re-en. Sec. 6189, Rev. C. 1907; re-en. Sec. 8750, R. C. M. 1921. Cal. Civ. C. Sec. 3521. Field Civ. C. Sec. 1976. which use of automobiles was excluded from coverage of policy; the defendant assumed the burden of protecting members of the public from injury, and having accepted the benefit (premium), should also accept the burden. *Doheny v. United States Fidelity & Guaranty Co.*, 34 F Supp 888, 891, 123 F 2d 746.

Operation and Effect

Where defendant furnished contractors with surety bond providing that contractors would faithfully perform contract with Montana state highway commission for roadwork, and contract required contractors to carry public liability insurance to indemnify public for injuries sustained by reason of work on highway, defendant was liable for satisfaction of judgments, notwithstanding exclusion clause under

References

Gilna v. Barker et al., 78 M 357, 369, 254 P 174; *Federal Land Bk. of Spokane v. Gallatin Co.*, 84 M 98, 111, 274 P 288; *Humbird et al. v. Arnet et al.*, 99 M 499, 44 P 2d 756.

49-114. (8751) One who grants a thing is presumed to grant also whatever is essential to its use.

History: En. Sec. 4613, Civ. C. 1895; 8751, R. C. M. 1921. Cal. Civ. C. Sec. re-en. Sec. 6190, Rev. C. 1907; re-en. Sec. 3522. Field Civ. C. Sec. 1977.

49-115. (8752) For every wrong there is a remedy.

History: En. Sec. 4614, Civ. C. 1895; re-en. Sec. 6191, Rev. C. 1907; re-en. Sec. 8752, R. C. M. 1921. Cal. Civ. C. Sec. 3523. Field Civ. C. Sec. 1978. fully and by false representations persuading bondmen on a bail bond furnished by plaintiff, charged with crime, to withdraw therefrom with the result that plaintiff was kept in jail for thirty-eight days and until a new bond was furnished by some of the persons who had previously withdrawn on the solicitation of defendants,

Operation and Effect

Complaint in an action for damages based upon acts of defendants in wrong-

held to state a cause of action, irrespective of the form or nature of the action, upon the theory that for every wrong there is a remedy. *Pyles v. Melvin et al.*, 84 M 338, 347, 275 P 753.

Since under chapter 138, Laws of 1927, (75-1805) an order of the board of county commissioners in the matter of setting aside an order of the county superintendent of schools creating a school district, is final and no appeal lies to either school authorities or courts, equity will take jurisdiction of an action to right any wrong committed by the board. *Grant et al. v. Michaels et al.*, 94 M 452, 459, 23 P 2d 266.

49-116. (8753) Between those who are equally in the right, or equally in the wrong, the law does not interpose.

History: En. Sec. 4615, Civ. C. 1895; re-en. Sec. 6192, Rev. C. 1907; re-en. Sec. 8753, R. C. M. 1921. Cal. Civ. C. Sec. 3524. Field Civ. C. Sec. 1979.

Operation and Effect

The rule that the violation of a penal statute or ordinance by one resulting in injury to another is negligence per se does not apply where the wrongdoer and the injured party are in *pari delicto*. *Elmer Jackson v. Lomas*, 60 M 8, 15, 198 P 434.

Id. A city ordinance prohibited the sale, as well as the discharge, of fireworks, within the city limits. A minor purchased

References

Samuell v. Moore Mercantile Co. et al., 62 M 232, 236, 204 P 376; *Simonsen v. Barth et al.*, 64 M 95, 100, 208 P 938; *State v. District Court et al.*, 66 M 496, 509, 214 P 85; *McIntyre et al. v. Dawes*, 71 M 367, 373, 229 P 846; *Link v. Haire*, 82 M 406, 425, 267 P 952; *Maki v. Murray Hospital*, 91 M 251, 262, 7 P 2d 228; *Vonault v. O'Rourke*, 97 M 92, 105, 33 P 2d 535; *State ex rel. Hill v. District Court*, 126 M 1, 242 P 2d 850, 853.

a package of fireworks from defendant, discharged one and was injured. Held, that having been in *pari delicto* with defendant in violating the ordinance, he could not recover damages for the injuries sustained.

References

Cited or applied as section 6192, Revised Codes, in *Melville v. Butte-Balaklava Copper Co.*, 47 M 1, 7, 130 P 441; *Puckett v. Sherman & Reed*, 62 M 395, 400, 205 P 250; *McManus v. Fulton*, 85 M 170, 186, 278 P 126.

49-117. (8754) Between rights otherwise equal, the earliest is preferred.

History: En. Sec. 4616, Civ. C. 1895; re-en. Sec. 6193, Rev. C. 1907; re-en. Sec. 8754, R. C. M. 1921. Cal. Civ. C. Sec. 3525. Field Civ. C. Sec. 1980.

49-118. (8755) No man is responsible for that which no man can control.

History: En. Sec. 4617, Civ. C. 1895; re-en. Sec. 6194, Rev. C. 1907; re-en. Sec. 8755, R. C. M. 1921. Cal. Civ. C. Sec. 3526. Field Civ. C. Sec. 1981.

49-119. (8756) The law helps the vigilant, before those who sleep on their rights.

History: En. Sec. 4618, Civ. C. 1895; re-en. Sec. 6195, Rev. C. 1907; re-en. Sec. 8756, R. C. M. 1921. Cal. Civ. C. Sec. 3527. Field Civ. C. Sec. 1982.

Operation and Effect

The maxim enunciated in this section was applied in a case where the plaintiff, knowing of the defendant's adverse claim to the property in controversy, remained silent for twelve years and offered no explanation for the delay in bringing suit. *Kavanaugh v. Flavin*, 35 M 133, 137, 88 P 764.

Where a claimant of land permitted thirty years to elapse before he seriously attempted to enforce his claim, and during that time the value of the land had increased more than a hundredfold, and

innocent third parties without notice of his claim had purchased portions thereof and expended time and money in their improvement, he was guilty of such laches in prosecuting his alleged right as to make this maxim applicable. *Kimes v. Northern Pacific Ry. Co.*, 49 M 573, 576, 144 P 156.

The rule of laches is most rigidly applied in cases involving mining claims for the reason that no other class of property is subject to more violent fluctuations in value. *O'Hanlon et al. v. Ruby Gulch Min. Co.*, 64 M 318, 328, 209 P 1062.

Under the following maxims of jurisprudence plaintiff in the above action, who did nothing toward having the decree of foreclosure amended for a period of more than six months and whose action was not

filed for more than a year after foreclosure sale, was not entitled to relief: The law does not aid one who sleeps on his rights; one may waive the advantage of a law intended solely for his benefit; he who consents to an act is not wronged thereby; acquiescence in error takes away the right of objecting to it; where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened, must be the sufferer, etc. Federal Land Bk. of Spokane v. Gallatin Co., 74 M 98, 110, 274 P 288.

Held, under the doctrine that the law helps the vigilant and not one who sleeps on his rights, that where defendant in a mortgage foreclosure suit, who had been regularly served in person with summons, permitted two years to elapse after entry of judgment by default against him, and eight months after execution of the sheriff's deed to the property, before moving to set it aside on the ground that the judgment, having been entered one day too soon, was void, he was not entitled to

relief by writ of certiorari; under such circumstances the judgment will be presumed to have been entered within jurisdiction. State ex rel. Matt v. District Court et al., 86 M 193, 200, 282 P 1042.

A person claiming an interest in property must be diligent in asserting his claim, and this is especially true as to mining claims; stockholder's action for cancellation of mining lease allegedly procured through secret collusion between corporate lessor's confidential agent and lessee and other defendants was barred by "laches," where plaintiff failed to make due inquiry, permitted lessee to expend large sums, accepted benefits of lease, ratified it twice, and delayed two years after collusion should have been discovered before bringing action. Jeffrey v. Pioneer Placer Dredging Co., 50 F Supp 43, 50, 51.

Collateral References

Equity Ⓒ64.

30 C.J.S. Equity § 100.

49-120. (8757) The law respects form less than substance.

History: En. Sec. 4619, Civ. C. 1895; re-en. Sec. 6196, Rev. C. 1907; re-en. Sec. 8757, R. C. M. 1921. Cal. Civ. C. Sec. 3528. Field Civ. C. Sec. 1983.

References

State v. District Court et al., 66 M 496, 509, 214 P 85; Shelley v. Normile, 109 M 117, 124, 94 P 2d 206; In re Irvine's Estate, 114 M 577, 581, 139 P 2d 489.

49-121. (8758) That which ought to have been done is to be regarded as done, in favor of him to whom, and against him from whom, performance is due.

History: En. Sec. 4620, Civ. C. 1895; re-en. Sec. 6197, Rev. C. 1907; re-en. Sec. 8758, R. C. M. 1921. Cal. Civ. C. Sec. 3529. Field Civ. C. Sec. 1984.

Operation and Effect

Where an oil and gas lease had been placed in escrow and all conditions precedent to delivery had been complied with, it will be deemed to have been delivered under the doctrine that that which ought to have been done will be regarded as having been done. Guerin v. Sunburst Oil & Gas Co., 68 M 365, 371, 218 P 949.

The equitable doctrine that that which ought to have been done must be regarded as done does not operate in favor of every person, but only in favor of him who holds the equitable right to have the act performed, as against the one upon whom the duty of such performance has devolved. Morton v. Union Central Life Ins. Co., 80 M 593, 609, 261 P 278.

Where a vendor executes a deed to an interest in oil land and receives an adequate consideration therefor, the former may not come into a court of equity to evade his obligation on the ground that the instrument was so drawn that, tested

by the technical rules of law, it does not convey what was intended to be conveyed, but the court will consider that as done which should have been done, and sustain the transaction if, on sound rules of law and equity, effect can be given to all the provisions of the deed and the intention of the parties carried out. Krutzfeld v. Stevenson et al., 86 M 463, 475, 284 P 553.

Where vendee of an elevator bought under a contract permitting him to pay for it out of the profits derived in operating it, had in that manner fully paid for it on a certain day, but in reliance upon the correctness of an erroneous audit of his books by the vendor, about a month thereafter executed a surrender of his rights, a court of equity will, on the theory that that was done which ought to have been done, decree that legal title vested in him when full payment was made, and defendant vendor may not be heard to say in defense that plaintiff had relinquished his rights which then had become fixed, but of which he was kept in ignorance by the vendor's acts. Whorley v. Patton-Kjose Company, Inc., 90 M 461, 488, 5 P 2d 210.

References

Town of Cascade v. County of Cascade, 75 M 304, 308, 243 P 806; Kester v. Amon et al., 81 M 1, 17, 261 P 288; Peterson v. Livestock Commission, 120 M 140, 181 P 2d 152, 158.

49-122. (8759) That which does not appear to exist is to be regarded as if it did not exist.

History: En. Sec. 4621, Civ. C. 1895; re-en. Sec. 6198, Rev. C. 1907; re-en. Sec. 8759, R. C. M. 1921. Cal. Civ. C. Sec. 3530. Field Civ. C. Sec. 1985.

Collateral References

Equity ⇐ 57.
30 C.J.S. Equity § 106.

References

Pierce v. Pierce, 108 M 42, 47, 89 P 2d 269.

49-123. (8760) The law never requires impossibilities.

History: En. Sec. 4622, Civ. C. 1895; re-en. Sec. 6199, Rev. C. 1907; re-en. Sec. 8760, R. C. M. 1921. Cal. Civ. C. Sec. 3531. Field Civ. C. Sec. 1986.

Operation and Effect

Where from the very nature or character of a consideration received by a minor for the execution of a contract (services performed by attorneys under a contract of employment to institute an action) it cannot be returned by him as required by section 64-107, as a condition precedent to disaffirmance, he may disaffirm though unable to make return. Downey et al. v. Northern Pacific Ry. Co., 72 M 166, 185, 232 P 531.

Since the law does not require impossibilities nor the doing of idle acts, where a school board by filling the position for which it had employed plaintiff had put it out of its power to place her, all other positions being filled, did not hold any

meeting at which plaintiff could have presented herself for duty, and the superintendent had advised her that the board had repudiated its contract with her, she was not required to tender her services to the board or the superintendent, within the meaning of the instruction above, to entitle her to recover. Le Clair v. School Dist. No. 28, 74 M 385, 391, 240 P 391.

Where farm contract required party in possession to summer-fallow 80 acres and court found he had summer-fallowed 74.5 acres and that was all the tillable land available, this constituted substantial and sufficient performance since the law never requires impossibilities. Letz v. Lampen, 110 M 477, 483, 104 P 2d 4.

References

State v. District Court et al., 76 M 143, 150, 245 P 529; Stoner v. Underseeth et al., 85 M 11, 24, 277 P 437; Fisk Tire Co. v. Lanstrum et al., 96 M 279, 282, 30 P 2d 84.

49-124. (8761) The law neither does nor requires idle acts.

History: En. Sec. 4623, Civ. C. 1895; re-en. Sec. 6200, Rev. C. 1907; re-en. Sec. 8761, R. C. M. 1921. Cal. Civ. C. Sec. 3532. Field Civ. C. Sec. 1987.

Operation and Effect

Where in an action on a surety bond indemnifying a despositor in a bank against loss, the bank, as principal, has put it out of its power to fulfill the condition of the bond by becoming insolvent, a demand upon it for payment is not necessary to fix the liability of the sureties, and therefore the complaint need not allege such demand. Mutual Oil Co. v. Hamilton et al., 73 M 385, 390, 236 P 545.

On the opening of school plaintiff knew that her former position was occupied, and to appear there seeking to discharge the duties of that position would have resulted only in embarrassment to her successor, to the principal of the school, and to herself; it would have been but an idle gesture, and again we have a maxim of jurisprudence which exactly fits

the case: "The law neither does nor requires idle acts" (this section). Le Clair v. School Dist. No. 28, 74 M 385, 391, 240 P 391.

To have given the ten days' notice in writing to a tenant present in person, repudiating the lease and declaring that he could not go on with it, would have been an idle act not required by law (this section). First Nat. Bank of Columbus v. Coit, 79 M 468, 479, 257 P 469.

Defendant, a defaulting purchaser of realty at execution sale, in an action by the sheriff brought under section 93-5828, to recover the difference in the amount of defendant's bid and the amount which the officer received on resale, was not in a position to rely on the sheriff's failure to tender him a certificate of sale where he had stated that he would not have paid the amount of his bid even if a certificate had been tendered, thus showing that tender would have been an idle ceremony, not required by law. Sherlock v. Vinson, 90 M 235, 239, 1 P 2d 71.

Where plaintiffs sought to cancel gas lease for failure to market the product and for failure to drill offset wells but there was no market for the gas produced, the drilling of such wells would have been a useless act and failure to do so might not be deemed a breach of the contract. *Severson v. Barstow*, 103 M 526, 533, 63 P 2d 1022.

Where a decree of distribution of an estate was entered and no appeal was taken from such decree, an affidavit thereafter filed and recorded, stating that the affiant was an heir and devisee of the will and claiming an interest in the real estate distributed, was void on its face, and no suit to quiet title was necessary to convey clear title. *Hart v. Barron*, 122 M 350, 204 P 2d 797, 805.

Where person convicted in district court petitioned supreme court for writ of mandate to compel district court to furnish "copy of trial and court record transcript" for purpose of appeal in forma pauperis, but no notice of appeal had been filed as required by statute and time for appeal

had elapsed, writ would be denied. *State ex rel. Treat v. District Court*, 124 M 234, 221 P 2d 436, 437.

References

Cited or applied as section 6200, Revised Codes, in *Parchen v. Chessman*, 49 M 326, 340, 142 P 631; *Montana Livestock Co. v. Stewart*, 58 M 221, 227, 190 P 985; *Wells-Dickey Co. v. American A. Ins. Co.*, 69 M 586, 592, 223 P 489; *Brown v. Roberts et al.*, 78 M 301, 306, 254 P 419; *Link v. Haire*, 82 M 406, 425, 267 P 952; *Backer v. Parker-Morelli-Barclay M. Co.*, 87 M 595, 601, 289 P 571; *Superior Coal Co. v. Musselshell Co. et al.*, 98 M 501, 41 P 2d 14; *State ex rel. Lynch v. Batani*, 103 M 353, 365, 62 P 2d 565; *Matteson v. Ackerson*, 104 M 239, 243, 66 P 2d 797; *State v. Safeway Stores, Inc.*, 106 M 182, 198, 76 P 2d 81; *In re Irvine's Estate*, 114 M 577, 581, 139 P 2d 489; *Maynard v. City of Helena*, 117 M 402, 412, 160 P 2d 484; *Rieckhoff v. Consolidated Gas Co.* 123 M 555, 217 P 2d 1076, 1083.

49-125. (8762) The law disregards trifles.

History: En. Sec. 4624, Civ. C. 1895; re-en. Sec. 6201, Rev. C. 1907; re-en. Sec. 8762, R. C. M. 1921. Cal. Civ. C. Sec. 3533. Field Civ. C. Sec. 1988.

Omission of Comma

The omission of a comma in quoting words of statute in caption of complaint to quiet title action was unimportant. *Clinton v. Miller*, 124 M 463, 226 P 2d 487, 492.

Operation and Effect

To constitute actionable fraud, the representations must relate to material facts, upon the theory that "the law disregards trifles." *Stillwell v. Rankin*, 55 M 130, 136, 174 P 186.

References

Superior Coal Co. v. Musselshell Co. et al., 98 M 501, 41 P 2d 14; *In re Irvine's Estate*, 114 M 577, 581, 139 P 2d 489; *State ex rel. Borberg v. District Court*, 125 M 481, 240 P 2d 854, 859.

49-126. (8763) Particular expressions qualify those which are general.

History: En. Sec. 4625, Civ. C. 1895; re-en. Sec. 6202, Rev. C. 1907; re-en. Sec.

8763, R. C. M. 1921. Cal. Civ. C. Sec. 3534. Field Civ. C. Sec. 1989.

49-127. (8764) Contemporaneous exposition is in general the best.

History: En. Sec. 4626, Civ. C. 1895; re-en. Sec. 6203, Rev. C. 1907; re-en. Sec.

8764, R. C. M. 1921. Cal. Civ. C. Sec. 3535. Field Civ. C. Sec. 1990.

49-128. (8765) The greater contains the less.

History: En. Sec. 4627, Civ. C. 1895; re-en. Sec. 6204, Rev. C. 1907; re-en. Sec. 8766, R. C. M. 1921. Cal. Civ. C. Sec. 3536. Field Civ. C. Sec. 1991.

References

Cited or applied in *Smith v. Town of Hot Springs*, 125 M 458, 240 P 2d 249, 250.

49-129. (8766) Superfluity does not vitiate.

History: En. Sec. 4628, Civ. C. 1895; re-en. Sec. 6205, Rev. C. 1907; re-en. Sec. 8766, R. C. M. 1921. Cal. Civ. C. Sec. 3537. Field Civ. C. Sec. 1992.

Operation and Effect

Where in an order establishing an irrigation district the descriptions of the lands included in it were sufficient, the

fact that the court went further and made a tabulation under various headings, such as Gross Area, Area Included, etc., did not render the order void, such matter having been surplusage which may properly be disregarded under the statutory maxim that superfluity does not vitiate. *Walden v. Bitter Root Irr. Dist.*, 68 M 281, 290, 217 P 646.

49-130. (8767) That is certain which can be made certain.

History: En. Sec. 4629, Civ. C. 1895; re-en. Sec. 6206, Rev. C. 1907; re-en. Sec. 8767, R. C. M. 1921. Cal. Civ. C. Sec. 3538. Field Civ. C. Sec. 1993.

Operation and Effect

The fact that the letter of the insured to the insurer suggesting a change of beneficiaries in his policy from his second wife to his children by his first wife, did not name the proposed beneficiaries, did not render the request insufficient, since under this section, "that is certain which can be made certain." *Bell et al. v. Criviansky*, 98 M 109, 123, 37 P 2d 673.

Semble: It would seem, under the doctrine that "that is certain which can be

made certain," that where objection is made as to the sufficiency of the pleading of a tender of the balance due under a contract of sale of real property, it failing to set out the amount tendered, the exact amount may be arrived at by a simple mathematical calculation by reference to the allegations of the complaint, the pleading should be deemed sufficient. *Thompson v. Lincoln National Life Insurance Co.*, 110 M 521, 526, 105 P 2d 683.

References

Cited or applied as section 6206, Revised Codes, in *Myrick v. Peet*, 56 M 13, 26, 180 P 574; *State ex rel Lyman v. Stewart*, 58 M 1, 7, 190 P 129.

49-131. (8768) Time does not confirm a void act.

History: En. Sec. 4630, Civ. C. 1895; re-en. Sec. 6207, Rev. C. 1907; re-en. Sec. 8768, R. C. M. 1921. Cal. Civ. C. Sec. 3539. Field Civ. C. Sec. 1994.

Operation and Effect

All proceedings founded upon a void order of the district court sitting in probate are ineffective for any purpose. The

order is open to collateral attack and may be set aside at any time. *State v. McCracken*, 91 M 157, 163, 6 P 2d 869.

References

State ex rel. Boorman v. State Board of Land Commissioners, 109 M 127, 134, 94 P 2d 201; *Hames v. Polson*, 123 M 469, 215 P 2d 950.

49-132. (8769) The incident follows the principal, and not the principal the incident.

History: En. Sec. 4631, Civ. C. 1895; re-en. Sec. 6208, Rev. C. 1907; re-en. Sec. 8769, R. C. M. 1921. Cal. Civ. C. Sec. 3540. Field Civ. C. Sec. 1995.

References

Orchard Homes Ditch Co. v. Snavely, 117 M 484, 494, 159 P 2d 521.

49-133. (8770) An interpretation which gives effect is preferred to one which makes void.

History: En. Sec. 4632, Civ. C. 1895; re-en. Sec. 6209, Rev. C. 1907; re-en. Sec. 8770, R. C. M. 1921. Cal. Civ. C. Sec. 3541. Field Civ. C. Sec. 1996.

References

In re *Irvine's Estate*, 114 M 577, 581, 139 P 2d 489.

49-134. (8771) Interpretation must be reasonable.

History: En. Sec. 4633, Civ. C. 1895; re-en. Sec. 6210, Rev. C. 1907; re-en. Sec. 8771, R. C. M. 1921. Cal. Civ. C. Sec. 3542. Field Civ. C. Sec. 1997.

References

Fisk Tire Co. v. Lanstrum et al., 96 M 279, 282, 30 P 2d 84; *Johnson v. Kaiser*, 104 M 261, 275, 65 P 2d 1179; In re *Irvine's Estate*, 114 M 577, 581, 139 P 2d 489.

49-135. (8772) Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer.

History: En. Sec. 4634, Civ. C. 1895; re-en. Sec. 6211, Rev. C. 1907; re-en. Sec. 8772, R. C. M. 1921. Cal. Civ. C. Sec. 3543. Field Civ. C. Sec. 1998.

against a subsequent purchaser without knowledge of the first purchaser's interest. *Gullicksen v. Shadoan*, 124 M 56, 218 P 2d 714, 718, 18 ALR 2d 1142.

Failure to Record Contract

Where purchaser of standing timber failed to have contract acknowledged and recorded such contract was of no effect as

Operation and Effect

The rule is just and equitable. The assignee is presumed to know the law, and, if he would protect his interests, he should

notify the maker of the note that he is the assignee thereof; if he neglects to do so and, through his negligence, either he or the maker must suffer through the act of the payee in collecting the amount due on the note, he should be the one to suffer (this section). *Erlandson v. Erskine et al.*, 76 M 537, 546, 248 P 209.

In a foreclosure suit in which the defense was payment, the evidence showed that the mortgagee knew that the property had been transferred to another by the mortgagor, the purchaser assuming the mortgage; that the interest coupons were payable at the office of a real estate dealer where the mortgagee had originally listed the property for sale, where he received payment therefor and also a part payment on his note; that he was advised by the purchaser that the entire debt had been paid at that office on a certain day, he replying that he would take care of it. The real estate agent converted the final payment to his own use. Held, that the mortgagee by his conduct caused the purchaser to believe that the real estate dealer was his agent for the purpose of receiving payment, and that therefore he was estopped to deny his authority to receive it (this section). *Millious v. Thompson*, 94 M 110, 118, 20 P 2d 1060.

Where plaintiff wrote and delivered to defendants, a fire insurance policy contracted for by the father of one of the defendants who managed the store for them, and who, the previous year had tended to the same matter, the defendants paying the premium, held, that the fact that the defendants had obtained fire insurance from a different company could not defeat plaintiff's claim, since under

this section those through whose fault the loss is sustained must bear it, defendants having impliedly held out their store manager as their agent, and plaintiff is entitled to recover the \$42 premium for the policy sold the manager. *Coover v. Davis*, 112 M 605, 610, 121 P 2d 985.

Where Party to Joint Bank Account Drew Balance

Where a mother opened joint bank account in both her own and daughter's names, and signed signature card setting out withdrawal provision authorizing both to withdraw the funds, and the daughter drew a check covering practically the entire account, the bank was legally bound to pay it, and if the mother suffered injury it resulted from exercise of the power the mother placed in the daughter's hands, bringing the mother under the provisions of the maxim contained in this section. (See sec. 5-528.) *Ludwig v. Montana Bank & Trust Co.*, 109 M 477, 497, 98 P 2d 379.

References

Cited or applied as section 6211, Revised Codes, in *Daly v. Kelley*, 57 M 306, 187 P 1022; *Colwell v. Grandin Investment Co.*, 64 M 518, 527, 529, 210 P 765; *Union Bank etc. Co. v. Lynn*, 73 M 473, 477, 237 P 490; *Security State Bk. v. First Nat. Bk.*, 78 M 389, 393, 254 P 417; *Harvey E. Mack Co. v. Ryan*, 80 M 524, 535, 261 P 283; *Federal Land Bk. of Spokane v. Gallatin Co.*, 84 M 98, 111, 274 P 288.

Collateral References

Estoppel⇒72.

31 C.J.S. Estoppel § 103.

TITLE 50

MINES AND MINING

- Chapter 1. Regulation of quartz mining industry—inspection of mines, 50-101 to 50-118.
2. Sampling and assaying of ore, 50-201 to 50-206.
 3. Payment for consignments of ore—purchases from leased mines, 50-301 to 50-306.
 4. Regulation of coal mining industry—coal mining code, 50-401 to 50-473.
 5. Regulation of coal mining industry—coal mining code (continued), 50-501 to 50-531.
 6. Regulations for sale and marketing of coal, 50-601 to 50-606.
 7. Location and record of mining and millsite claims, 50-701 to 50-716.
 8. Mining—rights of way, 50-801 to 50-812.
 9. Consolidation of boiler and mines inspectors under control of industrial accident board, 50-901 to 50-906.

CHAPTER 1

REGULATION OF QUARTZ MINING INDUSTRY—INSPECTION OF MINES

- Section 50-101. Inspectors of quartz mines—appointment, term and compensation.
- 50-102. Duties of mine inspector—annual inspection.
- 50-103. Duty to inspect mine upon complaint.
- 50-104. Notice to owner of defects.
- 50-105. Annual inspection—report.
- 50-106. Investigation after accidents.
- 50-107. Report.
- 50-108. To what mines act is applicable.
- 50-109. Penalties.
- 50-110. Safety apparatus must be used in mines.
- 50-111. Penalties.
- 50-112. Code of signals in mines.
- 50-113. Penalties.
- 50-114. Fines paid into school fund.
- 50-115. Ventilation of quartz mines—duty of operator to furnish.
- 50-116. Toilet places in mines—underground stables.
- 50-117. Protections and guard-rails in case of shafts and underground openings.
- 50-118. Violation of act a misdemeanor.

50-101. (3418) Inspectors of quartz mines—appointment, term and compensation. The industrial accident board shall appoint not to exceed two inspectors of quartz mines and shall prescribe their term of office and fix their compensation.

History: En. Sec. 1, p. 109, L. 1897; re-en. Sec. 1711, Rev. C. 1907; amd. Sec. 1, Ch. 71, L. 1909; amd. Sec. 1, Ch. 22, L. 1921; re-en. Sec. 3418, R. C. M. 1921.

Cross-References

Children not to be employed, secs. 10-207, 10-208.

Condemnation of land for tailings and debris, sec. 93-9903.

Fraudulent financing, secs. 94-2322 to 94-2325.

Inspection of mines by commissioner of agriculture, sec. 3-1503.

License taxes on micaceous mines, secs. 84-5901 to 84-5909.

Metal mines tax, sec. 84-2001 et seq.

Mining partnerships, secs. 63-1001 to 63-1010.

Occupational diseases, duty of mine inspectors to report, secs. 69-207, 69-208.

Placer mines, interference with flumes, sec. 94-3204.

Safety provisions, violations, secs. 94-35-125 to 94-35-134.
 Salting mines prohibited, sec. 94-1815.

Collateral References
 Mines and Minerals ~~93~~93.
 58 C.J.S. Mines and Minerals § 237.

50-102. (3419) Duties of mine inspector—annual inspection. It is the duty of the inspectors of quartz mines to visit every mine in the state once every year and inspect its workings, timbering, ventilation, means of ingress and egress, and the means adopted and in use for the preservation of the lives and safety of the miners employed therein. For this purpose the inspectors at all times shall have access to any mine and all parts thereof. All mine owners, lessees, operators, or superintendents must render such assistance as may be necessary to enable the inspectors to make the examination. When upon such inspection any mine or portion thereof is found to be in an unsafe condition, the inspector shall at once serve a notice in writing upon the owner, lessor, lessee, agent, manager, or superintendent thereof, setting forth the nature of the defects which render such mine unsafe, and the point or place in such mine where such defects exist, and requiring the repairs necessary to remedy such defects to be made within a specified time, and if in his judgment the circumstances so require, he shall forbid the operation of such mine or portion thereof as has been declared unsafe, save and except for the purpose of making the repairs necessary for the purpose of remedying such defects and making such mine safe for the laborers employed therein.

History: En. Sec. 1, Ch. 98, L. 1903; re-en. Sec. 1713, Rev. C. 1907; re-en. Sec. 3419, R. C. M. 1921.

Collateral References
 36 Am. Jur. 389, Mines and Minerals, § 151.

NOTE.—In this and succeeding sections the words “inspector of mines” have been changed to “inspectors of quartz mines” to conform to later enactments.

50-103. (3420) Duty to inspect mine upon complaint. Whenever an inspector of quartz mines receives a complaint in writing signed by one or more parties, setting forth that the mine in which he or they are working is dangerous in any respect, he must in person visit and examine such mine. Every complaint must set forth the nature of the danger existing at the mine, and the time the cause of such danger was first observed.

History: En. Sec. 2, Ch. 98, L. 1903; re-en. Sec. 1714, Rev. C. 1907; re-en. Sec. 3420, R. C. M. 1921.

50-104. (3421) Notice to owner of defects. After such complaint has been received by an inspector of quartz mines, he must, as soon as possible, visit such mine; and if from such examination he ascertains that the mine is from any cause in a dangerous condition, he must at once notify the owner, lessor, or agent thereof, such notice to be in writing, and to be served by copy on such owner, lessor, lessee, or agent, in the same manner as provided by law for the serving of legal process, and the notice must state fully and in detail in what particular manner such mine is dangerous or insecure, and require all necessary changes to be made without delay, for the purpose of making such mine safe for the laborers employed therein; and in any criminal or civil procedure at law against the party or parties so notified, on account of loss of life or bodily injury sustained

by an employee subsequent to such notice and in consequence of a neglect to obey the inspectors' requirements, a certified copy of the notice served by the inspector is prima-facie evidence of the gross negligence of the party or parties so complained of. If the owner, lessor, lessee, or agent of any such mine shall neglect or refuse to obey or comply with the instructions of the inspector as contained in such notice, or shall neglect or refuse to cause the repairs necessary to remedy such defect to be made within a reasonable time, or shall refuse to cause work to be stopped when so ordered, such party or parties so refusing may be prosecuted criminally by the inspector.

History: En. Sec. 3, Ch. 98, L. 1903;
re-en. Sec. 1715, Rev. C. 1907; re-en. Sec.
3421, R. C. M. 1921.

50-105. (3422) Annual inspection—report. It is the duty of the inspectors of quartz mines, at least once in each year, to visit each mining county in the state, and examine as many of the mines in the different counties as practicable, and make such recommendations as in their judgment are necessary to insure the safety of the workmen employed therein; and whenever, from his examination an inspector finds any mine to be in an unsafe condition, he shall at once serve a notice upon the owner, lessor, lessee, or agent thereof; and if any such owner, lessor, lessee, or agent fails to comply with such notice, he may prosecute them or any of them as provided in the next preceding section.

History: En. Sec. 4, Ch. 98, L. 1903;
re-en. Sec. 1716, Rev. C. 1907; re-en. Sec.
3422, R. C. M. 1921.

50-106. (3423) Investigation after accidents. Whenever a serious or fatal accident occurs in any mine, it is the duty of the person in charge thereof to immediately notify the industrial accident board, and upon receiving such notice an inspector must at once repair to the place of the accident and investigate fully the cause of such accident, and whenever possible to do so, the inspector shall be present at the coroner's inquest held over the remains of the person or persons killed by such accident and testify as to the cause thereof and state whether, in his opinion, the accident was due to the negligence or mismanagement of the owner or person in charge. If the inspector cannot be immediately present in case of a fatal or serious accident occurring, it is the duty of the owner or person in charge of the mine to have written statements made by those witnessing the same, and duly sworn to. In case no person was present at the time of the accident, then the verified statement of those first present after the accident must be taken, and such statement must be given to the inspector. If after making such investigation the inspector deems the facts warrant it, he may prosecute criminally the owner, lessor, lessee, or agent of the mine in which such accident occurred.

History: En. Sec. 5, Ch. 98, L. 1903;
re-en. Sec. 1717, Rev. C. 1907; re-en. Sec.
3423, R. C. M. 1921.

50-107. (3424) Report. The industrial accident board must make an annual report to the governor on the first Monday of November, and in the

report must state all the accidents that have occurred in the mines of the state which have occasioned serious injury or resulted fatally, together with the nature and cause of such accidents. Such report must also contain statistical and other information which may tend to promote the development of the mineral resources of the state, and must set forth the result of the inspector's labors.

History: En. Sec. 588, Pol. C. 1895;
re-en. Sec. 1719, Rev. C. 1907; re-en. Sec.
3424, R. C. M. 1921.

50-108. (3425) To what mines act is applicable. The provisions of sections 50-102 to 50-114 do not apply to mines in which less than five men are employed. But all owners, lessors, lessees, agents, or managers operating any metalliferous mine in this state in which five or more men are employed shall report the same to the inspector of mines, state the name of the mine, the location of the same, the name of the company, person, or persons owning or operating the same, postoffice address, and number of men employed.

History: En. Sec. 6, Ch. 98, L. 1903;
re-en. Sec. 1720, Rev. C. 1907; re-en. Sec.
3425, R. C. M. 1921.

50-109. (3426) Penalties. All violations of the provisions of sections 50-102 to 50-114 are provided for in section 94-35-105.

History: En. Sec. 590, Pol. C. 1895;
re-en. Sec. 1721, Rev. C. 1907; re-en. Sec.
3426, R. C. M. 1921.

50-110. (3427) Safety apparatus must be used in mines. It is unlawful for any person to sink or work through any vertical shaft, where mining cages are used, at a greater depth than two hundred feet, unless the shaft is provided with an iron bonneted safety-cage to be used in lowering and hoisting employees or any other persons. The safety apparatus, whether consisting of eccentrics, springs, or other device, must be securely fastened to the cage, and of sufficient strength to hold the cage loaded at any depth to which the shaft may be sunk. The iron bonnet must be made of boiler sheet-iron of good quality, at least three-sixteenths of an inch in thickness, and must cover the top of the cage in such manner as to afford the greatest protection to life and limb, from any debris or anything falling down the shaft.

History: En. Sec. 3650, Pol. C. 1895;
re-en. Sec. 1722, Rev. C. 1907; re-en. Sec.
3427, R. C. M. 1921.

56 C.J.S. Master and Servant § 24.
36 Am. Jur. 386, Mines and Minerals,
§§ 147, 148.

Collateral References

Master and Servant 12.

50-111. (3428) Penalties. The penalty for violating any of the provisions of the preceding section is provided in section 94-35-126.

History: En. Sec. 3651, Pol. C. 1895;
re-en. Sec. 1723, Rev. C. 1907; re-en. Sec.
3428, R. C. M. 1921.

50-112. (3429) Code of signals in mines. It is made the duty of the inspector of quartz mines of Montana, and he is hereby required to prepare

a complete code of signals for use in all mines in this state, worked through a shaft of seventy-five feet or more in depth, and employing ten or more men, and cause the same to be made known to each owner or operator of a mine in Montana by printed circular instructions, to the end that a uniform code of mine signals may prevail. The said inspector of mines of Montana may add to or change such code of signals as circumstances may require, but no change of signals shall go into effect until a time specified by him, not less than sixty days nor more than ninety days from the time such change shall be ordered by him; provided, that the code of signals first prepared by him shall be used in all said shaft mines from and after June 1, 1895.

History: En. Sec. 3652, Pol. C. 1895; re-en. Sec. 1724, Rev. C. 1907; re-en. Sec. 3429, R. C. M. 1921.

Codes, in *Daniels v. Granite Bi-Metallic Con. Mining Co.*, 56 M 284, 184 P 836.

References

Cited or applied as section 1724, Revised

Collateral References

Mines and Minerals 92.
58 C.J.S. Mines and Minerals § 240.

50-113. (3430) Penalties. Any owner or operator of a mine who shall refuse or neglect to cause the signals provided for in the preceding section to be used in his mine, to the exclusion of all other signals, shall be deemed guilty of a misdemeanor, and upon conviction of such refusal or neglect shall be fined in a sum not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail for a period of not less than thirty days or more than ninety days, in the discretion of the court, for each and every offense.

History: En. Sec. 3653, Pol. C. 1895; re-en. Sec. 1725, Rev. C. 1907; re-en. Sec. 3430, R. C. M. 1921.

50-114. (3431) Fines paid into school fund. All fines which may be collected under the provisions of this act shall be paid into and form a portion of the public school fund in the county in which conviction takes place.

History: En. Sec. 3654, Pol. C. 1895; re-en. Sec. 1726, Rev. C. 1907; re-en. Sec. 3431, R. C. M. 1921.

Collateral References

Fines 20.
36 C.J.S. Fines § 19.

50-115. (3432) Ventilation of quartz mines—duty of operator to furnish. It shall be the duty of all mining operators of any and all quartz mines in this state, when working to a greater depth than three hundred feet, or any general manager, superintendent, or foreman acting on behalf of the above, whether said mining property is operated by tunnel, shaft, or other opening, to provide where necessary, feasible, and practicable, a suitable and practical method for ventilating said mine, either by separate shaft or other mine working of suitable size or capacity, which said ventilating system shall provide for the delivery of air to all portions of said mine that are being operated, and also provide reasonable means for carrying away of noxious fumes, gas, or smoke.

History: En. Sec. 1, Ch. 72, L. 1911; re-en. Sec. 3432, R. C. M. 1921.

Collateral References

Master and Servant 12.
56 C.J.S. Master and Servant § 24.

50-116. (3433) Toilet places in mines—underground stables. It shall

be the duty of all mining operators to provide suitable and practicable toilet arrangements, or places which may be used for toilet purposes, for the use of employees in mines. Such toilets or sanitary arrangements may consist of a properly constructed toilet-car or receptacle, where it is practicable and feasible to use the same, that may be taken into the different working levels of a mine, and when such cars or receptacles are used they shall be sent to the surface each day for proper cleaning or disinfecting. Where proper toilet apparatus is not provided, the employee shall be allowed to go to the surface or other suitable place, which place shall be kept in a reasonably sanitary condition. Underground stables shall be cleaned and droppings in waste taken to the surface each day. This section applies to mines working thirty men or over.

History: En. Sec. 2, Ch. 72, L. 1911;
re-en. Sec. 3433, R. C. M. 1921.

50-117. (3434) Protections and guard-rails in case of shafts and underground openings. Underground workings consisting of chutes, manways, and winzes, or any opening kept for ventilating purposes, or for the removal of ore or waste material, shall when necessary be protected by guard-rails, or by a suitable cover known as a grizzly, made of good, substantial timbers or metal bars. Shafts at stations shall be protected by guard-rails at every level. In vertical manways used by employees exclusively for traveling purposes, in addition to proper ladders there shall be suitable landings, placed not to exceed thirty feet apart, and so far as feasible and practicable all such manways or air-courses used as an escape for men must be kept free from all obstructions.

History: En. Sec. 3, Ch. 72, L. 1911;
re-en. Sec. 3434, R. C. M. 1921.

50-118. (3435) Violation of act a misdemeanor. Every mining operator, whether person or corporation, failing to comply with any of the provisions of this act, or any general manager, superintendent, or foreman acting on behalf of such mining operator, and failing to comply with any of the provisions of this act, shall be guilty of a misdemeanor.

History: En. Sec. 4, Ch. 72, L. 1911;
re-en. Sec. 3435, R. C. M. 1921.

CHAPTER 2

SAMPLING AND ASSAYING OF ORE

- Section 50-201. Purchasers and samplers of ore to maintain sample-room.
50-202. Samples of fifty pounds per ton to be retained until settlement.
50-203. Penalty for commingling foreign substances with ore.
50-204. Umpire assayers—appointment, qualifications and duties.
50-205. Notice of selection.
50-206. Violation of act a misdemeanor—penalty.

50-201. (3436) Purchasers and samplers of ore to maintain sample-room. Any person, association, or corporation engaged in the business of buying or sampling or smelting for hire ores of gold, silver, copper, lead, zinc, iron, or other valuable metal, shall maintain a sampling-room or house to which the ore shippers, their agents, or representatives, shall have access

at all times during the sampling of ores, or while the same is being carried on, and in which shall be samples of all ores he or they may buy or smelt.

History: En. Sec. 1, Ch. 54, L. 1909;
re-en. Sec. 3436, R. C. M. 1921.

Collateral References

Mines and Minerals 93½.
58 C.J.S. Mines and Minerals § 239.

50-202. (3437) Samples of fifty pounds per ton to be retained until settlement. Every such person, association, or corporation which shall buy any ores upon any agreement to pay for the same in amount dependent upon the metallic contents of the same, or smelt any ore, shall retain from the pulp or crushed ore, as the same is sampled, an amount selected regularly and at equal intervals from any lot of ore so brought or to be smelted, a quantity not less than fifty pounds out of each ton of such ore, and shall keep the same separate and apart from any other ores or pulp for a period of thirty days, or until full settlement is made and accepted by the shipper; and until such settlement is made and accepted, the ore shipper, his agents, or representatives, shall be entitled to take from the quantity so retained any part thereof for the purpose of sampling or assaying the same; provided, that the value of any part so taken by such owner or shipper may be deducted from the total value of the ore delivered by him.

History: En. Sec. 2, Ch. 54, L. 1909;
re-en. Sec. 3437, R. C. M. 1921.

50-203. (3438) Penalty for commingling foreign substances with ore. Any person, or persons, corporation, association or copartnership who shall, with intent to defraud, in any manner introduce any foreign substance into any ore, or commingle any foreign substance with any ore intended for sale in any smelter or which any person, association, or corporation shall have undertaken for hire to smelt; or into any sample retained for tests or assays, as in the next preceding section provided, in any manner whatever, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for a period of not less than sixty days nor more than twelve months, or by both such fine and imprisonment.

History: En. Sec. 3, Ch. 54, L. 1909;
amd. Sec. 1, Ch. 44, L. 1921; re-en. Sec.
3438, R. C. M. 1921.

Cross-Reference

Altering samples, penalty, sec. 94-1816.

50-204. (3439) Umpire assayers — appointment, qualifications and duties. Any person, association, or corporation engaged in the sampling of ores with intent to purchase or smelt the same, whether for themselves or as the agent or agents for other purchasers, shall, on or before the tenth day of April, 1909, choose an assayer or assayers who, for at least one year prior to the passage of this act, shall have operated an assay office or chemical laboratory within this state, and to such selected assayer or assayers shall be submitted all samples of ore, sampled by such person, association, or corporation, over which there is a dispute as to metallic contents or value between the buyer or sampler and the seller of such ore. Said chosen assayer or assayers shall be known as the umpire or umpires for such person, association, or corporation.

History: En. Sec. 1, Ch. 115, L. 1909;
re-en. Sec. 3439, R. C. M. 1921.

50-205. (3440) Notice of selection. Upon the selection of such assayer or assayers, who shall be actively engaged in the assaying business in this state, every person, association, or corporation selecting the same shall, within ten days after such choice is made, post a notice of such choice, in which shall appear the name of the assayer or assayers so selected, in a conspicuous place with and without the room or house where the sampling of ores is carried on by such person, association, or corporation.

History: En. Sec. 2, Ch. 115, L. 1909;
re-en. Sec. 3440, R. C. M. 1921.

50-206. (3441) Violation of act a misdemeanor—penalty. Every person, association, or corporation engaged in the sampling of ores belonging to others, who fails to comply with the provisions of this act, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than one thousand dollars nor less than five hundred dollars.

History: En. Sec. 3, Ch. 115, L. 1909;
re-en. Sec. 3441, R. C. M. 1921.

CHAPTER 3

PAYMENT FOR CONSIGNMENTS OF ORE—PURCHASES FROM LEASED MINES

- Section 50-301. Time for settlement for ores purchased by smelters, etc.
50-302. Violation of act a misdemeanor—penalty.
50-303. Purchasers of ore from leased mines to furnish statement.
50-304. Sampling works and smelters to mail statement to lessee.
50-305. Shipper—penalty for violation.
50-306. Smelters—penalty for violation.

50-301. (3442) Time for settlement for ores purchased by smelters, etc. Every person, association, company, or corporation, engaged within this state in purchasing ores, minerals, or metals from, or in smelting, milling, or otherwise reducing or preparing the same for market for any other person, or persons, association, company, or corporation, shall, within twenty days after any such ores, minerals, or metals shall have arrived at his, their, or its smelter, mill, reduction works, yards, or other place for receiving such ores, minerals, or metals, make full settlement with and payment of the amount due to the consignor, or consignors thereof, unless restrained or prevented from making such settlement and payment by an order, writ, or process of a court of competent jurisdiction. Every such person, association, company, or corporation, to whom or to which any such ores, minerals, or metals have heretofore been shipped and delivered, and for which settlement and payments have not been made or had, shall, within twenty days after this act takes effect, make full settlements and payments therefor to, and with the consignor or consignors thereof, unless restrained or prevented from making such settlement and payment by an order, writ, or process of a court of competent jurisdiction. However, the provisions of this section shall not be applicable to any such ores, minerals or metals received pursuant to an existing written contract at time of shipment between the consignor, or consignors thereof, and the person, association, company, or corporation, receiving the same, where the time for settlement and payment is provided for in such contract.

History: En. Sec. 1, Ch. 37, L. 1911;
re-en. Sec. 3442, R. C. M. 1921; amd. Sec.
1, Ch. 5, L. 1953.

Collateral References

Mines and Minerals 93½, 94.
58 C.J.S. Mines and Minerals §§ 239,
241.

50-302. (3443) Violation of act a misdemeanor—penalty. Any person, association, company, or corporation, violating any of the provisions of this act, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than one thousand dollars, nor less than five hundred dollars.

History: En. Sec. 2, Ch. 37, L. 1911;
re-en. Sec. 3443, R. C. M. 1921.

50-303. (3444) Purchasers of ore from leased mines to furnish statement. All persons or corporations buying or treating ores from leased mines or mining claims, shall furnish both to the lessor and lessee, or lessors and lessees, of such mines or mining claims, a true and correct copy of the statement of returns of ores from such sale or shipment, such statement to show both the gross and net proceeds derived from such sale or shipment of ores. Upon shipment of any such ores from leased premises, either for sale or treatment, the shipper shall furnish to any sampling works or smelter buying or treating same the name, or names, and postoffice address of the lessor or lessors, lessee or lessees, interested in such shipment of ores, and within seven days after receipt of such statement from such sampling works or smelter the said shipper shall make settlement with such lessor or lessors, lessee or lessees, for such shipment or sale of ores, based upon such said statement received by the parties from such sampling works or smelter.

History: En. Sec. 1, Ch. 79, L. 1921;
re-en. Sec. 3444, R. C. M. 1921.

50-304. (3444.1) Sampling works and smelters to mail statement to lessee. That all sampling works and smelters within this state shall mail a duplicate copy of any statement showing the gross and net proceeds of all ores bought or treated from lessors of mines, to the lessee or lessees of the mine or mining claim from which the same shall have been extracted at the same time such statement is furnished to the lessor of said mine or mining claim or shipper of such ore.

History: En. Sec. 1, Ch. 17, L. 1937.

50-305. (3445) Shipper—penalty for violation. Any person or corporation who, as such shipper, shall violate the provisions of section 50-303 shall be liable to the lessor or lessors, lessee or lessees, for ten per cent of the net returns from such shipment, or sale, of ores referred to in said section, in addition to the value of the interest of the lessor or lessors, lessee or lessees in said shipment, the same to be recovered in an action in any court of competent jurisdiction.

History: En. Sec. 2, Ch. 79, L. 1921;
re-en. Sec. 3445, R. C. M. 1921.

50-306. (3446) Smelters—penalty for violation. Any person or corporation operating any sampling works, or smelter, within this state who shall violate any of the provisions of sections 50-303 and 50-304 shall be deemed

guilty of a misdemeanor, and upon conviction shall be punished by a fine not less than fifty (\$50.00) dollars, nor more than one hundred (\$100.00) dollars.

History: En. Sec. 3, Ch. 79, L. 1921;
re-en. Sec. 3446, R. C. M. 1921; amd. Sec.
2, Ch. 17, L. 1937.

CHAPTER 4

REGULATION OF COAL MINING INDUSTRY—COAL MINING CODE

- Section 50-401. Title of act.
50-402. Coal mine inspector—appointment, compensation and term.
50-403. Qualifications of inspector.
50-404. Powers and duties of inspector.
50-405. Inspector must not be employed by companies—report to governor.
50-406. Instruments to be furnished to inspector.
50-407. Inspector to post statement of mine at entrance.
50-408. Inspector ex officio sealer of weights and measures.
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50-410. Investigation of charges for neglect of duty.
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- 50-472. Safeguards for mechanical equipment.
- 50-473. Underground fire prevention, fire control and mine disasters.

50-401. (3447) Title of act. This act shall be known as the coal mining code of the state of Montana.

History: En. Sec. 1, Ch. 120, L. 1911; re-en. Sec. 3447, R. C. M. 1921.

NOTE.—Throughout the entire act the necessary changes have been made to conform to subsequent legislation placing the office of coal mine inspector under the control of the industrial accident board.

Cross-Reference

Taxation of mines, secs. 84-1301 to 84-1311.

Operation and Effect

The common-law rule that the master must exercise ordinary care and diligence to provide his employees with a reasonably safe place in which to work, though not applying when they and their fellow-servants are creating the place to work, when it is constantly being changed in

character by their work, or when it only becomes dangerous by their carelessness or negligence, does obtain where the place is a completed one, such as that part of a mine tunnel behind the miner driving it, and is applicable to coal mines as well as to any other place of employment. *Kallio v. Northwestern Improvement Co.*, 47 M 314, 321, 132 P 419.

Id. The provisions of this and following sections, the purpose of which is to reduce as far as possible the hazards incident to coal mining, cannot be nullified by any agreement between employer and employee, or any rule or custom in derogation of the duties imposed.

Collateral References

36 Am. Jur. 385, Mines and Minerals, §§ 146 et seq.

50-402. (3448) Coal mine inspector—appointment, compensation and term. The industrial accident board shall appoint a coal mine inspector and shall fix his compensation and term of office.

History: En. Sec. 2, Ch. 120, L. 1911; amd. Sec. 1, Ch. 20, L. 1921; re-en. Sec. 3448, R. C. M. 1921.

Cross-References

Children not to be employed, secs. 10-207, 10-208.

Deposit of slack in streams, secs. 94-3551, 94-3552.

Hours of labor in mines, secs. 41-1107, 41-1121.

Inspection of mines by commissioner of agriculture, sec. 3-1503.

Occupational diseases, duty to mine inspectors to report, secs. 69-207, 69-208.

Safety provisions, violations, secs. 94-35-125 to 94-35-134.

Strip mines, labor provisions, secs. 41-1110 to 41-1112.

Violation of inspection regulations, sec. 94-35-105.

Collateral References

Mines and Minerals—93.

58 C.J.S. Mines and Minerals § 237.

50-403. (3449) Qualifications of inspector. No person shall be eligible to the office of state coal mine inspector until he shall have attained the age

of thirty-five years. He shall be a citizen of the United States, a qualified resident of the state of Montana, shall have been actually employed at coal mining fifteen years prior to his appointment, and shall possess a competent knowledge of all the different systems of coal mining and working and properly ventilating coal mines, and the nature and constituent parts of noxious and explosive gases of coal mines, and of the various ways of expelling the same from the said mines. He shall have passed a successful examination by the board of examiners, and his certificate of qualification shall have been filed with the governor by the said board of examiners, as provided by law, provided, however, that the industrial accident board shall have the power to grant a permit to a person to perform the duty of state coal mine inspector, as provided for in this act, who may be employed until such time as the person so employed has had an opportunity to be examined as to his competency by the board of examiners and, provided further, that such person be the possessor of a mine foreman's certificate from the state of Montana.

History: En. Sec. 3, Ch. 120, L. 1911;
re-en. Sec. 3449, R. C. M. 1921; amd. Sec.
1, Ch. 185, L. 1949.

50-404. (3450) Powers and duties of inspector. (1) The state coal mine inspector shall have the right, and it is hereby made his duty, to enter, inspect and examine any coal mine or any shaft, drift, or slope in the process of sinking for the purpose of mining coal in this state, and the workings and the machinery belonging thereto, at all reasonable times, either by day or night, but not so as to impede or obstruct the workings of the mine. He shall also have the right and it is his duty to make inquiry into the conditions of such mine, workings, machinery, scales, ventilation, drainage, method of lighting or using lights, and into all methods and things connected with or relating to, as well as to make suggestions providing for the health and safety of persons employed in or about the same, and especially to make inquiry whether or not the provisions of the laws providing for the regulation of coal mines, or other acts which may hereafter be enacted governing coal mines, have been complied with.

(2) Said inspector or his deputy or deputies shall immediately notify the owner, lessee, superintendent, or mining boss of the discovery of any violation of the mining laws of this state, and of the penalty thereby imposed for such violations; and in case such notice is disregarded, such inspector or deputy or deputies shall have the power to stop immediately the working and operation of any mine or any part thereof where any dangerous or unlawful conditions are found; provided, however, that where conditions justify him in so doing he may grant a reasonable length of time for making repairs or for putting such mine in proper condition, but the number of men employed in the mine or in the section of the mine involved shall be limited to those necessary to correct the unsafe condition; and provided further, that where any stops or cessation of work are enforced, such inspector or deputy or deputies shall have the power thereafter to allow such mine or part of a mine to be reopened when the dangerous or unlawful conditions therein existing are removed or remedied so that they no longer exist.

(3) Every person, company or corporation who wilfully obstructs the state inspector of coal mines or his deputy or deputies in the execution of his or their duties under this act, and every owner, agent, officer, lessee or manager of a coal mine who refuses or neglects to furnish to the said inspector or his deputy or deputies the means, information, or opportunity necessary for making any entry, inspection, examination or inquiry of or relating to any coal mine in this state, as herein provided for, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than two hundred dollars (\$200.00) and not exceeding five hundred dollars (\$500.00).

(4) The owner, lessee, operator, superintendent, or mining boss of such mine is hereby required to furnish the means necessary for such entry, inspection, examination, inquiry, and exit. It shall also be the duty of the said coal mine inspector to carefully examine all the coal mines in operation in this state at least every three (3) months, and oftener if necessary, to see that every precaution is taken to insure the safety of all workmen that may be engaged in said coal mine. The said inspector shall make a record of the visit, noting the time and the material circumstances of the inspection. In the event the inspector has in his possession any complaint in writing to the effect that the mining code is being violated, he shall notify the employer and the employees that he is about to make such inspection. The employees shall have the right, when they so desire, to appoint a competent employee to represent them and accompany the state coal mine inspector in making any official mine inspection. The inspector may also, if he so desires, request some employee to accompany him in making his inspections. The owner or operator shall at all times have the right to personally accompany the inspector while inspecting his property, or to designate some one to so accompany him.

History: En. Sec. 5, Ch. 120 L. 1911; 1, Ch. 113, L. 1941; amd. Sec. 1, Ch. 38, L. re-en. Sec. 3450, R. C. M. 1921; amd. Sec. 1945; amd. Sec. 2, Ch. 185, L. 1949.

50-405. (3451) Inspector must not be employed by companies—report to governor. The said state coal mine inspector, while in office, shall not act as agent for any corporation, superintendent or manager of any mines, and shall in no manner whatever be under the employ of mining companies, nor shall he be interested in any coal mining operation, either as owner, lessee, or otherwise. It shall be the duty of the industrial accident board, on or before the first day of January of every year, to make a report to the governor of the proceedings of such state coal mine inspector and the conditions of each and every coal mine in the state, stating therein all accidents that have happened in or about said mine or mines, and to set forth in said report all such suggestions as he may deem important as to any further legislation on the subject of coal mines.

History: En. Sec. 6, Ch. 120, L. 1911;
re-en. Sec. 3451, R. C. M. 1921.

50-406. (3452) Instruments to be furnished to inspector. For the more efficient discharge of the duties herein imposed upon him, the said state coal mine inspector shall be furnished, at the expense of the state, with an anemometer, a safety-lamp, methane detector, self-rescuer, carbon monoxide

detector, and whatever other instruments or other appliances may be necessary in order to carry into effect the provisions of the acts regulating coal mines.

History: En. Sec. 7, Ch. 120, L. 1911;
re-en. Sec. 3452, R. C. M. 1921; amd. Sec.
2, Ch. 38, L. 1945.

50-407. (3453) Inspector to post statement of mine at entrance. The state coal mine inspector shall post in some conspicuous place at the top of each mine visited and inspected by him a plain statement of the conditions of such mine, showing what, in his judgment, is necessary for the better protection of the lives and health of persons employed in such mine; such statement, signed by the inspector, shall give the date of inspection, the number of cubic feet of air per minute in circulation at the last open cross-cut of each and every entry, and the last open cross-cut in each and every active room or working place, and such other information as he shall deem necessary. Where a local union has jurisdiction over the mine inspected, the inspector will mail a copy of said statement of conditions to the secretary and district office of the local union having jurisdiction at the mine within one week after making such inspection. He shall also post a notice at the landing used by the men, stating what number of men may be permitted to ride on the cage, car or cars at one time, and at what rate of speed men may be hoisted and lowered on the cage, car or cars in accordance as hereinafter provided for in this act. He must observe especially that the code of signals provided in the act of regulating coal mines between engineer and top-men and bottom-men is conspicuously posted for the information of all employees.

History: En. Sec. 8, Ch. 120, L. 1911; 3, Ch. 38, L. 1945; amd. Sec. 3, Ch. 185,
re-en. Sec. 3453, R. C. M. 1921; amd. Sec. L. 1949.

50-408. (3454) Inspector ex officio sealer of weights and measures. The state coal mine inspector is hereby made, equally with the secretary of state, ex officio sealer of weights and measures, in so far as the same relates to coal mines and coal mining, and as such is empowered to test and compare all weights and measures used in weighing and measuring coal at any coal mines, or used in measuring air-passages or other openings in coal mines, with the standards of weights and measures kept by the state sealer of weights and measures. Upon the written request of any coal mine owner or operator, or ten coal miners employed at any one mine, it shall be his duty to test and prove any scale or scales at such mine against which complaint is directed, and if he shall find that they or any of them do not weigh correctly, he shall call the attention of the mine owner, lessor, or operator to the fact, and direct that said scale or scales be at once overhauled and readjusted so as to indicate only true and correct weights, and he shall forbid the further operation of such scale until such scales are adjusted. In the event that such test shall conflict with any test made by any other sealer of weights and measures, or under and by virtue of any municipal ordinance or regulation, then the test by such state coal mine inspector shall prevail.

History: En. Sec. 10, Ch. 120, L. 1911;
re-en. Sec. 3454, R. C. M. 1921.

50-409. (3455) Standard test weights to be furnished to inspector. For the purpose of carrying out the provisions of this act, the state coal mine inspector shall be furnished by the state with such sets of standard weights suitable for testing the accuracy of track-scales, and of all smaller scales at mines, as may in the judgment of the state coal mine inspector be necessary; said test weights shall remain in the custody of the state coal mine inspector for use at any point within the state, and for any amounts expended by him for the storage, transportation, or the handling of the same, he shall be fully reimbursed upon making proper entry of the proper items in his expense voucher.

History: En. Sec. 11, Ch. 120, L. 1911;
re-en. Sec. 3455, R. C. M. 1921.

Collateral References

Weights and Measures \S 6, 8.
68 C.J. Weights and Measures \S 2.

50-410. (3457) Investigation of charges for neglect of duty. Whenever a petition signed by fifty or more reputable citizens, legal residents of the state, verified by oath by two or more of the said petitioners, and accompanied by a bond in the sum of five hundred dollars, running to the state, executed by two or more freeholders, approved and accepted by the clerk of the district court of the county or counties of their residence, conditioned for the payment of all costs and expenses arising from the investigation of the charges, is filed with the clerk of the district court setting forth that the state inspector of mines neglects his duties or is incompetent, or is guilty of malfeasance in office or misfeasance in office, it shall be the duty of the district court of the county to issue a citation in the name of the state to the said inspector to appear, at not less than five days' notice, on a day fixed, before said court, and the court shall then proceed to inquire into and investigate the allegations of the petitioners; such action shall be prosecuted by the county attorney.

History: En. Sec. 13, Ch. 120, L. 1911;
re-en. Sec. 3457, R. C. M. 1921.

50-411. (3458) Removal of coal mine inspector—procedure—cost. If the court finds that the said state coal mine inspector is neglectful of his duties or incompetent to perform the duties of his office, or that he is guilty of malfeasance or misfeasance in office, the court shall certify the same to the industrial accident board, who shall declare the office of said state coal mine inspector vacant, and proceed in compliance with the provisions of this act to fill the vacancy; and the costs of such investigation shall, if the charges are sustained, be imposed upon the said state coal mine inspector.

History: En. Sec. 14, Ch. 120, L. 1911;
amd. Sec. 2, Ch. 20, L. 1921; re-en. Sec.
3458, R. C. M. 1921.

50-412. (3459) Board of examiners of applicants for coal mine inspector, foreman and examiner—appointment. The industrial accident board of the state shall within sixty days after the approval of this act, upon the recommendation of the coal miners of the state, appoint one practical coal miner, who shall be a certified mine foreman, and actively employed in coal mining in the state of Montana; one mine manager or superintendent who shall be recommended to the industrial accident board by a majority of the coal operators of the state of Montana, who, with the state coal mine in-

spector, shall constitute a board of examiners to pass upon the qualifications of all applicants for the position of mine foreman and mine examiner for the state of Montana. They shall hold office for four (4) years and until their successors, appointed in the same manner, are appointed and qualified. Vacancies upon the said board of examiners shall be filled by the industrial accident board, in accordance with the intent and provisions of this act. The board of examiners to pass upon the qualifications of all applicants for the position of state coal mine inspector shall consist of one practical coal miner, recommended by the coal miners, who shall be a certified mine foreman and actively employed in coal mining in the state of Montana; one mine manager or superintendent, who shall be recommended to the industrial accident board by a majority of the coal operators of the state of Montana, and a third member from the state of Montana, who shall be selected by the first two members. All members of the board shall be present during the entire time that the examinations are being conducted and shall actively participate in the conduct of such examinations.

History: En. Sec. 15, Ch. 120, L. 1911; amd. Sec. 1, Ch. 160, L. 1921; re-en. Sec. 3459, R. C. M. 1921; amd. Sec. 4, Ch. 185, L. 1949.

Collateral References

36 Am. Jur. 389, Mines and Minerals, § 152.

50-413. (3460) Examination of applicants—scope—certificates of competency—revocation. It shall be the duty of the said board to examine into the qualifications of all applicants for the appointment to the position of state coal mine inspector, and applicants for the examination for mine foreman and mine examiner of the state of Montana by conducting a thorough examination as to their knowledge of mine workings, ventilation, gases, fire-damp, machinery and actual experience in underground coal mining, and general worthiness of each applicant. The examination for state coal mine inspector shall be in writing, and accompanied by an affidavit that the applicant is a citizen of the United States, a resident of the state of Montana, and that he has attained the age of thirty-five years; has had at least fifteen years' experience in underground coal mining in the United States, and at least five years' experience in underground coal mining in the state of Montana; and the manuscript and other papers of all applicants, together with the tally sheet and the solution of each question as given by the examining board, shall be filed with the industrial accident board as public documents, but such applicant shall undergo an oral examination pertaining to theoretical and practical mining on the nature and properties of noxious, poisonous and explosive gases found in the mines and methods for their detection and on the different systems of working and ventilating coal mines. The board of examiners shall file with the industrial accident board the names of all persons who shall have successfully passed the examination. From those so named the industrial accident board shall select one person to be state coal mine inspector, but no man shall be eligible for the appointment as state coal mine inspector who has any pecuniary interest in any coal mines, either directly or indirectly, as owner, lessee, or employer, or otherwise.

(a) The examination for mine foreman shall consist of oral and written questions, on theoretical and practical mining, on the nature and properties of noxious, poisonous and explosive gases found in the mines and methods

of their detection, and on the different systems of working and ventilating coal mines. The board shall issue to those examined and found to possess requisite qualifications, certificates of competency for the position of mine foreman, but such certificates shall be granted only to persons of thirty years of age, or over, of good, moral character, citizens of the United States and residents of the state of Montana, and with at least five years' practical experience in underground mines as a coal miner one of which shall be in the state of Montana. Applicants for the position of mine foreman shall furnish sworn affidavit or affidavits from employer or employers as to experience.

(b) Persons seeking certificates of competency as mine examiner or fire boss must produce evidence, satisfactory to the board, that they are citizens of the United States, residents of the state of Montana; have had at least five years' practical experience in underground mines in the state of Montana, as a coal miner; at least thirty years of age, and of good repute and temperate habits. They must prepare to submit to, and satisfactorily pass, an examination as to their experience in mines generating dangerous and explosive gases; their practical and technical knowledge of the nature and properties of mine gases and methods for their detection, the laws of ventilation, and the structure and use of the safety lamp. Manuscripts and other papers of all the applicants for the position of mine foreman, and mine examiner, together with the tally sheets and the solution of each question as given by the examining board, shall be filed with the industrial accident board as public documents. All papers and blanks, blank books and stationery used at the examination, must be furnished by the industrial accident board, and each candidate for examination for the position of state coal mine inspector, mine foreman, and mine examiner shall be given such questions, as are required, in writing, and each question shall be on a separate paper. Candidate must return such papers to the board, with answers to questions thereon, attested by his signature.

(c) When any person having been granted a certificate of competency by the state of Montana, to act as mine foreman, fire boss or mine examiner, is charged with gross or criminal carelessness, or intemperance, while in the performance of his duties, it shall be the duty of the state coal mine inspector to make a thorough investigation of the charge, and, upon satisfactory proof of such charge, to revoke said certificate of competency; provided, that such person whose certificate has been so revoked may appeal from such action of the state coal mine inspector to the state board of coal mine examiners, but such revocation shall continue until the state board of coal mine examiners, as provided for in this act, shall otherwise determine.

History: En. Sec. 16, Ch. 120, L. 1911; 3460, R. C. M. 1921; amd Sec. 5, Ch. 185, amd. Sec. 2, Ch. 160, L. 1921; re-en. Sec. L. 1949.

50-414. (3461) Applications for examinations—how made. Applications to the said board for examination for state coal mine inspector must be made in writing, and accompanied by an affidavit that the applicant is a citizen of the United States, a resident of the state of Montana, and that he has attained the age of thirty-five years; has had at least fifteen years'

experience in underground coal mining in the United States, and at least five years' experience in underground coal mining in the state of Montana.

History: En. Sec. 17, Ch. 120, L. 1911;
re-en. Sec. 3461, R. C. M. 1921; amd. Sec.
6, Ch. 185, L. 1949.

50-415. (3462) Selection, how made. The board of examiners shall file with the governor the names of all persons who shall have successfully passed the examination. From those so named the industrial accident board shall select one person to be state coal mine inspector; provided, that any one who has served capably as state coal mine inspector for one full term, upon making written application to the board setting forth these facts, shall be certified to the governor as properly qualified for appointment, but no man shall be eligible for the appointment as state coal mine inspector who has any pecuniary interest in any coal mine, either directly or indirectly, as owner, lessee, or employer, or otherwise.

History: En. Sec. 18, Ch. 120, L. 1911;
re-en. Sec. 3462, R. C. M. 1921.

50-416. (3463) Oath and meetings of examining board—basing per cent. The board of examiners appointed under this act shall each take the constitutional oath before some person duly authorized by law to administer an oath.

The board shall meet at the call of the state coal mine inspector for the purpose of examining applicants as provided for in section 50-412 of this code, on the second Monday in June of each year, in the city of Billings, in the county court house, and on the third Monday in June of each year, in the city of Great Falls, in the county court house. Public notice of meetings of the board for the purpose of holding examinations, shall be given by the board, by posting of notices in the postoffice and at the coal mines in the several coal mining towns throughout the state, at least fifteen days previous to the examination, and the publication in at least one paper in the county wherein coal mines are located, two consecutive weeks previous to the holding of examination.

No person shall be certified as competent whose grade on any one subject shall be less than seventy-five per cent, and his certificate shall show what per cent the applicant has attained, and such certificate shall be valid only when signed by all members of the examining board. The examining board shall, immediately after the examination, furnish to each person who comes before it to be examined, a copy of all questions, whether oral or written, which are given at the examination, which shall be marked solved right, imperfect or wrong, as the case may be, together with a certificate of competency to each candidate who successfully passes the examination.

History: En. Sec. 20, Ch. 120, L. 1911; 3463, R. C. M. 1921; amd. Sec. 7, Ch. 185,
amd. Sec. 4, Ch. 160, L. 1921; re-en. Sec. L. 1949.

50-417. (3464) Examination of candidates. The board shall then proceed to examination of those who may present themselves as candidates for examination as provided for in section 50-412, and who shall have com-

plied with the requirements necessary to entitle such applicant to be examined as provided for in section 50-413.

History: En. Sec. 21, Ch. 120, L. 1911;
amd. Sec. 5, Ch. 160, L. 1921; re-en. Sec.
3464, R. C. M. 1921.

50-418. (3465) Compensation of board of examiners—expenses. The members of the examining board, except the state coal mine inspector, shall receive as a compensation the sum of ten dollars each day, for a term not exceeding two meetings of five days each in any year, and whatever sum is necessary to reimburse them for such traveling expenses as may be incurred in the discharge of their duties. All such salaries and expenses of the members of the board shall be paid upon vouchers duly sworn to by each member of the said board and approved and ordered by the state board of examiners, and the state auditor is hereby authorized to draw his warrants on the state treasurer for the amounts thus shown to be due, payable out of any money in the state treasury, not otherwise appropriated.

History: En. Sec. 22, Ch. 120, L. 1911;
amd. Sec. 6, Ch. 160, L. 1921; re-en. Sec.
3465, R. C. M. 1921.

50-419. (3466) Coal mine inspector—appointment and term. The industrial accident board shall, from the names certified to them by the said board of examiners, appoint a state coal mine inspector for the state of Montana, who shall hold office at the pleasure of said board.

History: En. Sec. 23, Ch. 120, L. 1911;
amd. Sec. 3, Ch. 20, L. 1921; re-en. Sec.
3466, R. C. M. 1921.

50-420. (3467) Boards of examiners of coal mine inspectors, mine foremen and mine examiners. Every four years the industrial accident board shall in the manner provided in section 50-412 of this code appoint boards of examiners to pass upon the qualifications of applicants for coal mine inspectors, mine foremen and mine examiners, which boards shall be constituted, sworn and paid, and shall perform the same duties as the boards provided for in said section during the terms for which they were appointed.

History: En. Sec. 24, Ch. 120, L. 1911; 3467, R. C. M. 1921; amd. Sec. 8, Ch. 185,
amd. Sec. 4, Ch. 20, L. 1921; re-en. Sec. L. 1949.

50-421. (3468) Examining board may adopt rules. Each successive board of examiners shall have the power to adopt their own rules and regulations for examination as will best serve the purpose of this act; said rules not to conflict with the manner of examination as prescribed by section 50-413.

History: En. Sec. 26, Ch. 120, L. 1911;
re-en. Sec. 3468, R. C. M. 1921.

50-422. (3472) Certificates of qualification, when and how granted. Certificates of qualification to state coal mine inspector, mine foreman, and mine examiner shall be granted by the board of examiners herein provided for, to each applicant who shall have passed a successful examination. The certificate shall be in a manner and form as shall be prescribed by the industrial accident board, who shall keep a record in their department of

all such certificates granted. Each certificate shall contain the full name and age and birthplace of applicant, and also the length or nature of his previous service in coal mines.

History: En. Sec. 30, Ch. 120, L. 1911;
amd. Sec. 7, Ch. 160, L. 1921; re-en. Sec.
3472, R. C. M. 1921.

50-423. (3473) Qualifications for mine examiners. Persons seeking certificates of competency as mine examiners or fire-boss must produce evidence satisfactory to the board that they are citizens of the United States, residents of the state of Montana, have had at least five years' practical experience in working of underground coal mines one of which shall be in the state of Montana, at least thirty years of age, and of good repute and temperate habits. They must prepare to submit to and satisfactorily pass an examination as to their experience in mines generating dangerous and explosive gases, their practical and technical knowledge of the nature and properties of mine gases and methods for their detection, the laws of ventilation, and the structure and use of the safety lamp.

History: En. Sec. 31, Ch. 120, L. 1911;
re-en. Sec. 3473, R. C. M. 1921; amd. Sec.
9, Ch. 185, L. 1949.

50-424. (3474) Examining board shall grant certificates. The said board of examiners shall meet at the call of the state coal mine inspector, who shall call them upon receipt of two requests for examination, and shall grant certificates to all persons whose examination shall disclose their fitness for the duties of mine foreman as above classified, or mine examiner or fire-boss, and such certificates shall be sufficient evidence of the holder's competency for the duties of said position as far as it relates to the purpose of this act. No person shall be certified as competent whose grade on any one subject shall be less than seventy-five per centum and such certificates shall designate the position qualified for, and shall be valid only when signed by all members of the examining board.

History: En. Sec. 32, Ch. 120, L. 1911;
re-en. Sec. 3474, R. C. M. 1921; amd. Sec.
10, Ch. 185, L. 1949.

50-425. (3475) Certificates may be issued to those holding proper certificates. The board may exercise its discretion in issuing certificates of any class, without examination, to persons presenting with proper credentials certificates for the same or a similar position issued by competent authorities in this or other states; provided, however, that for every such certificate issued the board shall charge a fee of five dollars.

History: En. Sec. 33, Ch. 120, L. 1911; **Compiler's Note**
re-en. Sec. 3475, R. C. M. 1921.

The title of Ch. 185, Laws 1949 provided for the repeal of this section, however, the act itself contained no specific repeals.

50-426. (3476) Applications for examination—how made—fees. An applicant for examination for any certificate herein provided for, before being examined, shall register his name with the state coal mine inspector and file with him the credentials required by this act, to-wit, an affidavit as to all matters of fact establishing his right to and qualifications for receiving the examination, and a certificate of good character and tem-

perate habits, signed by at least ten of the citizens who know him best in the place in which he lives. Each candidate, before receiving the examination, shall pay to the state coal mine inspector the sum of two dollars (\$2.00) as an examination fee, and those who pass the examination for which they are entered, before receiving their certificate, shall also pay to the state coal mine inspector the further sum of three dollars (\$3.00) each as a certificate fee. All such fees shall be duly accounted for by the state coal mine inspector, and turned into the state treasurer at the close of the fiscal year.

History: En. Sec. 34, Ch. 120, L. 1911;
re-en. Sec. 3476, R. C. M. 1921; amd. Sec.
11, Ch. 185, L. 1949.

50-427. (3478) Violations. Any person who acts in the capacity of mine foreman, mine examiner, or fire-boss, without a certificate of competency as provided for in this act, shall be deemed guilty of an offense against this act.

Every company, corporation, association, person, or persons operating any coal mine or coal mines in the state of Montana, who employs any uncertified mine foreman, mine examiner, or fire-boss, shall be deemed guilty of an offense against this act.

History: En. Sec. 36, Ch. 120, L. 1911;
re-en. Sec. 3478, R. C. M. 1921; amd. Sec.
12, Ch. 185, L. 1949.

50-428. (3479) Necessary to have maps of coal mines. Every operator of every coal mine in this state shall make or cause to be made an accurate map or plan of such mine, drawn to a scale of not less than two hundred feet to one inch, and as much larger as practicable, on which shall appear the name of the state, county, and township in which the mine is located, the designation of the mine, the name of the company or owner, the certificate of the mining engineer or surveyor as to the accuracy and date of the survey, the north point, and the scale to which the drawing is made.

History: En. Sec. 37, Ch. 120, L. 1911;
re-en. Sec. 3479, R. C. M. 1921.

Collateral References

Mines and Minerals 92.

58 C.J.S. Mines and Minerals § 240.

50-429. (3480) Underground survey. For the underground working the said map shall show all shafts, slopes, tunnels, or other openings to the surface or to the workings of a contiguous mine, all excavations, entries, rooms and cross-cuts, the rise or dip of the seam from the bottom of the shaft, mouth of drift, or slope in either direction to the face of the workings, the location of the fan, the location of the permanent pumps, hauling engines, engine-planes, and fire-walls, the location of any standing water which might prove a menace to life or danger to property from flood, and the line of any contiguous surface outcrop of the seam.

History: En. Sec. 38, Ch. 120, L. 1911;
re-en. Sec. 3480, R. C. M. 1921; amd. Sec.
13, Ch. 185, L. 1949.

50-430. (3481) Map for every seam. A separate and similar map, drawn to the same scale in all cases, shall be made of each and every seam, which, after the passage of this act, shall be worked in any mine, and the

maps of all such seams shall show all shafts, drifts, tunnels, incline planes, or other passageways connecting the same.

History: En. Sec. 39, Ch. 120, L. 1911;
re-en. Sec. 3481, R. C. M. 1921.

50-431. (3482) Map of the surface. Every such map or plan, or, at the option of the operator, a separate map, shall show the surface boundary lines contiguous to the workings and pertaining to each mine, also all section or quarter-section lines and corners, town lots and streets, the tracts and side tracts of all railroads, the location of all wagon roads, rivers, streams, ponds, buildings, landmarks, and principal objects on the surface within the said boundary lines; and in all cases, if of a separate surface map, the same shall be drawn on transparent cloth or paper, so that it can be laid upon the map of the underground workings, and thus truly indicate the relative location of the lines and objects on the surface to the excavations of the mine.

History: En. Sec. 40, Ch. 120, L. 1911;
re-en. Sec. 3482, R. C. M. 1921.

50-432. (3483) Copies of maps for state coal mine inspector. The original or true copies of all such maps shall be kept in the office at the mine, and true copies thereof shall also be furnished the state coal mine inspector within thirty days after the completion of the same. The maps so delivered to the inspector shall be the property of the state, and shall remain in the custody of the said inspector during his term of office, and be delivered by him to his successor in office. They shall be kept at the office of the inspector and be open to inspection by all persons interested in the same, but such examination shall only be made in the presence of the inspector, and he shall not permit any copies of the same to be made without the written consent of the operator or owner of the property, under penalty of removal from office.

History: En. Sec. 41, Ch. 120, L. 1911;
re-en. Sec. 3483, R. C. M. 1921.

50-433. (3484) Semi-annual surveys. An extension of the last preceding survey of every mine in active operation shall be made once in every six months and the result of said survey, with the date thereon, shall be promptly and accurately entered upon the original maps so as to show all changes in plan or new work in the mine, and all extensions of the workings to the most advanced boundary of said workings which have been made since the preceding survey. The said changes and extensions shall be entered upon the copies of the maps in the hands of the state coal mine inspector, or new copies thereof be furnished him, within thirty days after the last survey is made. Whenever the operator of any mine shall neglect or refuse, or for any cause not satisfactory to the state coal mine inspector fail, for a period of three months, to furnish the said state coal mine inspector the map or plan of such mine, or a copy thereof, or of the extension thereto, as provided for in this act, the said state coal mine inspector is hereby authorized to make or cause to be made an accurate map or plan of such mine at the expense of the owner or lessee thereof, and the cost of the same may be recovered by law from said owner, lessee, or operator, in the same manner as other debts by suit in the name of the state.

The state inspector shall require an extension of the last preceding survey, once every twelve months, of every mine in active operation in which five men or less are employed on any one shift.

History: En. Sec. 42, Ch. 120, L. 1911;
re-en. Sec. 3484, R. C. M. 1921; amd. Sec.
14, Ch. 185, L. 1949.

50-434. (3485) Abandoned mines. When any coal mine is worked out, or is about to be abandoned or indefinitely closed, the operator of the same shall make or cause to be made a final survey of all available parts of such mine, and the results of the same shall be duly extended on all maps of the mine and copies thereof, so as to show all excavations and the most advanced workings of the mine, and their exact relations to the boundary or section lines on the surface.

The state coal mine inspector may order a survey to be made of the workings of any mine which is about to be abandoned, or of which he has reason to believe the maps are inaccurate, whenever in his judgment the safety of the workmen, the support of the surface, the conservation of the property, or the safety of an adjoining mine requires it. Such survey shall be paid for by the state.

History: En. Sec. 43, Ch. 120, L. 1911;
re-en. Sec. 3485, R. C. M. 1921.

50-435. (3486) Mine operators to furnish wash houses for employees. It shall be the duty of the owner, operator, or superintendent of any coal mine in the state of Montana to provide a suitable building, not an engine or boiler house, for the use of the persons employed in such mine, for the purpose of washing themselves and changing their clothes when entering the mine and returning therefrom. The said building shall not be over eight hundred feet from and convenient to the principal entrance of such mine when practicable to do so. When not practicable to build the wash house within the said distance and still conform to the other requirements of this section, the state coal mine inspector may give written permission to place the building at a greater distance from the mine than that herein specified, and the operator shall not be guilty of violation of this section. The said building shall be kept sanitary, maintained in good order, be properly lighted and heated, and supplied with good, clean cold and warm water, and be provided with facilities for persons to wash and a suitable locker or other facility for each person to be used by him as a repository for his usual clothes and personal effects for the loss of which by fire, the operator shall be liable for the value of such aforementioned personal property to an amount not to exceed a total sum of twenty-five dollars (\$25.00), for each individual employee. Provided this section does not apply where the number of employees does not exceed twelve (12) actually engaged in the mining of coal.

If any person shall maliciously injure or destroy, or cause to be injured or destroyed, the said building or any part thereof, or any of the appliances or fittings used for supplying light, heat, or water therein, or doing any act tending to the injury or destruction thereof, he shall be deemed guilty of an offense against this act and subject to a fine as hereinafter provided for.

History: En. Sec. 44, Ch. 120, L. 1911;
re-en. Sec. 3486, R. C. M. 1921; amd. Sec.
1, Ch. 146, L. 1937.

References

Jeffries Coal Co. v. Industrial Accident
Board, 126 M 411, 252 P 2d 1046.

Collateral References

Master and Servant 12.
56 C.J.S. Master and Servant § 24.
36 Am. Jur. 387, Mines and Minerals,
§ 148.

50-436. (3487) Oath of weighman—check weighman. The weighman employed at any mine shall subscribe to an oath or affirmation before some officer authorized to administer oaths, to do justice between employer and employee, and to truly and correctly weigh the output of coal from the mines as herein provided. The miners employed by or engaged in working for any mine owner, operator, or lessee of any mine in this state shall have the privilege, if they desire, of employing at their own expense a check weighman, who shall have like equal rights, powers, and privileges in the weighing of coal as the regular weighman, and be subject to the same oath and penalties as the regular weighman. Said oath or affirmation shall be kept conspicuously posted in the weight office, and any weigher of coal or person so employed, who shall knowingly violate any of the provisions of this section, or any owner, operator, or agent of any coal mine in this state, who shall forbid or hinder miners employing or using a check weighman as herein provided, or who shall prevent or wilfully obstruct any such check weighman in the discharge of his duty, shall be deemed guilty of any offense against this act. Whenever the state coal mine inspector, or his deputy, shall be satisfied that the provisions of this section have been wilfully violated, it shall be his duty to forthwith inform the prosecuting attorney of any such violation, together with all the facts within his knowledge, and the prosecuting attorney shall thereupon investigate the charges so preferred, and if he is satisfied that the provisions of this section have been violated, it shall be his duty to prosecute the person or persons guilty thereof.

History: En. Sec. 45, Ch. 120, L. 1911;
re-en. Sec. 3487, R. C. M. 1921.

Collateral References

Labor Relations 1085; Weights and
Measures 6.

56 C.J.S. Master and Servant § 151(1);
68 C.J. Weights and Measures § 23.
36 Am. Jur. 388, Mines and Minerals,
§ 150.

50-437. (3488) Must not use false weights. Any person or persons having or using any scale or scales for the purpose of weighing the output of coal at mines must not arrange or construct them so that fraudulent weighing may be done thereby, and must not knowingly resort to or employ any means whatsoever by reason of which such coal is not correctly weighed and reported in accordance with the provisions of this act.

History: En. Sec. 46, Ch. 120, L. 1911;
re-en. Sec. 3488, R. C. M. 1921.

Collateral References

Weights and Measures 10.
68 C.J. Weights and Measures § 17.

50-438. (3489) Hoisting operations and facilities. Hoists used for handling men shall be equipped with overspeed, overwind, and automatic stop controls, unless a second engineer is on duty.

At the beginning of each shift and after the hoist has been idle, the hoisting engineer shall operate the cages up and down the shaft at least

one round trip before hoisting or lowering men. Similar procedure shall be followed in slope hoisting, except that an attendant may ride on the trip.

Slope, shaft or incline-plane hoists shall be equipped with brakes capable of stopping and holding the fully loaded unbalanced cage or trip at any point in the shaft, slope or on the incline.

An accurate and reliable indicator, showing the position of the cage or trip, shall be placed so as to be in clear view of the engineer, unless the position of the car or trip is clearly visible to the engineer at all times.

Hoisting equipment shall be inspected daily and a record made of such inspection, which shall be open for inspection by interested persons.

Hoisting ropes on all cages or trips shall be adequate in size to handle the load and have a proper factor of safety as defined in the American standards association's wire rope standards and shall be replaced when it shows more than six broken wires in any single length or lay of rope.

The rope shall have at least three full turns on the drum when extended to its maximum working length and shall make at least one full turn on the drum shaft or around the spoke of the drum (in case of a free drum) and be fastened securely by means of clamps.

A hoisting rope shall be fastened to its load by a spelter-filled socket or by a thimble and clamps.

Cages used for hoisting men shall be of substantial construction; with adequate steel bonnets; with enclosed sides; with gates, safety chains, or bars across the ends of the cage when men are being hoisted or lowered; and with sufficient handholds or chains for all men on the cage to maintain their balance.

The floor of the cage shall be constructed so that it will be adequate to carry the load and so that it will be impossible for a workman's foot or body to enter any opening in the bottom of the cage.

Cages used for handling men shall be equipped with safety catches that act quickly and effectively in an emergency.

Cages shall be inspected daily. A test of safety catches on cages shall be made at least every two months. A written record shall be kept of inspections and tests, which shall be open for inspection by interested persons.

There shall be at least two independent methods of signalling, one of which shall be audible to the engineer, from all landings in shafts and slopes.

Workmen shall wear safety belts while doing repair work in or over shafts.

Shafts shall be equipped with self-closing or manually controlled safety gates at surface landings.

Positive stop blocks or derails shall be placed near shaft surface landings.

At the bottom of each hoisting shaft and at intermediate landings, a "run-around" shall be provided for safe passage from one side of the shaft to the other. This passageway shall be not less than 5 feet in height and 3 feet in width.

History: En. Sec. 47, Ch. 120, L. 1911;
re-en. Sec. 3489, R. C. M. 1921; amd. Sec.
15, Ch. 185, L. 1949.

Collateral References

Master and Servant 12.
56 C.J.S. Master and Servant § 24.
36 Am. Jur. 386, Mines and Minerals,
§ 147.

50-439. (3490) Passageway around the bottom of shafts. At the bottom of every shaft and at every caging place therein a safe and commodious passageway must be cut around such landing place to serve as a travelway, by which men or animals may pass from one side of the shaft to the other without passing under or on the cage.

History: En. Sec. 48, Ch. 120, L. 1911;
re-en. Sec. 3490, R. C. M. 1921.

ed for the repeal of this section, however, the body of the act contained no specific repeals. Provisions of this section are now covered by sec. 50-438 herein.

Compiler's Note

The title of Ch. 185, Laws 1949 provid-

50-440. (3491) Gates at the top of shafts. The upper and lower landings at the top of each shaft, and the opening of each intermediate seam from or to the shaft, shall be kept free and clear from loose materials, and shall be securely fenced with automatic or other gates, so as to prevent either men or materials from falling into the shaft.

History: En. Sec. 49, Ch. 120, L. 1911;
re-en. Sec. 3491, R. C. M. 1921.

ed for the repeal of this section, however, the body of the act contained no specific repeals. Provisions of this section are now covered by sec. 50-438 herein.

Compiler's Note

The title of Ch. 185, Laws 1949 provid-

50-441. (3492) Mine openings and escapeways. Every underground mine shall have at least two separate surface openings.

Main slope or drift openings shall be separated by at least fifty (50) feet of natural ground in all mines opened after the effective date of this act.

New shafts and partitions therein, made after the effective date of this act, shall be fireproof. Buntons and guides may be of wood.

Mine openings at isolated locations, where there is danger of fire entering the mine, shall have adequate protection against surface fires entering the mine.

Not more than twenty (20) persons shall be allowed at any one time in the mine until a connection has been made between the two mine openings, and work shall be prosecuted with reasonable diligence.

When only one main opening is available, owing to final mining of pillars, not more than twenty (20) persons shall be allowed in such mine at any one time.

There shall be at least two travelable passageways, to be designated as escapeways, from each working section to the surface whether the mine openings are shafts, slopes, or drifts. They shall be kept in safe condition for travel and reasonably free from standing water and other obstructions. One of the designated escapeways may be the haulage road, provided, however, that one of the escapeways shall be ventilated with intake air. At mines now operating with only one free passageway to the surface, immediate action shall be taken to provide a second passageway.

Where the designated escapeways are shafts:

They shall be equipped with hoist and cage, or with travelable stairway, or ladders. No shaft more than 30 feet deep sunk after the effective date of this act shall be equipped with ladders.

Stairways shall be of substantial construction, set at an angle not greater than 45° with the horizontal, and equipped on at least one side with a suitable handrail; landing platforms shall be at least two (2) feet wide and four (4) feet long and shall be railed properly.

Ladders shall be anchored securely.

Where ladders, or stairways set at an angle greater than forty-five degrees (45°) are now installed, their use may be continued provided they are of substantial construction, with platforms at intervals of not more than thirty (30) feet and equipped with a handrail in the case of stairways.

If a designated escapeway is a slope of not more than forty-five degrees (45°) it shall be equipped with a stairway or adequate walkway with cleats. If the slope is more than forty-five degrees (45°) stairways shall be installed.

Direction signs shall be posted conspicuously to indicate manways and designated escapeways.

History: En. Sec. 50, Ch. 120, L. 1911;
re-en. Sec. 3492, R. C. M. 1921; amd. Sec.
16, Ch. 185, L. 1949.

Cross-Reference

Escapement shafts, construction, secs.
94-35-132, 94-35-133.

50-442. (3493) Unlawful to employ more than ten men until escapement connection completed. It shall be unlawful to employ at any one time more men than in the judgment of the state coal mine inspector is absolutely necessary for speedily completing the connections with the escapement shaft, slope, or drift, or adjacent mine, and said number must not exceed ten men at any one time for any purpose in said mine until such escapement connection is completed.

History: En. Sec. 51, Ch. 120, L. 1911;
re-en. Sec. 3493, R. C. M. 1921.

Compiler's Note

The title of Ch. 185, Laws 1949 pro-

vided for the repeal of this section, however, the body of the act contained no specific repeals. The provisions of this section are now covered by sec. 50-441 herein.

50-443. (3494) Passageways to escapement. Such escapement shaft or opening, or communication with an adjacent mine aforesaid, shall be constructed in connection with every seam of coal worked in such mine, and all passageways communicating with the escapement shaft or place of exit, from the main hauling ways to said place of exit, shall be maintained free of obstructions, at least five feet wide and five feet in height. Such passageways must be so graded and drained that it will be impossible for water to accumulate in any depression or dip of the same, in quantities sufficient to obstruct the free and safe passage of men. At all points where the passageway to the escapement shaft or other place of exit is intersected by other roadways or entries, conspicuous sign-boards shall be placed indicating the direction it is necessary to take in order to reach such place of exit. Where pillars are being drawn on any entry outside of where other men are working, or where more than fifty per cent. of the coal is taken out in rooms, connections for escapement shall be made with some adjoining entry to provide a safe exit for the men.

History: En. Sec. 52, Ch. 120, L. 1911;
re-en. Sec. 3494, R. C. M. 1921.

Compiler's Note

The title of Ch. 185, Laws 1949 provid-

ed for the repeal of this section, however, the body of the act contained no specific repeals. The provisions of this section may now be covered by sec. 50-441 herein.

50-444. (3495) Distance of escapement from main shaft. The distance between the main shaft and escapement shall not be less than one hundred feet where steel head-frames are used, nor less than three hundred feet where wooden head-frames are used; provided, that where slopes or drifts are driven in or on the coal strata, the distance between the escapement road or travelway and the slope drift or hauling way shall not be less than fifty feet.

History: En. Sec. 53, Ch. 120, L. 1911;
re-en. Sec. 3495, R. C. M. 1921.

Compiler's Note

The title of Ch. 185, Laws 1949 provid-

ed for the repeal of this section, however, the body of the act contained no specific repeals. The provisions of this section may be affected by sec. 50-441 herein.

50-445. (3496) Buildings on surface. In dusty locations, electric motors, switches, and controls shall be of dust tight construction unless they are in reasonably dust tight housings or enclosures.

Structures shall be kept free of coal dust accumulations.

Where coal is dumped at or near intake openings, reasonable provisions shall be made to prevent the dust from entering the mine.

Where repairs are being made to the plant, proper scaffolding and proper overhead protection shall be provided for workmen wherever necessary.

Welding shall not be done in dusty atmospheres or dusty locations, and fire-fighting apparatus shall be readily available during welding.

Naptha or other flammable liquids in lamp houses shall be kept in approved containers or other safe dispensers.

Flame safety lamps shall be permissible and maintained in permissible condition. All flame safety lamps shall be checked by the persons using them, by a qualified lamp attendant, or by a fire-boss, immediately before entering the mine.

When not in service, flame safety lamps and electric lamps shall be under the charge of a responsible person.

Stairways, elevated platforms, and runways shall be equipped with handrails.

Elevated platforms and stairways shall be provided with toe-boards where necessary, and they shall be kept clear of refuse and maintained in good repair.

Good housekeeping shall be practiced in and around mine buildings and yards. Such practices include cleanliness, orderly storage of materials, and the removal of possible sources of injury, such as stumbling hazards, protruding nails, and broken glass.

Oil, grease, and similar flammable materials shall be stored in closed containers, separate from other materials so as not to create a fire hazard to nearby buildings or mines. If oil or grease is stored in a building, the building or the room in which it is stored shall be of fire-resistive material and well ventilated. Tight metal receptacles shall be provided for oily waste.

Smoking in or about surface structures shall be restricted to places where it will not cause fire or an explosion.

Unless existing structures located within 100 feet of any intake mine opening are of reasonably fireproof construction, fire doors shall be erected at effective points in such mine openings to prevent smoke or fire from outside sources endangering men working underground. These doors shall be tested at least monthly to insure effective operation.

History: En. Sec. 54, Ch. 120, L. 1911;
re-en. Sec. 3496, R. C. M. 1921; and Sec.
17, Ch. 185, L. 1949.

Collateral References

Mines and Minerals 86.
58 C.J.S. Mines and Minerals § 229.

50-446. (3497) Stairway or cages in escapement shaft. The escapement shaft at every mine which does not exceed one hundred feet in vertical depth shall be equipped with safe and ready means for the prompt removal of men from the mine in time of danger, and such means shall be a substantial stairway which shall be provided with the hand-rails and with platforms or landings not more than ten feet apart. Where the escapement exceeds one hundred feet in vertical depth, in place of the stairway, it may be equipped with a cage for hoisting men, and such cage must be suspended between guides and be so constructed that falling objects cannot strike persons being hoisted upon it. Such cage must be operated by steam or electricity, which power shall be kept available for immediate use at all times, and equipment of said hoisting apparatus shall include a depth indicator, a brake on the drum, a steel or iron cable and safety-catches on the cage; and all such hoisting machinery must be inspected at least once each week by some competent person representing the operating company or owner.

History: En. Sec. 55, Ch. 120, L. 1911;
re-en. Sec. 3497, R. C. M. 1921.

Compiler's Note

The title of Ch. 185, Laws 1949 provid-

ed for the repeal of this section, however, the body of the act contained no specific repeals. The provisions of this section are now covered by sec. 50-441 herein.

50-447. (3498) Obstructions in escapement shaft. No accumulation of ice or obstruction of any kind shall be permitted in any escapement shaft, nor shall any steam be discharged into said shaft; and all surface or other water which flows therein shall be conducted by rings or otherwise to receptacles for same, so as to keep the stairway or cage free from falling water.

History: En. Sec. 56, Ch. 120, L. 1911;
re-en. Sec. 3498, R. C. M. 1921.

50-448. (3499) Weekly inspection of escapements. All escapement shafts and passageways leading thereto or to the works of a contiguous mine must be carefully examined at least once each week by the mine foreman, or by a man specially delegated by him for that purpose, and the date and findings of such inspection must be entered in a record book in the office at the mine. If obstructions are found, their location and nature must be stated, together with the date on which they were removed.

History: En. Sec. 57, Ch. 120, L. 1911;
re-en. Sec. 3499, R. C. M. 1921.

50-449. (3500) Communication with adjacent mines. When operators of adjacent mines have by agreement established underground communica-

tion between said mines as an escapement outlet for the men employed in both mines, the roadways to the boundary on either side shall be regularly patrolled once each week and kept clear of all obstructions to travel by respective operators, and the intervening door shall remain unlocked and ready at all times for immediate use. When such communication has once been established between adjacent mines, it shall be unlawful for the operator of either mine to close the same without the consent of the contiguous operator and the state coal mine inspector; provided, that when either operator desires to abandon mining operations, the expense and duty of maintaining such communication shall devolve upon the party continuing operations and using the same.

History: En. Sec. 58, Ch. 120, L. 1911;
re-en. Sec. 3500, R. C. M. 1921.

50-450. (3501) Ventilation of mines. Mines shall be ventilated by means of main fans which shall be installed on the surface in fireproof housings, situated not less than 15 feet from the nearest side of the mine opening, and be equipped with fireproof air ducts and ample pressure relief or explosion doors. However, present fans that are offset any distance from the mine opening need not be moved if they otherwise comply with the provisions of this section.

In nongassy mines where face workings are 500 feet or less from the portal, provision requiring a main ventilating fan may be waived by the state inspector.

In lieu of requirements for the location of the fan and the pressure-relief or explosion doors, the fan may be directly in front of, or over, the mine opening, provided the opening is not in direct line with possible forces coming out of the mine if an explosion occurs, and provided further that there is another opening having a weak-wall stopping or explosion doors that would be in direct line with the forces coming out of the mine if an explosion occurs, such opening to be not less than 15 feet nor more than 100 feet from the fan opening.

No main fan shall be allowed in any mine.

The fan shall be on a separate power circuit, independent of the mine circuit.

Main fan installations shall be protected from wood fire, grass fire, and rubbish for at least 100 feet in all directions, from the fan installations where physical conditions permit.

The fan shall be inspected daily and a record kept of the inspection, which shall be open for inspection by interested persons.

When the main fan in gassy mines fails or stops, immediate action shall be taken to cut off the power and withdraw the men from the face regions of the mine. If ventilation is restored in a reasonable time, the face regions and other places where methane is likely to accumulate shall be re-examined by certified or capable supervisors, and if found to be free from explosive gas, power may be restored and work resumed. If ventilation is not restored in a reasonable time, all underground employees shall be removed from the mine.

Main fans shall be operated continuously except when the mine is shut down with all men out of the mine. In such event, after the fan has been

started, the mine shall be examined for gas and other hazards and made safe before men, other than the examiners, are permitted in the mine.

After the effective date of this act, the installation of booster fans shall not be permitted, unless after a finding by the state coal mine inspector, that such installation is necessary for the safe operation and proper ventilation of the mine, and that it would not materially increase the hazard of the mine. In mines where such fans are now being used, their use may be continued, but they or any new installations shall be surrounded with safeguards as follows:

The fan motor shall be an enclosed type, the surroundings of the fan fireproofed, and the fan installed and located so as to prevent recirculation of air.

Passageway by the fan installation shall be by means of an air lock, the doors of which shall have at least 30 square feet cross-sectional area and open automatically when the fan stops operating.

In case of booster-fan stoppage, the procedure hereinbefore contained in this act with respect to stoppage of main fans shall apply to the section of the mine affected. Inspected at least twice each shift and provided with a signal light, audible signal, or attended constantly.

Blower fans with tubing shall be surrounded with safeguards as follows:

In gassy mines the fan shall be powered with a permissible driving unit and installed on the intake air side of and not less than 16 feet from the entrance to the place to be ventilated.

The volume of air in which the fan is placed shall be at least $2\frac{1}{2}$ times the manufacturers' maximum rated capacity of the fan.

The fan tubing shall be maintained in good condition. The discharge end of the tubing shall be kept within 35 feet of the face, and not more than 300 feet of the tubing shall be extended from the fan.

In gassy mines places ventilated by means of blower fans shall be examined for methane by a certified official or other competent person designated by the mine foreman before the fan is started at the beginning of the shift and after the interruption of fan operation for 5 minutes or more during the shift.

Accumulation of methane shall not be moved by means of a blower fan and tubing; only line brattice shall be used for this purpose.

The fan and tubing shall be inspected at least twice during each working shift.

The main intake air current shall when necessary be divided into splits utilizing air crossings, where needed, so as to ventilate all parts of the mine effectively.

The number of men on a split shall be limited to 70.

The quantity of air reaching the last open cross-cut in any pair or set of entries shall not be less than 6,000 cubic feet a minute. However, the quantity of air reaching the last open cross-cut in any pair or set of entries in pillar sections may be less than 6,000 cubic feet a minute, provided that at least 6,000 cubic feet a minute is being delivered to the intake end of the pillar line. Mines now operating without the prescribed quantity of air in the last open cross-cut of each pair or set of entries may continue to

operate in such manner, but prompt action shall be taken to deliver the required minimum volume of air in the last open cross-cut of each pair or set of entries in the mine.

When the working faces are within 500 feet of the portal, the state inspector may waive the requirement of 6000 cubic feet of air a minute reaching the last open cross-cut in any pair or set of entries or on the intake side of a pillar section, provided the volume and velocity of the air at the working faces required under this section are met.

In gassy mines the main haulage system shall be on the intake airway, and hereafter when any new shaft, slope, or drift is opened, whether classified gassy or nongassy, the main haulage system shall be on the intake airway.

The air current at working faces shall under any condition have a sufficient volume and velocity to dilute and carry away smoke from blasting and any flammable or harmful gases.

At least once each week, the mine foreman, his assistants, or other competent persons designated by the mine foreman, shall measure the volume of air near the main intake or main return, the amount passing through the last open cross-cuts of entries, and the volume of air in each split. A record of these measurements shall be kept in a book on the surface and shall be open for inspection by interested persons. On or about the first day of each month the owner, operator, or superintendent shall mail or cause to be mailed to the state coal mine inspector a true copy of the air measurements recorded in said book.

The main intake and main return air currents in slope mines driven after the effective date of this act shall be in separate openings. The main intake and main return air currents in a single shaft sunk after the effective date of this act shall be separated by a curtain wall or partition substantially constructed of fireproof material.

Battery charging stations, and transformer stations containing liquid filled transformers shall be well ventilated by separate splits of air conducted through vents to the return air courses and returning direct to the surface.

Changes in ventilation that may affect the safety of the men shall be made when the mine is idle and with no men in the mine, other than those engaged in changing the ventilation.

Air in which men work or travel in mines shall be improved when it contains less than 19.5 percent oxygen, more than 0.5 percent carbon dioxide, or is contaminated with noxious or poisonous gases.

If the air immediately returning from a split that ventilates any group of active workings contains more than 1.0 percent methane, as determined with a permissible flame safety lamp, by air analysis, or by other recognized means of accurate detection, the ventilation shall be improved.

If the air immediately returning from a split contains 1.5 percent methane, the employees shall be withdrawn from the mine or portion of the mine affected, and all power shall be cut off from said mine or portion of the mine, until such dangerous condition has been corrected.

At working faces and other places where methane has accumulated and is likely to attain an explosive mixture, blasting shall not be done

and the men shall be removed from such working faces or places until such condition has been corrected.

When the methane content of air in face operations exceeds 1 per cent at any point not less than 12 inches from the roof, face, or rib, as determined by a permissible flame safety lamp, or by chemical analysis, the men shall be removed from the affected area until the condition has been corrected by improving the ventilation.

Cross-cuts between entries and rooms shall be made at intervals not exceeding 80 feet.

Cross-cuts between entries shall be closed, except the last one in a pair or set of entries.

Where necessary to obtain a movement of air to the face of a room to clear the room of flammable or noxious gases, cross-cuts between rooms shall be closed, except the one nearest the face.

Where practicable a cross-cut shall be provided at or near the face of each entry or room before the place is abandoned.

Entries, rooms, or chutes shall not be turned off an entry beyond the last cross-cut. This does not apply to the driving of such places to make a connection at the first cross-cut or similar passageway used as a main airway in connection with an entry. It does apply to extending such places beyond the airway before the main intake and return passageways are connected.

On entries other than room entries, stoppings in cross-cuts between intake and return airways shall be built of substantial, incombustible material such as concrete, concrete blocks, brick, or tile. In mines where physical conditions exist because of heavy or caving ground so as to make the use of concrete, concrete blocks, brick, or tile impracticable, timbers laid longitudinally "skin to skin" may be used.

Doors used on main-entry or cross-entry (entries from which room entries are turned) haulage roads, which when open would connect intake and return air courses ventilating the mine in by such doors, shall be in pairs to provide an air lock large enough to contain an entire trip; provided however, when only a single door is installed, such single door shall be attended except in the case of panel or room entries in process of development. Where air-lock doors are provided, there shall be sufficient leakage to prevent accumulations of methane between the doors.

Doors shall be kept closed except when men or equipment are passing through the doorways. Motor crews and other persons who open doors shall see that the doors are closed before leaving them.

Substantially constructed line brattice shall be used from the last open cross-cut of any entry or room, when necessary to remove gases, explosive fumes, and smoke. When damaged by falls or otherwise they shall be repaired promptly.

The space between the line brattice and the rib shall be large enough to permit the flow of a sufficient volume of air to keep the working face clear of flammable and noxious gases.

Flame resistive material shall be used in the construction of line brattice.

The entrances to abandoned workings shall be posted to warn unauthorized persons against entering the territory.

Abandoned workings shall be sealed or ventilated.

Where the practice is to seal abandoned workings, the sealing shall be done in a substantial manner with incombustible material. In every sealed area, one or more of the seals shall be fitted with a pipe and cap or valve to permit the gases behind the seals to be sampled and also to provide a means of determining any existing hydrostatic pressure.

In gassy mines air that has passed through or by abandoned sections or that has been used to ventilate pillar lines shall not be reused to ventilate live face workings. Mines that cannot comply with this requirement may continue to operate as at present until future mine development and ventilation can be changed to permit compliance with this section.

Any mine in which methane has been ignited or has been found by a permissible flame safety lamp or by air analysis in an amount of 0.25 per cent or more in any open workings or which is adjacent to a gassy mine shall be classed gassy.

Not less than two permissible flame safety lamps in proper working condition shall be kept available at each mine for the use of authorized persons. The state coal mine inspector may require [that] only one permissible flame safety lamp in proper working condition need be kept available at each mine where five men or less are employed on any one shift. Only permissible flame safety lamps, permissible methane detectors, or air sampling and analysis shall be used for determining the presence of methane in mine air.

In gassy mines mine officials whose regular duties require them to inspect working places shall have in their possession when underground, a permissible flame safety lamp in safe working condition, for the detection of methane and oxygen deficiency.

The working places in all mines shall be examined by a certified official for hazards at least once during each shift while the men are in the mines, or oftener if necessary for safety. In gassy mines such examinations shall include tests with a permissible flame safety lamp for methane, noxious gases, and oxygen deficiency. Any dangerous condition found shall be corrected promptly. In gassy mines pillar workings shall be examined for explosive gas and other dangers before a fall is made. If methane is found in amounts that can be detected with a permissible flame safety lamp, the fall shall not be made until the gas is removed or other precautions shall be taken to safeguard all employees.

History: En. Sec. 59, Ch. 120, L. 1911; re-en. Sec. 3501, R. C. M. 1921; amd. Sec. 2, Ch. 146, L. 1937; amd. Sec. 1, Ch. 145, L. 1939; amd. Sec. 4, Ch. 38, L. 1945; amd. Sec. 18, Ch. 185, L. 1949.

Compiler's Note

The bracketed word "that" was inserted by the compiler.

50-451. Gassy mines—regulation of operation. Upon finding the presence of gas in any part of a mine, classed as non-gassy, a report shall be made at once by the company to the state coal mine inspector.

It shall be unlawful for any owner, operator, superintendent, mine foreman or any employee of any mine which generates explosive gases to remove any accumulated body of gases by wafting or brushing. All such

bodies of gas must be removed from the mine by approved methods of ventilation. When it is necessary that arc-welding be done underground in a gassy mine, a certified man must first inspect and report it safe before starting welding, other than in the main fresh air intake.

In all mines classed as gassy all operators of coal cutting machines, electric drilling machines, and coal loading machines must be furnished safety lamps for testing and examining each place for gas before taking said machines in by the last open cut-through, and in no instance must any person incompetent to understand the operation of flame safety lamps and the detection of gas be allowed to operate any of said machines. Machines as hereinabove described shall not be taken into any place found to be containing gas. In detecting gas during operation of machines, operation must cease, power be cut off machine, and gas findings reported to foreman or person in charge. Machine operation must not continue until place is freed of gas.

History: En. Sec. 1, Ch. 30, L. 1945;
amd. Sec. 19, Ch. 185, L. 1949.

50-452. Penalty. Any person or persons violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be imprisoned for a term not exceeding six (6) months in the county jail or fined a sum not to exceed one hundred dollars (\$100.00), or both such fine and imprisonment. Any owner, superintendent, mine boss or fire-boss who shall knowingly permit violations of this act shall be deemed guilty of a misdemeanor and upon conviction thereof be subjected to the same penalties as hereinbefore prescribed.

History: En. Sec. 2, Ch. 30, L. 1945;
amd. Sec. 19, Ch. 185, L. 1949.

Compiler's Note

Sections 20 to 26, Ch. 185, Laws 1949
are compiled as sections 50-466, 50-467,
50-501, 50-502, 50-506, 50-522 and 50-523.

50-453. Rock dusting of certain coal mines required. Rock dusting shall be done with such regularity and frequency that all surfaces required to be rock dusted in dry mines shall be kept in such a condition that the incombustible content of the adhering dust shall not be less than sixty-five per cent (65%).

The rock dust shall be distributed on roof, sidewalls, floor, and on top of all timbered sections of all main haulageways, all active entries to the last open cross-cut, and to a distance of not less than forty (40) feet from the face of all active rooms and pillar workings and return airways. Whenever, by analysis, the rock dust material in any part of a mine so treated, shows a total incombustible content lower than that determined as necessary to render the coal dust inert, the section in question shall be fenced off, or the mine closed until sufficient inert material has been added to allow of safe operations.

In all worked-out sections of gaseous mines from which haulage facilities have been removed to the extent of making the cost of rock dusting prohibitive there shall be installed rock dust barriers so placed that an explosion originating in that level or panel cannot extend to other parts of the mine. These rock dust barriers shall be of a type which have been

tested and approved by the United States bureau of mines, and shall be correctly installed.

All mines except those which in the judgment of the state coal mine inspector are consistently damp throughout, must be rock dusted in accordance with the requirements of this act. The terms "consistently damp" will be construed to mean only those certain mines where the moisture content of the mine is so high as to prevent the accumulation of dry coal dust on the surface of rooms, entries, and other worked-out or partially worked-out portions of the mine.

History: En. Sec. 1, Ch. 31, L. 1945.

50-454. Penalty for violation of act. Any violations of the provisions of this act shall constitute a misdemeanor and shall be punishable under the provisions of section 50-529.

History: En. Sec. 2, Ch. 31, L. 1945.

50-455. Electricity. Overhead high-potential power lines shall be placed at least 15 feet above the ground and 20 feet above driveways and haulageways, shall be installed on insulators, and shall be supported and guarded to prevent contact with other circuits.

Overhead power circuits shall be protected against lightning and voltage surges, and high-potential power lines shall be protected adequately by circuit breakers, fuses, or both.

Electric wiring in surface buildings shall be installed so as to present minimum fire and contact hazards.

Unless surface transformers are isolated by elevations (8 feet or more above the ground), they shall be enclosed in a transformer house or surrounded by a suitable fence at least 6 feet high. If the enclosure is of metal, it shall be grounded effectively. The gate or door to the enclosure shall be kept locked at all times, unless authorized persons are present.

Surface transformers containing flammable oil and installed where they present a fire hazard (near mine openings, or in or near combustible buildings) shall be provided with means to drain or to confine the oil in event of rupture of the transformer casing.

Transformers ordered after the effective date of this act, both permanent and portable, for use underground shall be air-cooled or nonflammable-liquid cooled.

Permanent underground stations containing transformers filled with flammable oil shall be provided with door sills, or their equivalent, that will confine the oil if leakage or explosion occurs.

Portable underground substations for transformers or other power conversion equipment shall be in fireproof housings. Where the installation contains transformers filled with flammable oil, means shall be provided to confine the oil in event of leakage or explosion.

DANGER—HIGH VOLTAGE signs shall be posted conspicuously on all transformer enclosures, high-potential switch-boards, and other high-potential installations.

Underground structures (transformer stations, battery-charging stations, substations, permanent pump rooms, etc.) installed after the effective date of this act shall be of fireproof construction. Where the fireproofing

material is in contact with timber or coal, it shall not be of metal. Surface and underground substations shall be kept free from refuse and metal containers shall be provided for oily waste.

Switchboards installed after the effective date of this act shall be located so that ample room will be provided between the switchboard and passageways or lanes of travel and shall have an entrance at each end to permit authorized persons to inspect, adjust or repair apparatus back of the board. Switchboards shall have the entrance to the rear guarded against entrance of unauthorized persons, unless in a building that is kept locked.

Switchboards shall be well lighted for switch operations in the front end for repair and maintenance in the rear.

Rooms housing switchboards shall be free of debris and refuse.

Pull switches and circuit breakers, or other power controls shall be mounted on slate or other suitable insulating material.

High-potential power cables (600 volts or more) carried from the surface through shafts, boreholes and underground passageways shall be adequate for the services intended, installed in a permanent manner, and guarded from mechanical injury.

Power wires carrying less than 600 volts whether bare or insulated, except ground wires and trailing cables shall be supported on, or by well installed insulators and shall not touch combustible materials, roof or ribs.

Power wires shall be insulated properly when passing through doors and stoppings, and where they cross other power circuits.

Electric cables and wires, other than signal wires and trolley wires used for haulage, installed in haulage slopes shall be buried not less than 12 inches below combustible material or installed in fireproof protective conduit.

Where track is used as a power conductor:

Both rails of main-line tracks shall be well bonded at every joint and cross-bonded at least every 200 feet; however, if the track circuit is paralleled with a feeder cable, both rails of the track shall be well bonded at every joint, and cross bonds shall be installed at least every 1,000 feet in both the track and feeder circuit.

At least one rail on secondary haulage roads shall be well bonded at every joint, and cross bonds shall be installed at least every 200 feet.

Switches on entries shall be well bonded.

Power shall be disconnected before repair work is to be done on energized electric circuits or energized parts of electric equipment. Employees required to make repairs on energized bare trolley lines shall wear protective clothing, such as insulated shoes and lineman's gloves, or the power shall be disconnected.

Trolley and direct current and alternating current feeder wires shall be installed as follows:

On the opposite side of the entry from shelter holes and clearance space, except where 6 feet or more above the roadbed or adequately guarded at shelter holes.

The hangers on curves shall be spaced so that the trolley wire may become detached at any one hanger without exposing the locomotive operator to a shock hazard.

Trolley wires and trolley feeder wires shall be alined properly and installed at least 6 inches outside the track gauge line.

Provided with cut-out switches at intervals of not more than 2,000 feet and near the beginning of all branch lines.

Kept taut and not permitted to touch the roof, rib or cross bars; particular care shall be taken where they pass through door openings to preclude the possibility of bare wires coming in contact with combustible material.

Trolley wires and trolley-feeder wires shall be guarded adequately where it is necessary for men to pass or work under them regularly, unless the wires are more than 6½ feet above the top of the rail. They shall also be guarded adequately on both sides of doors.

Shall not extend beyond the last open cross-cut and shall be kept at least 150 feet from pillar workings.

Anchored securely and insulated properly at the ends.

Not in air known to contain 1.0 percent or more methane or in air returning from pillar recovery work or old workings where dangerous amounts of methane may be liberated suddenly.

Where practicable, power circuits underground shall be de-energized on idle days on idle shifts.

Metal conduit and metallic coverings and armor of cables shall be grounded effectively and shall be electrically continuous to afford a conductor path for the ground circuit.

Metallic frames, casings and other electric equipment that can become "alive" through failure of insulation or by contact with energized parts shall be grounded effectively.

Casings of transformers shall be grounded effectively unless protected by insulation (freedom from contact hazard by position.)

Power circuits shall be protected against short circuit or excessive overload. Wires and other conducting materials shall not be used as a substitute for properly designed fuses; where circuit breakers are used they shall be maintained in proper operating condition.

Dry wooden platforms, rubber mats or other electrically non-conductive material shall be kept in place at each switchboard, power-control switch, and at stationary machinery where shock hazards exist.

Signal wires shall be supported on insulators and insulated properly where they cross power lines.

Bare signal wires that are readily accessible to personal contact shall not carry more than 30 volts. (This does not apply to block-signal systems).

All new electric face equipment taken into gassy mines shall be permissible equipment approved by the United States bureau of mines, except that explosion-tested cable-reel locomotives and shuttle cars may be used.

Mining equipment mounted on rubber tires or caterpillar treads, receiving power through a trailing cable, purchased after the effective date of this act, shall be grounded effectively.

Fuses or equivalent protective devices of the correct type and capacity shall be installed on electric equipment to protect against excessive overload. Wires or other conducting materials shall not be used as a substitute for properly designed fuses, and where circuit breakers are used, they shall be maintained in proper operating condition and adjusted so that equipment cannot be overloaded.

Switches and circuit breakers shall be installed so that they are readily accessible and can be operated without danger of contact with moving or live parts.

Disconnecting switches shall be installed in all main power circuits at the bottoms of shafts, boreholes and at other places where main power circuits enter the mine.

Underground electric equipment and circuits shall be provided with switches or other controls of safe design and construction, and shall be installed in a safe manner.

Permissible junction or distribution boxes shall be used for making multiple-power connections in working places or other places where dangerous quantities of methane may be present or may enter the air current.

Permissible equipment shall be maintained in a good state of repair and in permissible condition. Explosion tested equipment shall be maintained in a good state of repair and in explosion tested condition.

It shall be unlawful for any person or persons in coal mines known to be generating gas to move electric equipment by nipping.

No electrically driven equipment shall be taken into or operated in a working place where 1.0 per cent or more methane can be detected at any point not less than 12 inches from the roof, face or rib.

In all face workings of gassy mines, inspections for methane shall be made before electric equipment is taken into or operated in face regions, and frequent tests shall be made for methane while such equipment is operated in face regions.

Electric drills or other electrically operated rotating tools intended to be held in the hands shall have the electric switch constructed so as to break the circuit when the hand releases the switch or shall be equipped with friction or safety clutches.

Explosion-tested cable-reel locomotives in gassy mines shall be equipped with two (2) conductor trailing cables.

All new trailing cables used on electric mine equipment shall meet the United States bureau of mines tests for flame-resistive qualities.

Trailing cables shall be provided with suitable overload protection and power taps, unless properly connected to permissible junction or distribution boxes.

Trailing cable splices shall be made in a workmanlike manner, mechanically strong and well insulated.

Electric light wires shall be supported by suitable insulators and fastened securely to the power conductors by means of clamps or the equivalent.

Electric lights shall not be installed within one hundred and fifty feet (150') of pillar workings or advancing workings.

Electric lights shall be installed so that they cannot come in contact with combustible materials.

History: En. Sec. 1, Ch. 32, L. 1945;
amd. Sec. 27, Ch. 185, L. 1949.

Compiler's Note

Section 28, Ch. 185, Laws 1949 is compiled as section 50-472.

50-456. Penalty. Any violations of the provisions of this act shall constitute a misdemeanor and shall be punishable under the provisions of section 50-529.

History: En. Sec. 2, Ch. 32, L. 1945.

50-457. Installation and location of telephones in certain coal mines. A system of party line telephones shall be installed, and kept in working condition by the coal mining company installing same in each coal mine in operation in the state of Montana employing more than fifteen (15) men. Said telephone equipment shall include one (1) telephone on the surface within one hundred (100) feet of the mine tipple, one (1) at the bottom of each hoisting shaft and in drift or slope mines at the first cross entry or parting in operation where men are liable to congregate or be stationed. In addition thereto there shall be one (1) telephone on each side of the mine, if such side is in more than one thousand (1,000) feet from the bottom of the hoisting shaft or in beyond one thousand (1,000) feet past the first cross entries or parting in operation in a drift or slope mine.

Telephones inside any coal mine may be changed to more convenient locations, other than designated in this section, if in the opinion of the state coal mine inspector it should make for greater safety for the men employed therein.

History: En. Sec. 1, Ch. 33, L. 1945.

50-458. Penalty. Any violations of the provisions of this act shall constitute a misdemeanor and shall be punishable under the provisions of section 50-529.

History: En. Sec. 2, Ch. 33, L. 1945.

50-459. (3502) Pressure-gauges. At each mine generating fire-damp so as to be detected by a safety-lamp a water-gauge for the purpose of recording the pressure of vacuum of the main air current shall be provided and maintained, which shall be kept in constant use, and records preserved subject to the inspection of the state coal mine inspector or his authorized representative.

History: En. Sec. 60, Ch. 120, L. 1911;
re-en. Sec. 3502, R. C. M. 1921.

50-460. (3503) Number of persons permitted to work in same air current. The current of air in mines must be split or subdivided so as to give a separate current to a number not exceeding one hundred men at

work, and the inspector has the discretion to order a separate current for a smaller number of men if special conditions render it necessary.

History: En. Sec. 61, Ch. 120, L. 1911; re-en. Sec. 3503, R. C. M. 1921.

ed for the repeal of this section, however, the body of the act contained no specific repeals. The provisions of this section are now covered by sec. 50-450 herein.

Compiler's Note

The title of Ch. 185, Laws 1949 provid-

50-461. (3504) Cross-cuts and brattices for ventilation. Cross-cuts between the entries, except where the same are within the confines of shaft bottom pillars, or are hereafter provided for, shall be made not exceeding sixty (60) feet apart, unless sufficient brattice is used to keep the air current up to the entry face, in which case they shall not exceed one hundred (100) feet apart. Where entries or rooms are being driven by entry driving machines, or any other mechanical loading device, or where local mechanical methods of ventilation are installed to furnish air to the workmen at the face, except as provided in section 50-450, pertaining to booster fans, cross-cuts may be driven at not exceeding three hundred (300) feet apart, provided that brattice, tubing or some other device is used sufficient to give at the face twice the amount of air per man and animal provided for in section 50-450, and to clear said face of powder smoke before the men are required to return to work therein. In mines or sections of a mine where no local mechanical methods of ventilation are installed, when there is a solid block on one side of a room, cross-cuts shall be made between such room and the adjacent room not to exceed sixty (60) feet apart; where there is a breast or group of rooms, a cross-cut shall be made on one side or the other of each room, except the room adjoining said block, not to exceed fifty (50) feet from the outside corner of the cross-cut to the nearest corner of the entrance of the room, and on the opposite side of the same room a cross-cut shall be made not to exceed ninety (90) feet from the outside corner of the cross-cut to the nearest corner of the entrance of the room, and thereafter cross-cuts shall be made not to exceed eighty (80) feet apart on each side of the room.

Brattices between permanent inlet and outlet airways shall hereafter be constructed in a substantial manner of brick, blocks, masonry, concrete, or nonperishable material. Rooms must not be worked in advance of the ventilating current.

History: En. Sec. 62, Ch. 120, L. 1911; re-en. Sec. 3504, R. C. M. 1921; amd. Sec. 1, Ch. 28, L. 1927; amd. Sec. 3, Ch. 146, L. 1937; amd. Sec. 5, Ch. 38, L. 1945.

ed for the repeal of this section, however, the body of the act contained no specific repeals. The subject-matter of this section is now covered by sec. 50-450 herein.

Compiler's Note

The title of Ch. 185, Laws 1949 provid-

50-462. (3505) Operation of ventilating fans—furnaces, etc. All ventilating fans, furnaces, and any means in use to ventilate mines shall be kept in constant operation, day and night, in mines generating fire-damp, or where two shifts are being worked. Where no fire-damp is generated, or only one shift is worked, the fan, furnace, or other means of ventilation shall be started and kept running not less than two hours before the time to begin work. Should it at any time become necessary to stop the fan or other means of ventilation on account of accident or needed repairs to any

part of the machinery, furnace, or other means of ventilation connected therewith, or by reason of any unavoidable cause, it shall then be the duty of the mine foreman, or any official in charge, after first having provided as far as possible for the safety of the persons employed in the mine, to order said fan or other means of ventilation to be stopped so as to make the necessary repairs or to remove any other difficulty that may have been the cause of such stoppage. All ventilating furnaces in mines shall, for two hours before the appointed time to begin work and during working hours, be properly attended by a person employed for the purpose.

History: En. Sec. 63, Ch. 120, L. 1911;
re-en. Sec. 3505, R. C. M. 1921.

vided for the repeal of this section, however, the body of this act contained no specific repeals. The provisions of this section may be affected by sec. 50-450 herein.

Compiler's Note

The title of Ch. 185, Laws 1949 pro-

50-463. (3506) Overcasts, air-bridges and doors—how to be constructed.

In all mines, all main air-bridges or overcasts built after the passage of this act shall be constructed of masonry or other incombustible material of ample strength, or be driven through the solid strata. In all mines the doors used in guiding and directing ventilation of the mine shall be so hung and adjusted that they will close themselves, or can be supplied with springs or pulleys so that they cannot be left standing open, and an attendant shall be employed at all principal doors through which cars are hauled, for the purpose of opening and closing said doors when trips of cars are passing to and from workings, unless an approved self-acting door is used. Necessary room shall be provided at each door so as to protect said attendant from being run over by the cars while attending to his duties, and persons employed for this purpose shall at all times remain at their post of duty during working hours. On every inclined plane, or where haulage is done by machinery, and where a door is used, an extra door shall be provided to use in case of necessity.

History: En. Sec. 64, Ch. 120, L. 1911;
re-en. Sec. 3506, R. C. M. 1921.

Compiler's Note

The provisions of this section may be affected by sec. 50-450 herein.

50-464. (3507) Underground stables. Where livestock is kept underground, the stables or stalls shall be separated from the main air-course by not less than twenty (20) feet of solid strata, or a solid wall of brick masonry or concrete not less than twelve (12) inches in thickness. The construction of the stable shall, as far as possible, be free from all combustible material. No hay or straw shall be taken into the mine unless same be compressed into compact bales, and only from time to time in such quantities as will be required for two (2) days' use. No greater quantity of hay or straw shall be stored in the mine or stable, and when such is taken inside the mine it shall be taken to the stable at once and placed in a separate room provided therein for the same. The stable must be so placed that the air ventilating the same is returned immediately to the main outlet air-course, and not allowed to go further into the mine to where men are working. The connections between the air-courses and the stables must be fitted with substantial doors, placed so that they can be readily reached in the event of fire in the stable. Where conditions prohibit the use of entirely incombustible material in the construction of the stable,

the doors leading to or from the same shall be made of iron or steel plate, not less than one-quarter ($\frac{1}{4}$) inch in thickness, set in masonry or concrete walls. The lights used in the stable shall be in compliance with section 50-503. All refuse and waste shall be promptly removed from the stable in the mine, and shall not be allowed to accumulate.

Stables constructed underground after the passage of this act shall be located not nearer than one hundred fifty (150) feet to any opening to the mine used as a means of ingress or egress.

History: En. Sec. 65, Ch. 120, L. 1911;
re-en. Sec. 3507, R. C. M. 1921; amd. Sec.
6, Ch. 38, L. 1945.

50-465. (3508) Precautions when approaching abandoned workings. Whenever any working place of a mine approaches within one hundred feet of the abandoned workings of another mine, as indicated by an accurate survey, or while driving any working place parallel with the workings of such abandoned mine within one hundred feet thereof, and such abandoned mine cannot be explored, or when same contains fire-damp or water which may inundate such working place, the mine foreman shall not permit such working place to be advanced until a drill hole has been extended not less than twelve feet in the center of such working place, and a flank hole not less than twelve feet extended on each rib, starting at the working face after taking out each cut of breaking.

Whenever the limits of an abandoned mine are not known by actual survey, the above rule shall apply whenever any working place approaches within two hundred feet of the supposed limits of such abandoned mine.

History: En. Sec. 66, Ch. 120, L. 1911;
re-en. Sec. 3508, R. C. M. 1921.

50-466. (3509) Timber and supplies. Minimum standards for systematic timbering suitable to the roof conditions and mining system of each mine shall be adopted. The minimum standards of timbering shall be complied with by workmen and officials, and additional timbering shall be done wherever it is necessary to afford adequate protection.

At each mine, the management shall provide at or near the face workings an ample supply of timber and cap pieces or wedges of proper size with which to timber all working places in a safe manner.

Temporary safety posts, jacks or cross bars shall be set close to the face when necessary, before other mining operations are begun, and as needed thereafter.

All underground working places shall be timbered sufficiently to protect employees working at the face from falls of roof, ribs or face. Loose top and overhanging or loose faces and ribs shall be either timbered adequately or taken down.

Timber removed by cutting-machine or loading-machine operators or knocked out by blasting shall be replaced promptly, unless they are not needed for adequate roof support or protection.

It shall be the duty of the mine foreman, assistant mine foreman and mine inspectors to ascertain if workmen understand roof, rib and face testing. Uninformed workmen and new employees shall be instructed properly in correct methods of testing.

During work on any shift, the mine foreman in charge of the shift or his designated assistants shall examine, or cause to be examined by a competent person, roof, ribs and face of working places and passageways where men travel, for dangerous conditions. Where found, such dangerous conditions shall be corrected promptly by removing loose roof or rib, by adequate timbering, or duplication of defective timbering where necessary. Such timbering shall conform to the clearance provisions hereinafter provided.

When there is danger of coal rolling on a person during or after undercutting or center cutting, it shall be spragged by placing blocks in the cut or by blocking with leaning posts.

In worked-out places where timbers are being removed, persons engaged in drawing timber shall not be permitted to work alone.

History: En. Sec. 67, Ch. 120, L. 1911;
re-en. Sec. 3509, R. C. M. 1921; amd. Sec.
20, Ch. 185, L. 1949.

50-467. (3510) Haulage. The roadbed rails, joints, switches, frogs and other elements of the track of all haulage roads shall be constructed, installed and maintained in a manner consistent with speed and type of haulage operations being conducted to insure safe operation.

Track switches, except room and entry development switches, shall be provided with properly installed throws, bridle bars and guardrails; switch throws and stands, where possible, shall be placed on the clearance side.

Haulage roads on entries developed after the effective date of this act, shall have a continuous unobstructed clearance of at least thirty inches (30") from the farthest projection of moving equipment on the side opposite the trolley wire.

On the trolley wire or "tight" side, there shall be sufficient clearance to prevent the farthest projection of moving equipment from rubbing or coming in contact with ribs or timber.

After the effective date of this act, all new sidetracks, partings or entries equipped with more than one track shall have a clearance of at least 30 inches between the outermost projection of moving traffic.

The clearance space on all haulage roads on entries driven before or after the effective date of this act shall be kept free of loose rock, coal, supplies or other materials, provided that not more than thirty inches (30") need be kept free of obstructions.

Ample clearance shall be provided at all points where supplies are loaded or unloaded along haulage roads or conveyors.

Where it is necessary for men to cross conveyors regularly and where the width of conveyors or low roof introduces a hazard, suitable crossover bridges shall be provided.

Shelter holes shall be provided along haulage entries driven after the effective date of this act where locomotive, rope, animal or shuttlecar haulage is used. Such shelter holes shall be spaced not more than eighty feet (80') apart. Except where the trolley wire is six feet (6') or more above the roadbed or guarded effectively at the shelter holes, they shall be on the side of the entry opposite the trolley wire.

Shelter holes made after the effective date of this act shall be at least five feet (5') in depth, not more than four feet (4') in width, and six feet (6') in height or as high as the traveling space, if the traveling space is less than six feet (6') high. Room necks and cross-cuts may be used as shelter holes even though their width exceeds four feet (4').

Shelter holes shall be kept clear of refuse and other obstructions.

Shelter holes shall be provided at switch throws, except where more than six feet (6') clearance is maintained and at room switches.

At each landing of a slope where men are passing and cars are handled, a shelter hole at least ten feet (10') deep, four feet (4') wide, and six feet (6') high shall be provided.

Nonpermissible internal-combustion engines or other machinery which gives off noxious fumes shall not be permitted underground in any coal mine.

Locomotives shall be equipped with proper devices for the rerailing of locomotives and cars.

An audible warning device and headlights shall be provided on each locomotive and shuttle car.

Where hoists are used for handling men in underground slopes, in pitching beds or on slopes between two or more beds, the provisions governing hoisting or haulage mentioned heretofore shall apply.

A permissible trip light shall be used on the rear of trips pulled or pushed by a locomotive, on the rope-end car of trips pulled up slopes and on the front of trips lowered into slopes or pushed. Trip lights need not be used during gathering operations at working faces.

Pushing of cars on main haulage roads shall be prohibited, except where necessary to push cars from side tracks to producing entries, where necessary to clear switches and side tracks, and on the approach to cages.

Back-poling shall be prohibited except at places where the trolley pole cannot be reversed or when going up extremely steep grades and then only at very slow speed.

Other than the motorman and trip rider, no person shall ride on a locomotive unless authorized by the mine foreman, and no person shall ride on loaded cars or between cars of any trip, except that the trip rider may ride on the last car.

Motormen and brakemen shall not get on or off cars, trips or locomotives while in motion, except that a brakeman may get on or off the rear end of a slowly moving trip to throw a switch or to close a door.

All trips and all traffic equipment shall come to a complete stop before couplings are made by hand, unless a coupling hook is used.

Standing cars on any track, unless held effectively by brakes, shall be properly blocked or spragged. Cars shall be secured effectively at working faces.

On slopes and places having a knuckle, there shall be a positive-acting stoplock, at or above the knuckle, and a derail.

On entries going to the rise, a positive stopblock or derail shall be placed outby the switch of the first active working place

On entries going to the dip, a positive-acting stoplock or derail shall be placed just outby the switch to the first active working place and a

stopblock shall be placed just inby the switch of the last active working place.

When coal is not being loaded, but men are working at a room or entry face, a positive-acting stopblock or derail shall be placed across the room or entry track, or the room switch shall be kept closed to prevent cars from being inadvertently pushed or running into the places.

Slides, skids or other adequate means shall be used on descending trips on grades where the locomotive is not adequate to control the trip, and where practicable, a drag shall be used on ascending trips.

Material being hauled inside the mine shall be so loaded and protected that there is no danger to the motorman or brakeman from sliding of equipment and material.

Man-trips shall be operated at safe speeds consistent with the condition of roads and type of equipment used, but not to exceed 12 miles an hour.

Each man-trip shall be under the charge of a responsible person and it shall be operated independently of any loaded trip of coal or other material.

Cars on the man-trip shall not be overloaded and sufficient cars in good mechanical condition shall be provided.

No person shall ride under the trolley wire unless suitable covered man-cars are used.

No materials or tools shall be transported in the same cars with men on any man-trip, and all persons shall ride inside of man-trip cars, except the motorman and brakeman or trip rider.

Men shall not load or unload before the cars in which they are to ride or are riding come to a full stop, and men shall proceed in an orderly manner to and from man-trips.

A waiting station shall be provided where men are required to wait for man-trips or man-cages. It shall have sufficient room, ample clearance from moving equipment, and adequate seating facilities.

Trolley and power wires shall be guarded effectively at man-trip stations where there is a possibility of any person coming in contact with energized electric wiring while loading or unloading from the man-trip.

Where belts are used for transporting men, a minimum clearance of 18 inches shall be maintained between the belt and the roof or cross bars, projecting equipment, cap pieces, overhead cables, wiring, and other objects; but where the height of the coal bed permits, the clearance shall not be less than 24 inches.

The belt speed shall not exceed two hundred and fifty feet (250') a minute while men are loading, unloading or being transported.

The space between men riding on a belt line shall be not less than five feet (5').

Loading and unloading stations shall be illuminated properly.

An official or some other person designated by the mine foreman shall supervise the loading and unloading of belts and man-trips.

History: En. Sec. 68, Ch. 120, L. 1911;
re-en. Sec. 3510, R. C. M. 1921; amd. Sec.
21, Ch. 185, L. 1949.

Compiler's Note

Section 22, Ch. 185, Laws 1949 is compiled as section 50-501.

(2) Shafting and projecting shaft ends that are within seven feet (7') of floor or platform level.

(3) Belt, chain or rope drives that are within seven feet (7') of floor or platform.

(4) Fly wheels. (Where fly wheels extend more than seven feet (7') above the floor, they shall be guarded to a height of at least seven feet (7').

(5) Circular and bandsaws and planers.

(6) Repair pits. (Guards shall be kept in place when the pits are not in use).

(b) Machinery shall not be repaired or oiled while in motion, unless such oiling can be done without danger to the oiler.

(c) A guard or safety device removed from any machine shall be replaced before the machine is put in operation.

(d) Mechanically operated grinding wheels shall be equipped with:

(1) Safety washers and tool rests.

(2) Substantial retaining hoods, the hood openings of which shall not expose more than 90° sector of the wheel.

(3) Eye shields, unless goggles are worn by the operators.

History: En. Sec. 28, Ch. 185, L. 1949. mining law, contained no reference to additional subject-matter.

Compiler's Notes

The title of Ch. 185 of Laws 1949, which was amendatory of various sections of the

Section 27, Ch. 185, Laws 1949 is compiled as section 50-455.

50-473. Underground fire prevention, fire control and mine disasters.

Subsection 1. Fire prevention and control.

(a) Each mine shall be provided with suitable fire fighting equipment, adequate for the size of the mine, such as supplies of rock dust at doors and at other strategic places, water lines and hose, water or chemical trucks, and fire extinguishers.

(b) Clean dry sand, rock dust or fire extinguishers, suitable from a toxic and shock standpoint, shall be provided and placed at each electrical station (substations, transformer stations, permanent pump stations) so as to be out of the smoke in case of a fire in the station.

(c) After every blasting operation performed on shift by shot firers or other persons, an examination shall be made to determine whether fires have been started.

(d) Should a fire occur, the person discovering it and any persons in the vicinity of the fire shall make a prompt effort to extinguish it.

(e) If, or when, a fire has attained such proportions that an individual cannot extinguish it, he shall report immediately the existence of the fire to a competent official of the mine, who shall order all workmen from that part of the mine affected by the fire, except those needed for fire fighting.

(f) If the fire gets out of control, men shall be withdrawn; and the part of the mine in which the fire is located or the entire mine, as conditions may require, shall be sealed or flooded.

(g) All fire-fighting operations shall be under the direct supervision of the mine manager or mine foreman or a designated assistant who shall consult with the federal inspectors, who shall serve in an advisory capacity.

(h) Underground storage places for lubricating oil and grease in excess of two (2) days' supply shall be of fireproof construction.

(i) Lubricating oil and grease kept in face regions or other working places shall be in portable closed metal containers.

(j) Hay or straw shall be transported from the surface to underground stables in enclosed incombustible cars. It shall be stored in a fireproof structure apart from the stable or in a fireproof compartment within the stable.

History: En. Sec. 29, Ch. 185, L. 1949.

Compiler's Note

Section 30, Ch. 185, Laws 1949 is compiled as section 50-531.

CHAPTER 5

REGULATION OF COAL MINING INDUSTRY—COAL MINING CODE CONTINUED

- Section 50-501. Mine foreman and his duties.
 50-502. Mine examiners and their duties.
 50-503. Electric lamps, safety-lamps and self-rescuers.
 50-504. Only safety-lamps to be used.
 50-505. Firing of blasts where safety-lamps are used.
 50-506. Explosives and blasting.
 50-507. Manner of handling explosives.
 50-508. Tamping tools.
 50-509. System of blasting.
 50-510. Care of working places.
 50-511. Duties of machine-men.
 50-512. Duties of motormen, trip riders and drivers.
 50-513. Duties of other employees.
 50-514. Persons permitted to ride on haulage trips.
 50-515. Employees shall not loiter around mines—intoxication or possession of intoxicants forbidden.
 50-516. Top and bottom men.
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 50-518. Regulations for hoisting or lowering of men.
 50-519. Checking men in and out of mines and the rights of men to come out of mines.
 50-520. Stretchers, blankets, bandages, oil, ambulance to be provided.
 50-521. Boundary lines.
 50-522. Notice to inspectors.
 50-523. Duty of inspectors.
 50-524. Coroner's inquest.
 50-525. Code of signals at coal mines.
 50-526. Duties of hoisting engineers.
 50-527. Qualifications of miners.
 50-528. Operators must make reply to statistical inquiry.
 50-529. Penalties.
 50-530. Definitions.
 50-531. Miscellaneous—protective clothing—interested persons defined.

50-501. (3515) Mine foreman and his duties. In order to secure efficiency in the coal mines, the operator or superintendent shall employ a competent and practical foreman; said mine foreman shall have passed an examination and obtained a certificate of competency as required by this act, and said mine foreman shall devote the whole of his time to his duties at the mine when in operation.

Provisions of these sections requiring a state certified foreman may be waived by the state coal mine inspector in mines where five men or less are employed on any one shift; provided, however, that the state inspector considers the person in charge of the underground work has adequate

ability to supervise the safety of the workers and to carry out the duties imposed by law in the mine concerned.

The mine foreman or his assistant shall visit and examine every working place in the mine at least once each day, or more often if necessary, while the miners of such places are or should be at work, and shall examine and see that each working place is secured by timbering so that the safety of the mine is assured; he shall see that a sufficient supply of timbers and material is always on hand at the working places in compliance with this act.

When the mine foreman is personally unable to carry out the requirements of this act as pertaining to his duties, on account of sickness or of other unavoidable conditions, a competent person shall be appointed to act in his place. The said person so appointed shall possess a mine foreman's certificate of competency.

Whenever such mine foreman, his assistant or assistants, shall have an unsafe place reported to him or them, he or they shall order and direct that the same be placed in a safe condition, and until such is done no person or persons shall enter such unsafe place except for the purpose of making it safe.

History: En. Sec. 73, Ch. 120, L. 1911; re-en. Sec. 3515, R. C. M. 1921; amd. Sec. 22, Ch. 185, L. 1949.

Compiler's Note

Section 21, Ch. 185, Laws 1949 is compiled as section 50-467.

Operation and Effect

Defendants being aware of the existence

of a pot-hole in a coal mine for a sufficient time before an accident to an employee to enable them to make a proper examination and repairs, they were bound by this section and were liable in damages for their failure to perform their duty in this respect. *McInness v. Republic Coal Co.*, 49 M 112, 118, 140 P 235.

50-502. (3516) Mine examiners and their duties. Fire-bosses or mine examiners shall make examinations of all mines before other men are permitted to enter, and they shall begin their examination in the first working place in their assigned territory not more than three (3) hours before the first shift enters the mine; however, such examinations in multiple shift operations may be made by a certified official within three (3) hours of the entrance of the next or succeeding shift, provided that in mines that are not classed gassy such examination need be made only before the first shift enters the mine.

The state coal mine inspector may waive a pre-shift examination of a mine in which five persons or less are employed on one shift if the inspector considers the onshift examination provisions of the Montana code adequately safeguard the worker.

He shall especially examine the edges and accessible parts of recent falls and old gobs and air-courses. As evidence of such examination, he shall mark with chalk upon the face of the coal his initial and the date of the month and year; if there is any standing gas discovered he shall leave a danger-signal across every entrance to such place.

He shall make a report on a blackboard provided on the outside of the mine, or at some other convenient place for that purpose, and arranged so that the men can inspect it while passing to their work, showing the conditions of the mine as to the presence of firedamp, and indicating the

place or places where present, if any is present, before he permits any person or persons to enter the mine. He shall complete his inspection before the time for the day-shift men to go to work, and shall personally check each miner or loader into the mine, advising each as to the condition of his working place, and holding back any man whose working place is in dangerous condition. He shall return to the mine with such miners or loaders thus held back, and remain there attending to the removal of any standing gas.

He shall examine parts of the mine not in actual course of working and available, not less than once each three (3) days. He shall see that every part of the mine is kept free from standing gas and all old workings are properly fenced off. He shall examine the mine on idle days and Sundays if any men are required to work in any part of it, and, if any time elapse between the day turn leaving and night turn starting, the places to be worked by night turn must be examined by him with a safety lamp and reported safe before persons go to them. He shall make a daily record of the conditions of the mine as he has found them, in a book kept for that purpose, which shall be preserved in the office of the company, said record to be signed by the examiner when made, countersigned by the foreman daily and by the superintendent weekly, and by the state coal mine inspector on his regular periodic visit. No miner or loader, when advised by the mine examiner that his working place is dangerous, shall enter such working place until accompanied by the mine examiner.

History: En. Sec. 74, Ch. 120, L. 1911; 7, Ch. 38, L. 1945; amd. Sec. 23, Ch. 185, re-en. Sec. 3516, R. C. M. 1921; amd. Sec. L. 1949.

50-503. (3517) Electric lamps, safety-lamps and self-rescuers. All men entering coal mines in Montana generating explosive gases, and in mines not generating explosive gases, but in which more than five (5) men are employed on any one (1) shift shall be equipped with electric battery lamps approved by the U. S. bureau of mines, and no flame lamps shall be permitted in the mine, except for testing purposes. All lamps used for testing purposes shall bear the approval of the U. S. bureau of mines and shall be magnetically locked and the igniters shall be maintained in a serviceable condition. Mines employing five (5) men or less on any one shift may be required to comply with the above regulations at the direction of the state coal mine inspector.

The flame safety-lamps used for examining mines or which may be used in working therein shall be the property of the owner or operator of said mine, and shall be in charge of the agent or the owner or operator of such mine. No person shall have in his possession in any part of a mine where closed lights or locked safety-lamps or other similar devices are used any lamp key or instrument for the opening of a light or lamp. Any man working in a mine or mines classified as gaseous, shall before entering the mine be subject to search by the mine foreman or his assistants, for matches or other flame producing devices, and smoking is strictly prohibited.

In any mine or mines known to be generating explosive gases, mine foremen and others charged with the duties of examining working and idle places or territories, shall be required to carry with them at all times while

underground, safety-lamps and same shall be kept lighted and in usable condition during their individual services underground.

All employees working in a mine or mines, or those employees who are required to work part-time in a mine or mines shall wear a self-rescuer furnished by the company without charge. The self-rescuer shall be the property of the owner or operator of said mine or mines, and shall be returned to the owner or operator when the employee severs his employment with the company.

Persons violating any part of the above act shall be guilty of a misdemeanor and punished accordingly.

History: En. Sec. 75, Ch. 120, L. 1911;
re-en. Sec. 3517, R. C. M. 1921; amd. Sec.
8, Ch. 38, L. 1945.

Collateral References

Master and Servant 14.
56 C.J.S. Master and Servant § 25.

50-504. (3518) Only safety-lamps to be used. In every working approaching any place where there is likely to be an accumulation of explosive gases, or in any working where danger is imminent from explosive gases, no light or fire other than electric battery lamps and locked safety-lamps approved by the U. S. bureau of mines shall be allowed or used.

History: En. Sec. 76, Ch. 120, L. 1911;
re-en. Sec. 3518, R. C. M. 1921; amd. Sec.
9, Ch. 38, L. 1945.

50-505. (3520) Firing of blasts where safety-lamps are used. In any mine where locked safety-lamps are used, no blast shall be fired in such portion of the mine except by permission of the mine foreman or his assistants, and before a blast is fired the person in charge must examine the place and adjoining places and satisfy himself that it is safe to fire such blast before such permission is given.

History: En. Sec. 78, Ch. 120, L. 1911;
re-en. Sec. 3520, R. C. M. 1921.

Collateral References

Explosives 2.
35 C.J.S. Explosives § 3.

50-506. (3521) Explosives and blasting. Separate surface magazines shall be provided for the storage of explosives, detonators and Cardox heater elements.

Surface magazines for storing and distributing high explosives in amounts exceeding one hundred and twenty-five (125) pounds shall be:

Reasonably bulletproof and constructed of incombustible material or covered with fire resistive material. The roofs of magazines so located that it is impossible to fire bullets directly through the roof from the ground, need not be bulletproof, but where it is possible to fire bullets directly through them, roofs shall be made bullet resistant by material construction, or by a ceiling that forms a tray containing not less than a four inch (4") thickness of sand, or by other methods.

Provided with doors constructed of three-eighths inch ($\frac{3}{8}$ ") steel plate line with a two inch (2") thickness of wood, or the equivalent.

Provided with floors made of wood or other non-sparking material and have no metal exposed inside the magazine.

Provided with suitable warning signs so located that a bullet passing directly through the face of a sign will not strike the magazine.

Equipped with no openings except for entrance and ventilation. Provided with properly screened ventilators.

Kept locked securely when unattended.

Surface magazines for storing black blasting powder, detonators and Cardox heater elements need not be bulletproof, but they shall be in accordance with other provisions for storing high explosives.

High explosives, black blasting powder or Cardox heater elements in amounts of one hundred and twenty-five (125) pounds or less or five thousand (5,000) detonators or less shall be stored in accordance with preceding standards or in separate box-type magazines. Box-type magazines may also be used as distributing magazines when quantities do not exceed those mentioned. Box-type magazines shall be constructed strongly of two inch (2") hardwood or the equivalent. Metal magazines shall be lined with non-sparking material. No magazine shall be placed in a building containing oil, grease, gasoline, waste paper or other highly flammable material, nor shall a magazine be placed less than twenty (20) feet from a stove, furnace, open fire or flame.

After the effective date of this act, and where practicable, the location of magazines shall be not less than two hundred (200) feet from any mine opening unless effectively barricaded.

The supply kept in distributing magazines shall be limited to approximately one (1) day's requirements, and such supplies of explosives and detonators may be distributed from the same magazine, if separated by at least a six inch (6") substantially fastened hardwood partition or the equivalent.

The area surrounding magazines for not less than 25 feet in all directions shall be kept free from rubbish, dry grass or other material of a combustible nature.

If the explosives magazine is illuminated electrically, the lamps shall be of the explosion-proof type, installed and wired so as to present minimum fire and contact hazards.

Only nonmetallic tools shall be used for opening containers. Extraneous materials shall not be stored in an explosives or detonator magazine.

Smoking, carrying smokers' articles or open flame shall be prohibited in or near any magazine.

A Cardox charging station shall:

Be in a fireproof structure on the surface or isolated from other operations in the same building by a substantial fireproof partition.

Be provided with at least two methods of relieving excess pressure in the storage tank. If one of these methods is a valve, the valve shall be tested monthly.

Have a box-type magazine or equivalent for storing the daily supply of heater elements.

Permissible explosives or detonators carried underground shall be in individual containers constructed of substantial nonconductive material, maintained in good condition, and kept closed.

When explosives or detonators are transported underground by locomotive, rope or shuttle car, they shall be in special covered cars or in special containers.

The bodies and covers of special cars and the containers shall be constructed of nonconductive material.

If explosives and detonators are hauled in the same explosives car or in the same special container, they shall be separated by at least a four inch (4") substantially fastened hardwood partition or the equivalent.

Permissible explosives, detonators and Cardox shells shall not be carried on the same trip with workmen.

Where quantities of explosives and detonators are transported in special cars or in special containers in cars, they shall be hauled on a special trip, not connected to any other trip, and shall not be hauled into or out of a mine within five minutes preceding or following a man-trip or any other trip.

Explosives and detonators shall be transported underground by belt only under the following conditions:

In the original and unopened case, in special closed cases constructed of nonconductive material, or in suitable individual containers.

Clearance requirements shall be the same as those for transporting men on belts.

Suitable loading and unloading stations shall be provided.

There shall be an attendant at loading and unloading points and stop controls at these points.

Explosives or detonators shall not be transported on flight or shaking conveyors, or by scraper or mechanical loading machines.

Where underground section boxes or magazines are used they shall be of substantial construction and placed in a cross-cut or idle room neck at least 25 feet from roadways or trolley wires and in a reasonably dry and well-rock-dusted place; the explosives and detonators shall be kept in separate boxes or magazines, or if kept in the same box they shall be separated by at least a four inch substantially fastened hardwood partition or the equivalent. Not more than a forty-eight hour supply of explosives, including any surplus remaining from the previous day, shall be stored underground in such boxes or magazines.

The state inspector may waive the provisions requiring surface storage magazines for the storage of explosives and detonators for mines employing five persons or less, if the amount of explosives does not exceed 125 pounds, and storage is in an underground, box-type magazine.

Explosives and detonators kept near the working faces shall be stored in separate, closed containers of substantial nonconductive material located not less than fifteen feet from rail or power lines, except that if kept in a niche in the rib, the distance shall be at least five feet, and in a location out of line of blast where they will not likely be subjected to shock.

Explosives and detonators shall be kept in their containers until removed for use at the working faces.

In all underground coal mines, for the blasting of coal or other blasting operations, permissible explosives or permissible blasting devices shall be used except as hereinafter provided for. The use of permissible explosives shall comply with the following:

Fired only with electric detonators of proper strength.

Fired with permissible blasting units unless blasting is done from the surface.

Boreholes in coal shall not be drilled beyond the back of the cut, nor into the solid rib, roof or floor.

Boreholes shall be cleaned and checked to see that they are placed properly and are of correct depth, in relation to the cut, before being charged.

To prevent blow-throughs, all portions of the boreholes where the height of the coal permits, shall have a burden in all directions of at least eighteen inches before being fired.

Boreholes shall be stemmed with at least 24 inches of incombustible material, or at least one-half of the length of the hole shall be stemmed if the hole is less than four (4) feet in depth.

In gassy mines examinations for gas shall be made immediately before and after firing each shot where on-shift shooting is done.

The state inspector may permit the use of pellet black powder for blasting in a non-gassy mine where five men or less are employed, providing all shots are fired by a competent person when all other men are out of the mine. Further, mine electric power shall not be used to set off shots unless the shots are fired from the surface with all persons out of the mine, including the person firing the shots.

Charges exceeding one and one-half ($1\frac{1}{2}$) pounds, but not exceeding three pounds, shall be used only if boreholes are six (6) feet or more in depth, and explosives are charged in a continuous train, with no cartridges deliberately deformed or crushed, with all cartridges in contact with each other, and with the end cartridges touching the back of the hole and the stemming respectively, and class A or class B permissible explosives are used. Provided, however, that the three (3) pound limit shall not apply to solid rock work such as solid rock tunnels, etc.

Competent persons shall be designated to fire shots and they shall comply with the requirements of this act pertaining to blasting.

In mines where charging or shooting is done on shift, each shot or group of simultaneous shots shall be fired immediately after it is charged.

Only wooden tamping bars shall be used when charging holes.

Leg wires of electric detonators shall be kept shunted or the ends twisted together until ready to connect to the firing cable.

Shots shall not be fired from the power or signal circuit while any men are in the mine.

Roof and faces of working places shall be tested before and after blasting.

Ample warning shall be given before shots are fired, and care shall be taken to ascertain that all persons are in the clear. Men shall be removed from adjoining working places when there is danger of a shot blowing through.

Adobe (mudcap) or other open, unconfined shots shall not be fired in any mine.

Blasting cables shall be:

Well insulated and as long as may be necessary to permit the shot-firer to get in a safe place around a corner.

Short-circuited at the battery end until ready to attach to the blasting unit.

Staggered as to length or kept well separated when attached to the detonator leg wires.

Kept clear of power wires and all other possible sources of active or stray current.

Power wires in face regions shall be de-energized during charging and blasting operations.

Where misfires occur with electric detonators, a waiting period of at least 5 minutes shall elapse before anyone returns to the shot. After such failure, the blasting cable shall be disconnected from the source of power and the battery end short-circuited before electric connections are examined.

Explosives shall be removed by firing a separate charge at least two feet (2') away from, and parallel to, the misfired charge or by washing the stemming and the charge from the borehole with water, or by inserting and firing a new primer after the stemming has been washed out.

A very careful search of the working place, and, if necessary, of the coal after it reaches the tippie shall be made after blasting a misfired hole, to recover any undetonated explosive.

The handling of a misfired shot shall be under the direct supervision of the mine foreman or a competent person designated by him.

The provisions governing the handling, storage and transportation of explosives shall apply to the heater elements of Cardox blasting devices prior to their installation in the shells.

Charged Cardox shells shall be transported underground in insulated cars or in insulated boxes placed in ordinary mine cars and shall be stored on wooden racks, built for that purpose, in a cross-cut or an idle room neck, at least ten feet (10') from power lines and haulage tracks.

Where Cardox is used for blasting, the following shall apply:

Cardox shells need not be tamped or stemmed.

When Cardox is fired all persons in the vicinity, including the shot-firer, shall be around a second corner or in an equally safe place.

Blasting cables shall be as long as may be necessary to assure the safety of the shot-firer, attached only after the charge has been placed in the borehole, and maintained in good repair.

The charge shall be detonated with a permissible shot-firing unit.

Cardox shall not be shot off the solid, over heavy rock binders or shale, or in a "tight" shot.

Cardox misfires caused by the failure of the disk to rupture shall not be approached until after the lapse of fifteen minutes (15) and shall be handled under the supervision of a foreman or other competent designated person. Such misfired shells shall be bled off before complete removal from the hole, and shall be marked conspicuously upon removal from the hole.

Where Airdox is used for blasting or breaking down the coal, the following shall apply:

Compressed air shall be conducted from the compressor to within a practical working distance of the face by steel air lines tested to withstand an approximate pressure of twenty thousand (20,000) pounds per square inch.

Air lines shall be grounded at the compressor and, if possible, at other low resistance ground connections along the lines, such as at borehole casings. They shall not be connected in any way to tracks, water lines or other electric power return conductors and shall be suitably insulated where they cross electric wires or underneath the track.

Unions shall be installed in steel air lines at not more than one thousand foot (1,000') intervals. Insulated couplings shall be installed at the inby end of such lines.

Shut-off valves shall be installed every one thousand feet (1,000') in all Airdox lines and, in all branch lines, at a point near the main lines.

Airdox lines shall be protected at places where equipment passes over, under or adjacent to them; they shall not be handled or repaired when air pressure is in the line.

Air lines shall be examined periodically for kinks or other weaknesses and replaced immediately when defects are found.

Copper tubing shall be coiled and uncoiled properly. The part of the tubing that is affected by frequent coiling and uncoiling shall be renewed periodically because of the dangers from kinks of crystallization.

Blown-down valves shall not be less than forty-five feet (45') from the face and shall be around a right angle.

Holes for Airdox tubes shall not be on the solid.

The Airdox tube shall be pushed to the back of the drill hole and then withdrawn six (6) to twelve (12) inches to form an air cushion.

When blow-down valves are opened to discharge the Airdox tube, they shall remain open until time to place the tube in the next borehole.

After the breaking down of the coal in any one place, the tube shall be disconnected at once from the air line and not reconnected until ready to be used in the next place.

When an Airdox tube fails to discharge, the line leading to the tube shall be disconnected at the blow-down valve and the tube shall be dragged by means of the line to an abandoned place, marked with warning signs, and left for twelve (12) hours before any repair work is done thereon.

All persons shall be removed from adjoining working places where there is danger of breaking through and shall be at a safe distance around a right angle, while coal breaking is in progress.

Any wilful neglect, refusal or failure to do the things required to be done in the above sections, clause or provision on the part of person or persons herein required to do them, or any violation of the provisions or requirements thereof, or any attempt to obstruct or interfere with any person in the discharge of the duties herein imposed upon him, or any refusal to comply with the provisions of this section shall be deemed a misdemeanor punishable by a fine of not less than one hundred dollars (\$100.00) and not to exceed two hundred dollars (\$200.00) or by imprisonment in the county jail for a period not exceeding three (3) months, or both, at the discretion of the court.

History: En. Sec. 79, Ch. 120, L. 1911; re-en. Sec. 3521, R. C. M. 1921; amd. Sec. 10, Ch. 38, L. 1945; amd. Sec. 24, Ch. 185, L. 1949.

Cross-Reference

Limit on quantity of explosives stored in mine, sec. 69-1922.

50-507. (3522) Manner of handling explosives. It shall be unlawful for any owner, operator, superintendent, foreman or any employee of any coal mine to transport powder on haulageways either by rope, motor or horse in any manner other than in a non-conductive safety-built car, approved by the state coal mine inspector. When the explosives car is transported by trolley locomotive at least two (2) cars shall be placed between the locomotive and the explosives car and an insulated coupling shall be used between the explosives car and the first car.

Wooden mallets and hardwood wedges shall be used to open explosives cases. Whenever a person is about to open a box or container of powder or other explosives and while handling the same in a mine employing five (5) men or less on any one shift when electric battery lamps are not used, he shall place and keep his lamp at least five (5) feet distant from such explosives, and in such position that the air current cannot carry sparks to it, and no person shall approach nearer than five (5) feet to any box or receptacle containing powder or other explosives with a lighted lamp, lighted pipe, or other thing containing fire.

Explosives shall be carried in canvas or similar bags or in an insulated container to the working faces.

Explosives shall not be brought to the face of any workings while electrical equipment is operating in the place.

History: En. Sec. 80, Ch. 120, L. 1911; re-en. Sec. 3522, R. C. M. 1921; amd. Sec. 11, Ch. 38, L. 1945.

Compiler's Note

The title of Ch. 185, Laws 1949 pro-

vided for the repeal of this section, however, the body of the act contained no specific repeals. The provisions of this section may be affected by sec. 50-506 herein.

50-508. (3523) Tamping tools. No person shall, whether working for himself or in the employ of any person, company, or corporation, while loading or charging a hole with any explosive, use or employ any steel, iron or other metal tamping bar, nor shall any mine manager, superintendent, foreman or shift boss, or other person having the management or direction of mine labor, allow or permit the use of such bar by any person under his management or direction, and no instrument other than an all wood tamping stick shall be used for tamping any permissible or high explosive charge.

When pellet powder is used as provided in section 50-509, a tamping bar tipped with at least five (5) inches of copper may be used.

History: En. Sec. 81, Ch. 120, L. 1911; re-en. Sec. 3523, R. C. M. 1921; amd. Sec. 12, Ch. 38, L. 1945.

Compiler's Note

The title of Ch. 185, Laws 1949 provid-

ed for the repeal of this section, however, the body of the act contained no specific repeals. The provisions of this section are at least partially superseded by sec. 50-506 herein.

50-509. (3524) System of blasting. (1) Shooting or blasting on shift shall only be permitted when permissible powder is used and fired by means of a permissible blasting unit, and then in gaseous mines, only after immediate inspection has been made and the place found free of gas and to be safe. In gaseous mines, tests for gas should be made with a flame safety-lamp before and after each round of shots, and provided further, that there shall be efficient means employed to carry the powder smoke as directly and as quickly as possible to the return airway and also that no

person or persons shall be required to work in a smoky atmosphere, and that all persons are out of danger from probable effects of such shots by being notified that shots are to be fired.

It shall be unlawful to use black powder in any coal mine except in pellet form.

When a fuse is used and a shot misses fire, no person shall return to such working place where shot misses fire until one (1) hour for each foot of fuse used shall have elapsed.

When more than one (1) shot is to be fired at the same time with fuse, in the same working place, different lengths of fuse shall be used so as to prevent any possibility of the shots going off simultaneously.

(2) The person assigned to the firing of shots shall immediately after the completion of his work report in writing to the proper official any shots not fired, their location and reason therefor. He shall similarly report any missed shots. He shall not drill out a missed fired hole for the purpose of removing powder from such hole, but shall drill and tamp another hole not less than twenty-four (24) inches distant from the missed fired shot and parallel to it.

No hole shall be drilled to a greater depth than the cut or shearing.

Under no circumstances shall any shot or shots be fired in a place containing gas, and shot or shots must not be fired in such place until same has been cleared of gas through approved methods of ventilation.

When firing shots in close proximity to other workmen on rib or in cross-cut driven for air or other purposes, he or they, firing such shots, shall notify in person or by signals the workmen in adjoining rooms or other place or entry.

(3) Electric power shall be cut off equipment at or near a face before explosives are taken to such face, during charging, and between charging and firing of shots.

Explosives shall be suitably stemmed with clay or other incombustible material, preferably to the collar of the hole; in no instance shall the stemming be less than two (2) feet in length, unless the hole is stemmed to the collar, but it shall not be obligatory to tamp holes where any blasting device is used which has been approved or may hereafter be approved by the United States bureau of mines and in the use of which the bureau of mines does not recommend tamping. No employees shall be less than one hundred (100) feet from the face being shot at the time of shooting and the employee shall be so situated that at least one (1) right angle shall be between him and such face.

(4) When any person is engaged in the work of firing shots, the shotfiring cable must be disconnected from battery, and cable leads must be short circuited at battery and before connection is made to detonating cap at face, and all employees other than the one (1) connecting cable to cap at face are forbidden to handle battery while the work of firing shots is being carried on. The cable connecting battery to detonating cap or caps must not be less than one hundred (100) feet in length at all times.

(5) At all coal mines where the coal is loaded by hand by individual miners or loaders the firing of shots shall be restricted to a specific time at the end of each shift, except that in entries, slants and room necks, when

necessary, one (1) snubbing shot may be fired in each at the middle of the shift. No miner shall fire a shot until the time appointed for him to do so, and then only in such rotation as designated by the proper authority, and then only under the conditions as set forth in this act. After each blast, he shall exercise great care in examining the roof and coal and shall secure them safely before beginning to load coal.

No person or persons shall order, command or induce by threat or otherwise, any shot-firer or person to fire any unlawful shot.

(6) Any wilful neglect, refusal or failure to do the things required to be done in the above sections, clause or provision on the part of person or persons herein required to do them, or any violation of the provisions or requirements thereof, or any attempt to obstruct or interfere with any person in the discharge of the duties herein imposed upon him, or any refusal to comply with the provisions of this section shall be deemed a misdemeanor punishable by a fine of not less than one hundred dollars (\$100.00) and not to exceed two hundred dollars (\$200.00) or by imprisonment in the county jail for a period not exceeding three (3) months, or both, at the discretion of the court.

History: En. Sec. 82, Ch. 120, L. 1911; re-en. Sec. 3524, R. C. M. 1921; amd. Sec. 1, Ch. 27, L. 1927; amd. Sec. 13, Ch. 38, L. 1945.

ed for the repeal of this section, however, the body of the act contained no specific repeals. This section is at least partially superseded by sec. 50-506 herein.

Compiler's Note

The title of Ch. 185, Laws 1949 provid-

50-510. (3525) Care of working places. Each miner shall examine his working place upon entering the same, and shall not commence to mine or load until it is made safe. He shall be very careful to keep his working place in safe condition at all times.

When draw slate is over the coal, the miner shall not go underneath the draw slate until it is made safe from falling by securely posting it, and he shall not remove the posts until the coal is removed and he is ready to take down the draw slate. He shall not place in the gob or refuse pile any fine coal or coal dust but shall load same into cars. He shall be very careful to keep his working place safe at all times.

Should he at any time find his place becoming dangerous from any cause or condition, to such an extent that he is unable to take care of the same personally, he shall at once cease work and notify the mine foreman or his assistant, as provided for hereinbefore in this act, of such danger, and upon leaving such place he shall place some plain warning at the entrance thereof to warn others from entering into the said danger, and he shall not return to his place until ordered to do so by the mine foreman or his assistant. Each miner, or other person employed in a mine, shall securely prop the roof of the working place therein under his control, and shall obey any order or orders given by the superintendent or mine foreman relating to the width of his working place or safety of the same. Such miner or other person shall not be held to have violated the provisions of this section, if the owner, leasee, agent, superintendent, or mine foreman fail to supply the necessary props, caps, timber, or necessary material as provided for in this act.

Each miner or other person shall avoid waste of props, caps, timber, or other material. When he has props, caps, timber, or other material unsuited for his purpose, he shall not cover them up or destroy them, but shall place same near the track where they can be readily seen.

History: En. Sec. 83, Ch. 120, L. 1911; re-en. Sec. 3525, R. C. M. 1921; amd. Sec. 14, Ch. 38, L. 1945.

Definition of Working Place

The "working place," within the meaning of the above section, of a miner engaged in loading coal, was the place where he was about to load the coal previously blasted down by him, and not the place in the tunnel where the accident occurred. *Kallio v. Northwestern Improvement Co.*, 47 M 314, 132 P 419; *McInness v. Republic Coal Co.*, 49 M 112, 115 et seq., 140 P 235.

Operation and Effect

A positive duty is imposed upon the

employee to examine and keep in a safe condition his working place, or in the event of his inability to do so, to cease operations and report to the employer, and in the event of his absence to observe this statutory duty, recovery cannot be had for injuries sustained, where no examination was made prior to commencing work, though the employer had failed to discharge its duty in keeping the place safe, since both were in *pari delicto*. *Kallio v. Northwestern Improvement Co.*, 47 M 314, 323, 132 P 419; *McInness v. Republic Coal Co.*, 49 M 112, 115, 140 P 235.

Collateral References

Master and Servant § 12.

56 C.J.S. Master and Servant § 24.

50-511. (3526) Duties of machine-men. (1) Machine runners and helpers shall use care while operating mining machines. They shall not operate a machine unless the shields are in place, and shall warn all persons not engaged in the operating of a machine of the danger in going near a machine while in operation, and shall not permit such persons to remain near the machine while in operation. They shall examine the roof of the working place and see that it is safe before starting to operate the machinery. They shall not move the machine while the cutter-chain is in motion.

(2) When connecting the power cable to electric wires, they shall make the negative or grounded connections before connecting to the positive, and, when disconnecting the power cable, shall disconnect from the positive line before disconnecting the negative, or grounded. When positive feed wires extend into rooms, they shall connect such wires to the positive wire on the entry before connecting the power cable, and as soon as the power cable is disconnected, shall disconnect such wire from the wire on the entry. They shall use care that the cable does not come in contact with metallic rails of the track, and shall avoid, where possible, leaving the cable in water. If any machine-men remove props which have been placed by the miner for the security of the roof, they shall reset such props as promptly as possible.

(3) When the state coal mine inspector finds that in the cutting of coal in any place or places in any mine or mines that the coal dust resulting from said cutting is apparent in such quantities as requiring the allaying of said coal dust, he shall order the owner, operator, superintendent or foreman of the mine to have the cutting machines equipped with a water tank and so connected to the cutter bar that water will be provided on the cutter chain while coal is being cut. It shall be the duty of machine-men while operating a cutting machine so equipped to make certain that ample water is being applied to the cutter chain while cutting coal in a place or places where it is necessary to allay the dust.

History: En. Sec. 84, Ch. 120, L. 1911;
re-en. Sec. 3526, R. C. M. 1921; amd. Sec.
15, Ch. 38, L. 1945.

Collateral References
Master and Servant 14.
56 C.J.S. Master and Servant § 25.

50-512. (3527) Duties of motormen, trip riders and drivers. (1) Motormen and trip riders shall use care in handling the motors and cars, and shall see that signals or markers, as provided for, are used as provided, and shall be governed by the speed provided for in this act in handling cars. They shall not run the motors with the trolley ahead of the motors, except in case where they cannot do the alternative, and then only at a speed of two (2) miles an hour. They shall warn persons forbidden to ride on the motors or cars, and shall not permit such persons to ride on motors or cars contrary to the provisions of this act.

(2) Each locomotive employed in underground haulage in a coal mine shall be equipped with an efficient gong and with an efficient headlight, both of which shall be maintained in good operating condition. Motorman must use the headlight and gong in a way to effectively warn employees in the mine of danger. When mine cars are pushed by a locomotive underground, an efficient trip light, maintained in working order and kept lighted, shall be carried on the front end of the forward car in a position where it can be plainly seen by the employees ahead of same. When loaded or empty mine car trips are being pulled by locomotives through entries or haulage-ways, an efficient trip light, maintained in working order and kept lighted, shall be carried on the rear end of the last car at all times except when trip rider is riding the rear end of the last car. A marker board, with an area of not less than one (1) square foot, painted white and kept clean for visibility, may be substituted for the trip light on the rear car of trips which are being pulled by locomotives; provided, however, that this section shall not apply to the gathering of cars or to any hauling of cars in a mine except haulage on main entries.

Drivers shall use care in handling cars, especially when going down extreme grades and at junction points.

Motormen, trip riders, and drivers in charge of hauling trips, passing through doors used as a means of directing the ventilation, shall see that such doors are closed promptly after the trip passes through.

History: En. Sec. 85, Ch. 120, L. 1911;
re-en. Sec. 3527, R. C. M. 1921; amd. Sec.
16, Ch. 38, L. 1945.

ed for the repeal of this section, however,
the body of the act contained no specific
repeals. The provisions of this section are
now covered in secs. 50-450 and 50-467
herein.

Compiler's Note

The title of Ch. 185, Laws 1949 provid-

50-513. (3528) Duties of other employees. (1) No person shall enter a mine generating fire-damp so as to be detected by a safety-lamp until the mine examiners make a report on the blackboard for that purpose, as hereinbefore provided for in this act.

No person, unless accompanied by the mine examiner, shall go beyond a danger-signal until all standing gas discovered has been removed or diluted and rendered harmless by a current of air. Any person, being ordered to withdraw by the mine foreman or mine examiner from the mine on account of the interruption of the ventilation, shall not re-enter the mine until given permission to do so by the mine foreman.

(2) No person other than the mine examiner shall remove any caution board or danger-signal placed at the entrance to any working place, or at the entrance to any old workings in a mine.

No person shall erase or change a mark of reference or monument made in connection with a measurement; change marks or dates or any caution board, or erase or change the dates at room or entry face, when made by the mine examiner, or take for his use a life check not issued to him as provided for in section 50-519, or change the checks on cars, wrongfully check a car, or do any act with intent to defraud. No person shall take anything containing fire, except as provided for in section 50-503, into any underground stable or barn.

(3) No person shall place refuse in or obstruct any airway or break-through used as an airway. No workman or other person shall injure a water-gauge, barometer, air-course, brattice equipment, machinery, or livestock; obstruct or throw open any airway; handle or disturb any part of the machinery of the hoisting-engine of a mine, open a door of a mine and neglect to close it; endanger the miners or those working therein; disobey an order given in pursuance of law, or do a wilful act whereby the lives and health of persons working therein or the security of a mine or machinery connected therewith may be endangered.

History: En. Sec. 86, Ch. 120, L. 1911;
re-en. Sec. 3528, R. C. M. 1921; amd. Sec.
17, Ch. 38, L. 1945.

Collateral References

Master and Servant \S 12.
56 C.J.S. Master and Servant \S 24.

50-514. (3529) Persons permitted to ride on haulage trips. No person or persons, except those in charge of trips, superintendents, mine foremen, mine examiners, electricians, mechanics, and blacksmiths, when required by their duty, shall ride on haulage trips, except where by mutual agreement in writing between the superintendent or agent and the employees a special trip of empty cars is run for the purpose of taking employees into or out of the mine, or empty cars are attached to loaded trips, which shall not be run at a speed exceeding six miles per hour.

History: En. Sec. 87, Ch. 120, L. 1911;
re-en. Sec. 3529, R. C. M. 1921.

ed for the repeal of this section, however, the body of the act contained no specific repeals. The provisions of this section are now covered by sec. 50-467 herein.

Compiler's Note

The title of Ch. 185, Laws 1949 provid-

50-515. (3530) Employees shall not loiter around mines—intoxication or possession of intoxicants forbidden. Each employee of a mine shall go to or from his place of duty by the traveling ways provided; shall not travel around the mine or the buildings, where duty does not require, and when not on duty shall not loiter at, in, or around the mine, the buildings, or machinery connected therewith, except by permission of the owner, lessee, operator, superintendent, or foreman.

No person shall go into or around a mine, the buildings, or the machinery connected therewith, while under the influence of intoxicants. No person shall use, carry, or have in his possession, at, in, or around a mine, the buildings, or the machinery connected therewith, any intoxicants.

History: En. Sec. 88, Ch. 120, L. 1911;
re-en. Sec. 3530, R. C. M. 1921.

Collateral References

Master and Servant \S 10.
56 C.J.S. Master and Servant \S 14.

50-516. (3531) Top and bottom men. At every shaft, operated by steam or other power, the operator must station at the top and the bottom of such shaft a competent man, charged with the duty of attending to signals, preserving order, and enforcing rules, during the carriage of the men on cages.

History: En. Sec. 89, Ch. 120, L. 1911;
re-en. Sec. 3531, R. C. M. 1921.

50-517. (3532) Lights on landings. Whenever the hoisting or lowering of men occurs before daylight or after dark, or when the landing at which men leave or take the cage, car, or cars is at all obscured by steam or otherwise, there must always be maintained at such landing a light sufficient to show the landing and surrounding objects distinctly. Lights shall also be maintained at each landing and the bottom of all shafts while men are at work underground.

History: En. Sec. 90, Ch. 120, L. 1911;
re-en. Sec. 3532, R. C. M. 1921.

Collateral References

Master and Servant 12.
56 C.J.S. Master and Servant § 24.

50-518. (3533) Regulations for hoisting or lowering of men. Cages in shafts, or cars in any slope, on which men are riding, shall not be lifted or lowered at a rate of speed greater than six hundred feet per minute.

No more than twelve persons shall ride on any cage or car at any one time, except where especially constructed man-cars are used on a slope.

No person shall carry any explosives, tools, timber, or other material with him on a cage, car, or cars in motion, in any shaft or any slope or incline plane while the men are being hoisted or lowered, except for use in repairing the shaft, slope, or incline plane.

No cage having an unstable or self-dumping platform shall be used for the carriage of men or materials, unless the same is provided with some device by which the platform can be securely locked, and unless it is so locked whenever men or materials are being conveyed thereon.

The rope-rider on any slope or incline plane shall, during working hours, see that all ropes and signals are in perfect working order, and, if he perceives anything wrong, he shall at once report the same to the mine foreman or his assistant.

He must be cautious when men are being hoisted out of or lowered into any slope, and shall see that all safety appliances are properly attached, and that all cars are securely coupled. He shall pay strict attention to all signals.

When more than twelve persons get on a cage or on one car on a slope or incline plane, except as above provided for, the bottomman, topman, or rope-rider in charge of the lowering and hoisting of such persons shall order a sufficient number to get off to reduce the number to twelve persons on the cage or car, and the person or persons so ordered shall immediately comply.

The car or cars used to hoist or lower men into or out of any slope or on any plane shall be connected by safety-chains, or some safety appliance must be used to maintain the trip in case of breakage of coupling or other connection.

History: En. Sec. 91, Ch. 120, L. 1911;
re-en. Sec. 3533, R. C. M. 1921.

50-519. (3534) Checking men in and out of mines and the rights of men to come out of mines. The owner, operator, or superintendent of every coal mine, whether operated by shaft, slope or drift, shall provide and hereafter maintain a checking system of the employees. Each employee shall be issued a life check at the beginning of a shift, and the check shall be returned to the check-house and placed on the checkboard at the end of the shift. An accurate record shall be kept of each check as it is issued.

Whenever men who have finished their day's work, or who have been prevented from further work for any cause, shall come to the bottom of any shaft to be hoisted out, a cage shall be given them for that purpose, unless there is an available exit by a slope or stairway in an escapement shaft, and providing there is no coal at the bottom to be hoisted. Whenever the designated number of persons for a cage load shall arrive at the bottom of the shaft in which persons are regularly hoisted or lowered, they shall be furnished with an empty cage and be hoisted.

History: En. Sec. 92, Ch. 120, L. 1911;
re-en. Sec. 3534, R. C. M. 1921; amd. Sec.
18, Ch. 38, L. 1945.

50-520. (3535) Stretchers, blankets, bandages, oil, ambulance to be provided. At every mine where men are employed underground, it shall be the duty of the operator thereof to keep always on hand and at some readily accessible place, a properly constructed stretcher, a woolen and water-proof blanket, and roll of bandages, in good condition and ready for immediate use, for binding, covering and carrying anyone who may be injured at the mine; also to provide a comfortable apartment near the mouth of the mine in which anyone so injured may rest while awaiting transportation home, and to provide for the speedy transportation of anyone injured in such mine to his home. When more than one hundred and fifty men are employed in any one mine two stretchers, two woolen and two water-proof blankets, with a corresponding supply of bandages, shall be provided and kept on hand. There shall also be provided and kept in store a suitable supply of linseed or olive oil, for use in case men are burned by an explosion or otherwise. There shall also be provided at any mine where more than five hundred men are employed an ambulance of standard make or kind to be used for the purpose of transporting sick or injured workmen from the mine to the hospital or home of such sick or injured workmen; provided, however, that mines employing less than five hundred men may jointly, when located within a radius of six miles of each other, provide an ambulance as provided in this section for the joint service of such mines, which ambulance shall be kept at the mine or garage that is most centrally or conveniently located for the service of the joint users.

History: En. Sec. 93, Ch. 120, L. 1911;
amd. Sec. 1, Ch. 185, L. 1921; re-en. Sec.
3535, R. C. M. 1921.

50-521. (3537) Boundary lines. In no case shall the workings of a coal mine be driven nearer than fifty (50) feet to the boundary line of the coal rights pertaining to said mine, except for the purpose of establishing connecting workings between properties owned by the same person, or an underground communication between contiguous mines as provided for elsewhere in this act.

History: En. Sec. 95, Ch. 120, L. 1911;
re-en. Sec. 3537, R. C. M. 1921; amd. Sec.
1, Ch. 83, L. 1947.

Collateral References
Mines and Minerals 92.
58 C.J.S. Mines and Minerals § 240.

50-522. (3538) Notice to inspectors. Within ten days after the close of each calendar month the operator of any coal mine shall report to the state coal mine inspector the tons of coal produced each day during the preceding month; and provided further that the state coal mine inspector shall submit, within fifteen days after the close of each calendar month, a true copy of such report on each mine to the district office of the local union having jurisdiction at the mine. Immediate notice must be conveyed to the state coal mine inspector by the operator interested.

First. Whenever an accident occurs whereby any person receives serious or fatal injury.

Second. Whenever work is commenced to sink a shaft, slope or drift, either for hoisting or escapement purposes.

Third. Whenever it is intended to abandon any mine or to re-open any abandoned mine.

Fourth. Upon the appearance of any large body of firedamp in mine, whether accompanied by explosion or not, and upon the occurrence of any serious fire within the mine or on the surface around the mine.

Fifth. When the workings of any mine are approaching near any abandoned mine believed to contain accumulation of water or gas.

Sixth. Upon the accidental closing or intended abandonment of any regularly established passageway to an escapement outlet.

History: En. Sec. 96, Ch. 120, L. 1911;
re-en. Sec. 3538, R. C. M. 1921; amd. Sec.
25, Ch. 185, L. 1949.

Collateral References
Mines and Minerals 93.
58 C.J.S. Mines and Minerals § 237.

50-523. (3539) Duty of inspectors. When advised by an operator of any accident in a coal mine involving loss of life or serious personal injury, the state coal mine inspector shall, if he deem it necessary from the facts reported, and in all cases of loss of life, immediately go to the scene of said accident, or send some competent person authorized by him. It shall, moreover, be the duty of every operator of a coal mine, or his agent, to make and preserve for the information of the inspector, upon uniform blanks furnished by the said inspector, a record of all injuries sustained by any employees in the pursuance of their regular occupation.

The state coal mine inspector may also make any original or supplementary investigation which he may deem necessary as to the nature and cause of any accident within his jurisdiction, and shall make a record of the circumstances attending the same and of the result of his investigations for preservation in the files of his office.

To enable him to make such investigation, he shall have the power to compel the attendance of the witnesses and to administer oaths or affirmations to them, and the cost of such investigation shall be paid by the county in which such accident has occurred, in the same manner as the cost of coroner's inquest is paid.

The state coal mine inspector shall, upon being notified of a fatality in any coal mine, relay such information promptly to the district office of the miners' organization. Provided further that the district president of the

miners' organization, or some person delegated by him, shall have the right to enter any coal mine for the purpose of investigating the cause or causes of any fatal accident.

History: En. Sec. 97, Ch. 120, L. 1911;
re-en. Sec. 3539, R. C. M. 1921; amd. Sec.
26, Ch. 185, L. 1949.

Compiler's Note

Sections 27 to 29, Ch. 185, Laws 1949
are compiled as sections 50-455, 50-472,
50-473.

50-524. (3540) Coroner's inquest. If any person is killed by any explosion or other accident, the operator must also notify the coroner of the county, his authorized deputy, or, in the absence of either or in the inability of either to act, any justice of the peace of said county, for the purpose of holding an inquest concerning the cause of such death. At such inquest the state coal mine inspector, his deputy or authorized representative, shall offer such testimony as he may be possessed of, and he may question or cross-question any witness appearing in the case; and the owner, agent, or manager of the coal mine, either in person or by counsel, and the employees either by their chosen representative or by counsel, shall also be at liberty to examine or cross-examine any witness at any such inquest.

Any person having personal interest in or employed in the management of the mine in which the accident occurred shall not be qualified to serve on the jury impaneled on the inquest; and it shall be the duty of the constable or other officer not to summon any person disqualified under this provision, and it shall be the duty of the coroner not to allow any such to be sworn or sit on the jury; nevertheless, when possible, one-third (1/3) of the jury-men shall be miners.

Unless the state coal mine inspector, or some person authorized by him, is present at an inquest held upon the body of any person, where death may have been caused by any such accident, the coroner shall adjourn the same, and, by written notice or telegram delivered or sent to the state coal mine inspector, at least two (2) days before holding the adjourned inquest, give notice of the time and place of the holding of the same. Before such adjournment the coroner, his authorized deputy, or the justice of the peace, may take evidence to identify the body and order the interment thereof.

History: En. Sec. 98, Ch. 120, L. 1911;
re-en. Sec. 3540, R. C. M. 1921; amd. Sec.
19, Ch. 38, L. 1945.

Collateral References

Coroners \Rightarrow 10.
18 C.J.S. Coroners § 14.

Cross-Reference

Coroner's inquest, secs. 94-201-1 to 94-201-13.

50-525. (3541) Code of signals at coal mines. At any coal mine operated by shaft more than one hundred (100) feet in depth, or by rope-haulage, slope, the manner of signaling to and from the bottom man, the top man, the rope-riders, and the engineer, shall consist of wires, or a tube or tubes, through which signals shall be communicated by electricity, compressed air, or other pneumatic devices.

The following signals are provided for use at coal mines where signals are required:

One (1) ring or whistle—One (1) ring or whistle shall signify to hoist coal or the empty cars or cage, and also to stop either when in motion.

Two (2) rings or whistles—Two (2) rings or whistles shall signify to lower cage or car.

Three (3) rings or whistles—Three (3) rings or whistles shall signify that men are coming up; when return signal is received from engineer, either by bell, whistle, or slight movement of the trip, men will get on cage or cars and the cager or rope-rider shall ring or whistle "one" (1) to start.

Four (4) rings or whistles—Four (4) rings or whistles shall signify to hoist slowly, implying danger.

Five (5) rings or whistles—Five (5) rings or whistles shall signify accident in the mine and call for stretchers.

From top to bottom—One (1) ring or whistle shall signify—All ready, get on cage or cars.

From top to bottom—Two (2) rings or whistles shall signify—To send away empty cage or cars.

Provided, that the management of any mine may, with the consent of the state coal mine inspector, add to or change this code of signals at their discretion, for the purpose of increasing its efficiency or of promoting the safety of the men in said mine, but, whatever code may be established and in use at any time, it must be approved by the state coal mine inspector, and shall be conspicuously posted at the top and at the bottom of every shaft or slope, and at the landing-place on all rope-haulage systems, also in all engine-rooms, for the information and instruction of all persons.

History: En. Sec. 99, Ch. 120, L. 1911;
re-en. Sec. 3541, R. C. M. 1921; amd. Sec.
20, Ch. 38, L. 1945.

50-526. (3542) Duties of hoisting engineers. The hoisting engineer on any shaft, slope, or drift at any mine shall be in constant attendance at his engine during working hours when there are workmen underground. He shall not permit anyone to enter or to loiter in the engine-room except those authorized by their positions or duties to do so, and he shall hold no conversation with any officer of the company or other person, or leave his engine while in motion, or while his attention is occupied with the signals. A notice to this effect shall be posted on the door of the engine-house.

The hoisting engineer must thoroughly understand the established code of signals, and such signals must be delivered in the engine-room in a clear and unmistakable manner, and he shall not recognize any signals other than those provided for in this act, or such as have been approved by the state coal mine inspector; and when he has the signal that men are on the cage, car or cars, he must work his engine only at the rate of speed herein provided for by this act. He shall permit no one to handle or meddle with any machinery under his charge, nor suffer anyone who is not a certified engineer to operate his engine except for the purpose of learning to operate it or repair same, and then only in the presence of the engineer in charge, and when men are not on the cages, car, or cars.

History: En. Sec. 100, Ch. 120, L. 1911;
re-en. Sec. 3542, R. C. M. 1921.

50-527. (3543) Qualifications of miners. Each person desiring to work by himself at mining or loading shall first produce satisfactory evidence, in writing, to the mine foreman of the mine in which he is employed, or to be

employed, that he has worked at least nine months with, under the direction of, or as a practical miner; provided, however, that if the mine in which such person is to be employed generates explosive gas or fire-damp, he shall have worked not less than twelve months with, under the direction of, or as a practical miner. Until a person has so satisfied the mine foreman of his competency, he shall not work or be permitted to work at mining or loading unless accompanied by a miner holding the foregoing qualifications.

History: En. Sec. 101, Ch. 120, L. 1911;
re-en. Sec. 3543, R. C. M. 1921.

50-528. (3544) Operators must make reply to statistical inquiry. Every coal mine operator, whether person, copartnership, or corporation, shall, within thirty days after receipt of blanks from the state coal mine inspector asking for statistical data relative to any coal mine operated by the person, copartnership, or corporation addressed, fill in the blanks of such forms, answering all interrogations correctly and mail the same to the state coal mine inspector.

History: En. Sec. 102, Ch. 120, L. 1911;
re-en. Sec. 3544, R. C. M. 1921.

50-529. (3545) Penalties. If any operator, company, or corporation neglects to comply with or violates the requirements of this act, either in part or in whole, or if any owner, operator, manager, superintendent, mine foreman, or his assistant coerces, intimidates, or causes any employee to do the things prohibited, or causes them to do as provided against in this act, such operator, company, corporation, manager, superintendent, mine foreman or his assistant shall be liable to a penalty of one hundred dollars (\$100.00) for each and every day during which the offense continues; except that in those sections of this act that provide a penalty for violation of any part thereof, those penalties as set forth in the section shall govern; proceedings to be instituted in any court of competent jurisdiction in the county in which such offense is committed.

Any employee engaged at work in or around any coal mine in the state of Montana, who violates any part of this act, shall for each offense be liable to a penalty not exceeding twenty-five dollars (\$25.00), or in default of payment shall be imprisoned in the county jail for a period of time not exceeding ten (10) days, proceedings to be instituted in any court of competent jurisdiction in the county in which such offense is committed.

History: En. Sec. 103, Ch. 120, L. 1911;
re-en. Sec. 3545, R. C. M. 1921; amd. Sec.
21, Ch. 38, L. 1945.

provement Co., 47 M 314, 322, 132 P 419;
Jeffries Coal Co. v. Industrial Accident
Board, 126 M 411, 252 P 2d 1046.

References

Cited or applied as sec. 103, Ch. 120,
Laws 1911, in *Kallio v. Northwestern Im-*

Collateral References

Labor Relations 1641.
56 C.J.S. Master and Servant § 25.

50-530. (3546) Definitions. In this act the words "mine" and "coal mine," used in their general sense, are intended to signify any and all under-ground parts of the property of a mining plant which contribute, directly or indirectly, under one management, to the mining or handling of coal.

The words "excavations" and "workings" signify any and all parts of a mine excavated or being excavated, including shafts, slopes, tunnels, entries, rooms, and working place, whether abandoned or in use.

The term "shaft" means any vertical opening through the strata which is or may be used for the purpose of ventilation or escapement, or for hoisting or lowering of men or material in connection with the mining of coal.

The terms "slope" and "drift" mean respectively an incline or horizontal way, opening, or tunnel to a seam of coal to be used for the same purpose as a shaft.

A "following shot" is a shot which is dependent in its action on the result of another shot.

The term "operator," as applied to the party in control of a mine under this act, signifies the person, firm, or body corporate who is the immediate proprietor as owner or lessee of the plant, and, as such, responsible for the condition and management thereof.

The "mine foreman" is a person who is charged with the general direction of the underground work, or both the underground work and the outside work of any coal mine, and who is commonly known and designated as "mine boss."

The "mine examiner" is the person charged with the examination of the condition of the mine before the miners are permitted to enter it, and who is commonly known as the "fire-boss."

History: En. Sec. 104, Ch. 120, L. 1911;
re-en. Sec. 3546, R. C. M. 1921.

Collateral References

Master and Servant $\approx 10\frac{1}{2}$.
56 C.J.S. Master and Servant § 14.

50-531. Miscellaneous—protective clothing—interested persons defined. Subsection 1. Protective clothing.

(a) All persons shall wear protective hats while underground and also while on the surface where falling objects may cause injury.

(b) Protective footwear shall be worn by employees, officials and others while on duty in and around a mine where falling objects may cause injury.

(c) All employees inside or outside of mines shall wear approved-type goggles where there is a hazard from flying particles.

(d) Welders and helpers shall use proper shields or goggles to protect their eyes.

(e) Employees engaged in haulage operations and other persons employed around moving equipment on the surface and underground shall wear snug-fitting clothing.

(f) Protective gloves shall be worn when material which may injure the hands is handled, but gloves with gauntlet cuffs shall not be worn around moving equipment.

(g) Men exposed for short periods to gas, dust, fume and mist-inhalation hazards shall wear permissible respiratory equipment. When the exposure is for prolonged periods, other measures to protect workmen or to reduce the hazard shall be taken.

Subsection 2. Definitions.

(a) The words "interested persons" as used in this code shall be construed to mean: Members of the mine safety committee; all other

authorized representatives of the United Mine Workers of America; federal, state and county coal mine inspectors; and, to the extent required by state law, any other persons.

History: En. Sec. 30, Ch. 185, L. 1949.

CHAPTER 6

REGULATIONS FOR SALE AND MARKETING OF COAL

- Section 50-601. Regulations concerning bills and invoices.
 50-602. Dealers' duties concerning bills and invoices.
 50-603. Weight of coal—substitution of kind.
 50-604. Copies of bills and invoices to be kept for inspection.
 50-605. Penalty for violations.
 50-606. Enforcement of act.

50-601. (3546.1) Regulations concerning bills and invoices. Any person, firm or corporation engaged in mining, producing or shipping of coal within the state of Montana, shall accurately bill and invoice the same, plainly indicating on all bills or invoices therefor the place where the same was mined, the person, firm or corporation by whom the same was mined and the trade name or mark, if any, thereof.

History: En. Sec. 1, Ch. 104, L. 1927.

Collateral References

Mines and Minerals § 93½.
 58 C.J.S. Mines and Minerals § 239.

50-602. (3546.2) Dealers' duties concerning bills and invoices. Any person, firm, or corporation wholesaling, jobbing, exchanging, offering for sale, or selling at retail, any coal within the state of Montana shall accurately bill and invoice the same to the person, firm or corporation purchasing or receiving the same and shall plainly indicate on all statements, bills or invoices, therefor, the name of the coal, the name of the person, firm or corporation producing the same, the place where mined and the trade name or trade mark, if any, thereof.

History: En. Sec. 2, Ch. 104, L. 1927.

50-603. (3546.3) Weight of coal—substitution of kind. In the sales of coal within the state of Montana, the seller must give to the purchaser full weight at the rate of two thousand (2,000) pounds per ton, and no person, firm or corporation shall deliver to any customer any coal in substitution for the kind, brand or character of coal ordered by the customer except upon the express written order, direction or approval of the purchaser.

History: En. Sec. 3, Ch. 104, L. 1927.

Cross-References

Full weight to be given, secs. 84-1410,
 94-1904.
 Measure of coal, sec. 90-115.

50-604. (3546.4) Copies of bills and invoices to be kept for inspection. Any person, firm, or corporation, mining, shipping, or producing coal, and all persons, firms or corporations wholesaling, jobbing, exchanging, offering for sale or selling at retail any coal within the state of Montana, shall keep within the state of Montana, a true, accurate and complete copy of all the original statements, bills and invoices of all coal produced, shipped, marketed, exchanged or sold for at least one (1) year; and all papers, rec-

ords and files of any person, firm or corporation transporting, producing, shipping, exchanging or selling any coal within the state of Montana shall, at all times, be open to inspection by the attorney general, the county attorneys and the state sealer of weights and measures for the purposes of enforcing this act.

History: En. Sec. 4, Ch. 104, L. 1927.

50-605. (3546.5) Penalty for violations. Every person, firm or corporation violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than twenty-five dollars (\$25.00), nor more than five hundred dollars (\$500.00), or by imprisonment in the county jail for not more than ninety (90) days, or by both such fine and imprisonment. Any person, firm or corporation convicted of a second violation of any of the provisions of this act shall be punished as above provided, and the license of any retail coal dealer shall, thereby, be automatically revoked, and it shall be unlawful for any person, firm or corporation, so convicted, thereafter to engage in said retail business, either directly or indirectly, for a period of six (6) months next after such second conviction.

History: En. Sec. 5, Ch. 104, L. 1927.

50-606. (3546.6) Enforcement of act. It shall be the duty of the state sealer of weights and measures to enforce the provisions of this act and the duty of the attorney general and the county attorneys of the counties of the state to prosecute all cases arising under the provisions hereof.

History: En. Sec. 6, Ch. 104, L. 1927.

CHAPTER 7

LOCATION AND RECORD OF MINING AND MILLSITE CLAIMS

- Section 50-701. Discovery—notice—marking boundaries—sinking shaft.
50-702. Record of certificate of location.
50-703. Effect of earlier recorded mining locations.
50-704. Recording of affidavit of performance of annual work.
50-705. Millsites.
50-706. Relocation of abandoned claim.
50-707. Rights of relocater.
50-708. Amended location.
50-709. Relocation by owner.
50-710. Amendment or relocation not a waiver of acquired rights.
50-711. Rights of third persons not affected.
50-712. Validating locations heretofore made.
50-713. Defective locations good against persons with notice.
50-714. Effect of patent.
50-715. Amended locations.
50-716. Effect of amended or additional declaratory statement heretofore filed.

50-701. (7365) Discovery—notice—marking boundaries—sinking shaft. Any person who discovers upon the public domain of the United States, within the state of Montana, a vein, lode, or ledge of rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, or a placer deposit of gold, or other deposit of minerals having a commercial value which is subject to entry and patent under the mining laws of the United States, may, if qualified by the laws of the United States, locate a

mining claim upon such vein, lode, ledge, or deposit in the following manner, viz.:

1. He shall post, conspicuously, at the point of discovery, a written or printed notice of location, containing the name of the claim, the name of the locator (or locators, if there be more than one), the date of the location, which shall be the date of posting such notice, and the approximate dimensions of area of the claim intended to be appropriated.

2. Within thirty days after posting the notice of location, he shall distinctly mark the location on the ground so that its boundaries can be readily traced. It shall be *prima facie* evidence that the location is properly marked if the boundaries are defined by a monument at each corner or angle of the claim, consisting of any one of the following kinds: (1) A tree at least eight inches in diameter, and blazed on four sides; (2) A post at least four inches square by four feet six inches in length, set one foot in the ground, unless solid rock should occur at a less depth, in which case the post should be set upon such rock, and surrounded in all cases by a mound of earth or stone at least four feet in diameter by two feet in height. A squared stump of the requisite size, surrounded by such mound, shall be deemed the equivalent of a post and mound; (3) A stone at least six inches square by eighteen inches in length, set two-thirds of its length in the ground, with a mound of earth or stone alongside at least four feet in diameter by two feet in height; or (4) A boulder at least three feet above the natural surface of the ground on the upper side. Where other monuments, or monuments of lesser dimensions than those above described, are used, it shall be a question for the jury, or for the court where the action is tried without a jury, as to whether the location has been marked upon the ground so that its boundaries can be readily traced. Whatever monument is used, it must be marked with the name of the claim and the designation of the corner, either by number or cardinal point.

3. Within sixty days after posting such notice, he shall sink a shaft upon the vein, lode, or deposit, at or near the point of discovery, to be known as the discovery shaft. Such shaft shall be sunk to the depth of at least ten feet, vertically, below the lowest part of the rim of such shaft at the surface, or deeper if necessary to disclose the vein or deposit located, and the cubical contents of such shaft shall be not less than one hundred and fifty cubic feet; provided, that any cut or tunnel which discloses the vein, lode, or deposit, located at a vertical depth of at least ten feet below the natural surface of the ground, and which constitutes at least one hundred and fifty feet of excavation, shall be deemed the equivalent of such shaft; and provided also, that where the vein, lode, or deposit located is disclosed at a less vertical depth than ten feet, any deficiency in the depth of the discovery shaft, cut, or tunnel may be compensated for by any horizontal extension of such working, or by any excavation done elsewhere upon the claim, equaling, in cubical contents, the cubical extent of such deficiency; but in every case at least seventy-five cubic feet of excavation shall be made at the point of discovery.

History: Earlier acts were those of Feb. claims, appearing as Secs. 1477 and 1478, 11, 1876, governing location of quartz 5th Div. Comp. Stat. 1887.

Ap. p. Sec. 3610, Pol. C. 1895; en. Sec. 1, Ch. 16, L. 1907; Sec. 2283, Rev. C. 1907; re-en. Sec. 7365, R. C. M. 1921. Cal. Civ. C. Sec. 1426.

Area of Claim

The area bounded by a mining location must be within the limits granted by the statute—1,500 feet in length by 600 in width—and boundaries beyond such limits do not impart notice to subsequent locators, they not being required to look for stakes or boundaries beyond such limits. *Thompson v. Barton Gulch Min. Co.*, 63 M 190, 206, 207 P 108.

Boundaries

The right of the legislature to provide rules for the marking of the boundaries of mining claims, to provide for a record of such claim, and what the recorded paper must contain, is fully settled in this state. *Baker v. Butte City Water Co.*, 28 M 222, 226, 72 P 617; affirmed in *Butte City Water Co. v. Baker*, 196 U S 119, 49 L Ed 409, 25 S Ct 211.

The boundaries of a mining location must be so definite and certain that, taking the discovery as the initial point, they may be readily traced, and the declaratory statement must furnish such information that a person of reasonable intelligence may therefrom find the claim and run its lines. *Thompson v. Barton Gulch Min. Co.*, 63 M 190, 206, 207 P 108.

Constitutionality

State statutes providing additional requirements for valid location of mining claims to those imposed by acts of congress are not in violation of the U. S. constitution and acts of congress. While the validity of a law of the territory requiring a location notice to be verified was doubted in *Wenner v. McNulty*, 7 M 30, 36, 14 P 643, the power of the legislature to impose additional burdens upon the locator of a mining claim is now definitely settled. *O'Donnell v. Glenn*, 8 M 248, 255, 19 P 302; *Metcalf v. Prescott*, 10 M 283, 293, 25 P 1037; *McCowan v. MacLay*, 16 M 234, 235, 40 P 602; *Berg v. Koegel*, 16 M 266, 267, 40 P 605; *Purdum v. Laddin*, 23 M 387, 389, 59 P 154.

Development Work

In addition to the acts required by the federal statutes, the state might rightfully exact of the locator of a quartz lode mining claim the doing of development work and the filing for record of a declaratory statement. *Mares v. Dillon*, 30 M 117, 129, 75 P 963; *Butte Consolidated Min. Co. v. Barker*, 35 M 327, 341, 89 P 302; *Orton v. Bender*, 43 M 263, 266, 115 P 406.

Extent of Right as to Exclusive Possession

One in rightful possession of a placer mining location lawfully made is guaranteed the exclusive right of possession, excluding anyone else from entering thereon during the life of the location for any purpose; hence a judgment quieting title in the locator with the right in another claiming title to certain mill tailings deposited thereon to enter and remove the same was erroneous, the latter's remedy lying in an appropriate action permitting removal. *Conway v. Fabian*, 108 M 287, 322, 89 P 2d 1022.

Notice

For decisions as to the requisites of a valid location of a mining claim and the sufficiency or insufficiency of notice of location and declaratory statement under former statutes, see, generally, *McBurney v. Berry*, 5 M 300, 5 P 867; *Garfield Min. & Mill Co. v. Hammer*, 6 M 53, 8 P 153; *Upton v. Larkin*, 7 M 449, 17 P 728; *O'Donnell v. Glenn*, 8 M 248, 19 P 302; *Flick v. Gold Hill & Lee Mountain Min. Co.*, 8 M 298, 20 P 807; *Gamer v. Glenn*, 8 M 371, 20 P 654; *Freezer v. Sweeney*, 8 M 508, 21 P 20; *O'Donnell v. Glenn*, 9 M 452, 23 P 1018; *Metcalf v. Prescott*, 10 M 281, 25 P 1037; *Shreve v. Copper Bell Min. Co.*, 11 M 309, 28 P 315; *Brownfield v. Bier*, 15 M 403, 39 P 461; *McCowan v. MacLay*, 16 M 234, 40 P 602; *Bramlett v. Flick*, 23 M 95, 57 P 869; *Purdum v. Laddin*, 23 M 387, 59 P 153; *McKay v. McDougall*, 25 M 258, 64 P 669; *Walker v. Pennington*, 27 M 369, 71 P 156; *Wilson v. Freeman*, 29 M 470, 75 P 84; *Mares v. Dillon*, 30 M 117, 75 P 963; *Hickey v. Anaconda Copper Min. Co.*, 33 M 46, 81 P 806; *Dolan v. Passmore*, 34 M 277, 85 P 1034; *Helena Gold & Iron Co. v. Baggaley*, 34 M 464, 87 P 455; *Butte Consolidated Min. Co. v. Barker*, 35 M 327, 89 P 302; *Butte Northern Copper Co. v. Radmilovich*, 39 M 157, 101 P 1078; *Tigge-man v. Mrzlak*, 40 M 19, 105 P 77; *Giberson v. Tuolumne Copper Min. Co.*, 41 M 396, 109 P 974; *Consolidated etc. Min. Co. v. Struthers*, 41 M 565, 575, 111 P 152.

Operation and Effect

The law contemplates that the location of a mining claim shall consist of a number of distinct acts which are independent of each other. The last that may be done does not relate back to the first, and all must be performed before a legal location exists. *Gonu v. Russell*, 3 M 358, 363; *McKay v. McDougall*, 25 M 258, 266, 64 P 669; *Thornton v. Kaufman*, 40 M 282, 286, 106 P 361.

A location of a mining claim is not made by taking possession alone, but by working on the ground, recording, and doing whatever else is required for that pur-

pose by the acts of congress and the local laws and regulations. *Upton v. Larkin*, 5 M 600, 603, 6 P 66; *Garfield M. & M. Co. v. Hammer*, 6 M 53, 59, 8 P 153; *Purdum v. Laddin*, 23 M 387, 389, 59 P 153.

By discovery and the posting of notice of claim, the discoverer acquires a right to make a location to the exclusion of one who thereafter enters and makes a location pending the time allowed by this section to complete the marking of the boundaries and the required excavation work. *Ferris v. McNally*, 45 M 20, 26, 121 P 889.

Held, that this section to 50-704, modifying to some extent the requirements of the law with relation to the location of mining claims, go no further than to direct the courts to disregard defects or irregularities in the posted and recorded notice and the failure to do any of the other acts made necessary to complete a location, when it appears that such acts have in fact been done before a location of the same ground has been made by another, and do not excuse the performance of any act, even though the subsequent locator has notice of a prior location which does not comply with the statute. *Ringling v. Mahurin et al.*, 59 M 38, 48, 197 P 829.

Power to Swing Claim

Though a locator has posted a notice under state and federal statutes stating the general course of the vein, he may, within ninety days, swing his claim in any direction required to include the vein, where no bad faith is shown. *Sanders v. Noble*, 22 M 110, 117, 55 P 1037.

Quartz Lode Claim

Under Political Code of 1895 the only way the locator of a quartz lode mining claim could manifest his intention to claim the ground embraced within his boundaries, in good faith under the mining laws, was by means either of a discovery shaft or a cross-cut sunk or made from an opening upon the claim sought to be located, and not upon grounds over which he had not complete control as a matter of right, or from which he might be excluded at any time at the option of another. *Butte Consolidated Min. Co. v. Barker*, 35 M 327, 334, 89 P 302.

Relative to the successive steps for making a valid location of a quartz lode mining claim, see *Butte Consolidated Min. Co. v. Barker*, 35 M 327, 333, 89 P 302, 90 P 177; *Butte Northern Copper Co. v. Radmilovich*, 39 M 157, 162, 101 P 1078; *Thornton v. Kaufman*, 40 M 282, 286, 106 P 361; *Orton v. Bender*, 43 M 263, 265, 115 P 406.

Substantial Compliance Necessary

There can be no valid location of a min-

ing claim without a discovery and a compliance with the requirements of the state statute. *Upton v. Larkin*, 7 M 449, 456, 17 P 728; *Sanders v. Noble*, 22 M 110, 117, 55 P 1037; *Baker v. Butte City Water Co.*, 28 M 222, 226, 72 P 617; *Ferris v. McNally*, 45 M 20, 25, 121 P 889.

Where the locator of a lode mining claim failed to comply with the requirements of the statute relative to completing his location after the posting of his declaratory statement, and another made a location conflicting with the claim of the prior discoverer, the area in conflict did not revert to the public domain, but inured to the benefit of the junior locator who, by performing the necessary work required by statute, became entitled to the possession of it. *Helena Gold & Iron Co. v. Baggeley*, 34 M 464, 475, 87 P 455. See *Street v. Delta Mining Co.*, 42 M 371, 381, 112 P 701; *Ferris v. McNally*, 45 M 20, 27, 121 P 889.

Where the locator had posted his notice a considerable distance away from the point of discovery, but about a month thereafter sank his discovery shaft at the point where he posted his notice, and in the meantime another had made discovery and posted his notice, the location of the former must be postponed to the date when he posted his notice at the point of discovery because of the intervening rights of the latter. *Butte Northern Copper Co. v. Radmilovich*, 39 M 157, 162, 163, 101 P 1078.

Evidence that the locator of a mining claim substantially complied with the requirements of the federal statutes is not alone sufficient to a valid location, a substantial compliance with the state statutes also being required. *Ringling v. Mahurin et al.*, 59 M 38, 48, 197 P 829.

The provisions of this section, calling for the posting of a notice of location of a quartz lode mining claim containing a statement of the number of feet claimed along the course of the vein from the point of discovery, and of the next section, requiring the recordation of a certificate of location in the office of the county clerk showing the direction and distance claimed along the course of the vein, etc., must be substantially complied with. *Thompson v. Barton Gulch Min. Co.*, 63 M 190, 206, 207 P 108.

Where Placer Rights Subject to Right to Mill Tailings

The locator of a placer mining claim does not have the right to mill tailings placed thereon by the operator of a quartz mine which have not been abandoned; the owner of the tailings having had a right to deposit them upon the public domain or upon lands of which he had possession, and a mineral location thereafter made

upon such lands is subject to the right of the prior deposit. *Conway v. Fabian*, 108 M 287, 305, 89 P 2d 1022.

References

Lehman v. Sutter et al., 60 M 97, 103, 198 P 1100.

Collateral References

Mines and Minerals 20.
58 C.J.S. *Mines and Minerals* § 46.
36 Am. Jur. 331, *Mines and Minerals*, §§ 77 et seq.

50-702. (7366) Record of certificate of location. Within sixty days after posting the notice of location, and for the purpose of constituting constructive notice of the location, the locator shall record his location in the office of the county clerk of the county in which such mining claim is situated. Such record shall consist of a certificate of location containing:

1. The name of the lode or claim.
2. The name of the locator or locators, if there be more than one.
3. The date of location, and such description of said claim, with reference to some natural object or permanent monument, as will identify the claim.

4. In the case of a lode claim, the direction and distance claimed along the course of the vein each way from the discovery shaft, cut, or tunnel, with the width claimed on each side of the center of the vein.

5. In the case of a placer claim, the dimensions or area of the claim, and the location thereon on the discovery shaft, cut, or tunnel.

6. The locator and claimant, at his option, may also set forth, in such certificate of location, a description of the discovery work, the corner monuments, and the markings thereon, and any other facts showing a compliance with the provisions of this law. Such certificate of location must be verified, before some officer authorized to administer oaths, by the locator, or one of the locators if there be more than one, or by authorized agent. In the case of a corporation, the verification may be made by any officer thereof, or by an authorized agent. When the verification is made by an agent, the fact of the agency shall be stated in the affidavit. A certificate of location so verified, or a certified copy thereof, is prima facie evidence of all facts properly recited therein.

History: Ap. p. Sec. 3612, Pol. C. 1895; amd. Sec. 2, p. 141, L. 1901; amd. Sec. 2, Ch. 16, L. 1907; Sec. 2284, Rev. C. 1907; re-en. Sec. 7366, R. C. M. 1921.

galey, 34 M 464, 469, 87 P 455; *Butte Northern Copper Co. v. Radmilovich*, 39 M 157, 161, 101 P 1078.

The provisions of the preceding section, calling for the posting of a notice of location of a quartz lode mining claim containing a statement of the number of feet claimed along the course of the vein from the point of discovery, and of this section, requiring the recordation of a certificate of location in the office of the county clerk showing the direction and distance claimed along the course of the vein, etc., must be substantially complied with. *Thompson v. Barton Gulch Min. Co.*, 63 M 190, 206, 207 P 108.

Operation and Effect

Recorded certificates of location may cloud the title when apparently valid but actually, under the mining law, invalid. *Hopkins v. Walker*, 244 U S 486, 491, 61 L Ed 1270, 37 S Ct 711.

Necessity for Substantial Compliance

The provisions of local statutes relative to the location and recording notice of the location of mining claims are not only valid, but they are mandatory, and must be substantially complied with in order that the locator may acquire any right under his location. *Gonu v. Russell*, 3 M 358, 362; *Purdum v. Laddin*, 23 M 387, 389, 59 P 153; *Walker v. Pennington*, 27 M 369, 376, 71 P 156; *Baker v. Butte City Water Co.*, 28 M 222, 226, 72 P 617; affirmed in *Butte City Water Co. v. Baker*, 196 U S 119, 49 L Ed 409, 25 S Ct 211; *Hahn v. James*, 29 M 1, 4, 73 P 965; *Wilson v. Freeman*, 29 M 470, 474, 75 P 84; *Mares v. Dillon*, 30 M 117, 131, 75 P 963; *Dolan v. Passmore*, 34 M 277, 279, 85 P 1034; *Helena etc. Iron Co. v. Bag-*

Statement Must Be Self-Evident

The declaratory statement of a mining location required to be filed for record cannot be supplemented by proof of what was actually done in the premises. *Hahn v. James*, 29 M 1, 4, 73 P 965; *Dolan v. Passmore*, 34 M 277, 280, 85 P 1034.

Statement Must Be Verified

A declaratory statement of location of quartz mining claim, required to be recorded, must be under oath. *Russell v. Hoyt*, 4 M 412, 421, 2 P 25; *McBurney v. Berry*, 5 M 300, 302, 5 P 567; *O'Donnell v. Glenn*, 8 M 248, 255, 19 P 302; *O'Donnell v. Glenn*, 9 M 452, 460, 23 P 1018; *Metcalf v. Prescott*, 10 M 283, 293, 25 P 1037; *Mattingly v. Lewisohn*, 13 M 508, 519, 25 P 111; *Davidson v. Bordeaux*, 15 M 245, 251, 38 P 1075; *Brownfield v. Bier*, 15 M 403, 416, 39 P 461; *McCowan v. Maclay*, 16 M 234, 236, 40 P 602. In *O'Donnell v. Glenn*, 8 M 248, 19 P 302, the supreme court held that a declaratory statement which does not contain the required affidavit is void, and that decision has since then been followed uniformly. *Washoe Copper Co. v. Junila*, 43 M 178, 183, 115 P 916. See *Hickey v. Anaconda Copper Min. Co.*, 33 M 46, 62, 81 P 806.

A location notice, the affidavit to which did not contain notarial evidence that the party making it took an oath, or was ever present before the officer, was held to be sufficient. *Metcalf v. Prescott*, 10 M 283, 294, 25 P 1037. So, too, an affidavit to the declaratory statement of a quartz location, which disclosed that the statement was sworn to one year before the location of the lode, was considered fatal to the

validity of the location in the absence of proof that the affidavit was wrongly dated by mistake of the notary. *Berg v. Koegel*, 16 M 266, 267, 40 P 605. But where it appeared that the declaratory statement was sworn and subscribed to before an officer having power to administer an oath, it was valid although affiant's name did not appear in the body of the instrument. *Davidson v. Bordeaux*, 15 M 245, 251, 38 P 1075.

An affidavit to a declaratory statement of a quartz mining claim, made on information, has been held sufficient under a former statute in *Wenner v. McNulty*, 7 M 30, 35, 14 P 643, and the fact that the locator verified the statement on information only, instead of on his personal knowledge, did not render the statement void under a statute requiring such statement to be verified by the "oath of the locator." In the absence of proof tending to impeach the truth of the facts stated in a declaratory statement for a mining claim, it is immaterial to an adverse locator that the declaration was verified on information only. *Mares v. Dillon*, 30 M 117, 134, 75 P 963.

References

Ringling v. Mahurin et al., 59 M 38, 46 et seq., 197 P 829; *Lehman v. Sutter et al.*, 50 M 97, 103, 193 P 1100.

Collateral References

Mines and Minerals ⇨ 21, 22.
58 C.J.S. *Mines and Minerals* § 49.
36 Am. Jur. 346, *Mines and Minerals*, §§ 95 et seq.

50-703. (7367) Effect of earlier recorded mining locations. All placer mining locations or locations of valuable mineral deposits which have heretofore been recorded in the office of the county clerk or recorder, have the same force and effect as though such records had been authorized by law, except in cases where the rights of third persons had been acquired before the passage of this code; and such record is entitled to be admitted in evidence in any court.

History: En. Sec. 3613, Pol. C. 1895; re-en. Sec. 7367, R. C. M. 1921.

Compiler's Note

A portion of this section was omitted as it was printed in the 1921 Code and such erroneous printing was carried for-

ward into subsequent codes. The section is set out above as enacted in 1895.

Collateral References

Mines and Minerals ⇨ 22.
58 C.J.S. *Mines and Minerals* § 56.

50-704. (7368) Recording of affidavit of performance of annual work. The owner of a lode or placer claim who performs or causes to be performed the annual work, or makes the improvements required by the laws of the United States in order to prevent the forfeiture of the claim, may, within twenty days after the annual work, file in the office of the county clerk of the county in which such claim is situated an affidavit of his own,

or an affidavit of the person who performed such work or made the improvements, showing:

1. The name of the mining claim, and where situated;
2. The number of days' work done, and the character and value of the improvements placed thereon;
3. The date of performing such work, and of making the improvements;
4. At whose instance the work was done or the improvements made;
5. The actual amount paid for work and improvements, and by whom paid when the same was not done by the owner.

Such affidavits, or a certified copy thereof, are prima facie evidence of the facts therein stated.

History: En. Sec. 1483, 5th Div. Comp. Stat. 1887; amd. Sec. 3614, Pol. C. 1895; re-en. Sec. 7368, R. C. M. 1921. Cal. Civ. C. Sec. 1426m.

Operation and Effect

Where labor performed as annual representation upon a mining claim is done by other than the owner, it is not necessary that such work be actually paid for by the owner in order to be effectual for that purpose. *Coleman v. Curtis*, 12 M 301, 304, 305, 30 P 266.

Such statutes as this relate, not to the effect of doing the work, or making the improvements, as required by law, but to the method of preserving prima facie evi-

dence of the fact that such requirement has been fulfilled. *Coleman v. Curtis*, 12 M 301, 305, 30 P 266; *Davidson v. Bordeaux*, 15 M 245, 250, 38 P 1075.

The affidavit of annual representation is prima facie evidence of the facts recited, but oral evidence may be given to prove that the work was done, and it will not be regarded as error to admit the affidavit. *Davidson v. Bordeaux*, 15 M 245, 250, 38 P 1075.

Collateral References

Mines and Minerals 23(4).
58 C.J.S. *Mines and Minerals* § 75.
36 Am. Jur. 365, *Mines and Minerals*, §§ 115 et seq.

50-705. (7369) Millsites. Millsite claims may be located and recorded in the same manner as other claims, except that no discovery or discovery work is required. Where a millsite claim is appurtenant to a mining claim, the certificate of location of such millsite claim shall describe, by appropriate reference, the mining claim to which it is appurtenant.

History: En. Sec. 3, Ch. 16, L. 1907; Sec. 2285, Rev. C. 1907; re-en. Sec. 7369, R. C. M. 1921.

References

Cited or applied as section 2285, Revised

Codes, in *Hopkins v. Walker*, 244 U S 486, 491, 61 L Ed 1270, 37 S Ct 711; *Ringling v. Mahurin et al.*, 59 M 38, 46, 197 P 829.

50-706. (7370) Relocation of abandoned claim. The relocater of an abandoned or forfeited mining claim may adopt as his discovery any shaft or other working, existing upon such claim at the date of the relocation, in which the vein, lode, or deposit is disclosed, but, in such shaft or other working, he shall perform the same discovery work as is required in the case of an original location.

History: En. Sec. 4, Ch. 16, L. 1907; Sec. 2286, Rev. C. 1907; re-en. Sec. 7370, R. C. M. 1921.

What Constitutes Abandonment of Mill Tailings

In determining what constitutes abandonment of personal property (in the instant case mill tailings), the paramount object of inquiry is the intention of the owner to abandon, gathered from his acts

or statements; hence where the owner of a mill tailing dump took measures to preserve it at considerable expense for future treatment, there was no abandonment. *Conway v. Fabian*, 108 M 287, 306, 89 P 2d 1022.

References

Ringling v. Mahurin et al., 59 M 38, 46, 197 P 829; *Lehman v. Sutter et al.*, 60 M 97, 103, 198 P 1100.

Collateral References

Mines and Minerals 26.

58 C.J.S. Mines and Minerals § 85.

36 Am. Jur. 349, Mines and Minerals,

§§ 99 et seq.

50-707. (7371) Rights of relocater. The rights of a relocater of any abandoned or forfeited mining claim, hereafter relocated, shall date from the posting of his notice of location thereon, and, while he is duly performing the acts required by law to perfect his location, his rights shall not be affected by any re-entry or resumption of work by the former locator or claimant.

History: En. Sec. 5, Ch. 16, L. 1907;
Sec. 2287, Rev. C. 1907; re-en. Sec. 7371,
R. C. M. 1921.

Relocation Under Former Statutes

Relocation of mining claims under former statutes. McKay v. McDougall, 25 M 258, 64 P 669.

50-708. (7372) Amended location. A locator or claimant may at any time amend his location, and make any change in the boundaries which does not involve a change in the point of discovery as shown by the discovery shaft, by marking the location as amended upon the ground, and filing an amended certificate of location conforming to the requirements of an original certificate of location. A defect in a recorded certificate of location may be cured by filing an amended certificate.

History: En. Sec. 6, Ch. 16, L. 1907;
Sec. 2288, Rev. C. 1907; re-en. Sec. 7372,
R. C. M. 1921.

58 C.J.S. Mines and Minerals §§ 34, 53,
84.

36 Am. Jur., Mines and Minerals, p. 336,
§ 82; p. 349, § 98.

Collateral References

Mines and Minerals 14(1), 21(3), 26.

50-709. (7373) Relocation by owner. A locator or claimant may at any time relocate his own claim for any purpose, except to avoid the performance of annual labor thereon, and, by such relocation, may change the boundaries of his claim, or the point of discovery, or both, but such relocation must comply in all respects with the requirements of this law as to an original location.

History: En. Sec. 7, Ch. 16, L. 1907;
Sec. 2289, Rev. C. 1907; re-en. Sec. 7373,
R. C. M. 1921.

man v. Sutter et al., 60 M 97, 103, 198 P
1100.

References

Ringling v. Mahurin et al., 59 M 38,
46, 197 P 829.

Collateral References

36 Am. Jur. 351, Mines and Minerals,
§ 101.

Operation and Effect

Where relocators of their own claims did not do the excavation work required to be done, under this section, before another had located the same ground, their attempted relocations were nugatory. Leh-

50-710. (7374) Amendment or relocation not a waiver of acquired rights. Where a locator or claimant amends or relocates his own claim, such amendment or relocation shall not be construed as a waiver of any right or title acquired by him by virtue of the previous location or record thereof, except as to such portions of the previous location as may be omitted from the boundaries of the claim as amended or relocated. As to the portion of ground included both in the original location and the location as amended or relocated, he may rely either upon the original location or the location as amended or relocated, or upon both; provided,

that nothing herein contained shall be construed as permitting the locator or claimant to hold a tract which does not include a valid discovery.

History: En. Sec. 8, Ch. 16, L. 1907; Sec. 2290, Rev. C. 1907; re-en. Sec. 7374, R. C. M. 1921.

50-711. (7375) Rights of third persons not affected. No amendment or relocation of a mining claim by the locator or claimant thereof shall interfere with the right of any third person existing at the time of such amendment or relocation.

History: En. Sec. 9, Ch. 16, L. 1907; Sec. 2291, Rev. C. 1907; re-en. Sec. 7375, R. C. M. 1921.

Collateral References

Mines and Minerals 27.
58 C.J.S. Mines and Minerals § 57.

50-712. (7376) Validating locations heretofore made. All mining locations, made and recorded under the laws of this state heretofore in force, that in any respect have failed to conform to the requirements of such laws, shall, nevertheless, in the absence of the rights of third persons accruing prior to the passage of this act, be valid, if the making and recording of such locations conform to the requirements of this act.

History: En. Sec. 10, Ch. 16, L. 1907; Sec. 2292, Rev. C. 1907; re-en. Sec. 7376, R. C. M. 1921.

sequent issuance of patent. Butte & Superior Copper Co. v. Clark-Montana Realty Co., 248 Fed 609, 614.

Operation and Effect

This section has a retroactive effect, and a failure to comply with the statutes as to recordation of locations is cured by sub-

References

Ringling v. Mahurin et al., 59 M 38, 47, 197 P 829.

50-713. (7377) Defective locations good against persons with notice. The period of time prescribed by this law for the performance of any act shall not be deemed mandatory where the act is performed before the rights of third persons have intervened, and no defect in the posted notice or recorded certificate shall be deemed material, except as against one who has located the same ground, or some portion thereof, in good faith and without notice. Notice to an agent, who makes a location in behalf of another, shall be deemed notice to his principal, and notice to one of several coclaimants shall be deemed notice to all.

History: En. Sec. 11, Ch. 16, L. 1907; Sec. 2293, Rev. C. 1907; re-en. Sec. 7377, R. C. M. 1921.

Operation and Effect

In an action in ejectment to recover possession of a mining claim, where defendants did not attempt to show title in themselves to the portion of the claim in dispute, either by location or any other method provided for by the federal statutes, they were in no position to take advantage of alleged defects in the original and amended declaratory statements of location. Consolidated etc. Min. Co. v. Struthers, 41 M 565, 575, 111 P 152.

In view of the provision of this section, that defects in a recorded certificate of

location of a mining claim shall not be deemed material where the person relying on the defects made his location with notice thereof, allegations in his complaint, in an action to determine an adverse claim, relating to such defects are immaterial. Lehman v. Sutter et al., 60 M 97, 102, 198 P 1100.

References

Cited or applied as section 2293, Revised Codes, in Heilman v. Loughrin et al., 57 M 380, 188 P 370; Ringling v. Mahurin et al., 59 M 38, 47, 197 P 829.

Collateral References

Mines and Minerals 29 (4, 5).
58 C.J.S. Mines and Minerals § 115.

50-714. (7378) Effect of patent. The issuance of a United States patent for a mining claim shall be deemed conclusive that the requirements

of the laws of this state, relative to the location and record of such mining claim, have been duly complied with; provided, however, that where questions of priority are involved, the date of the location shall be an issuable fact where it is claimed to have been prior to the date of the record of the location.

History: En. Sec. 12, Ch. 16, L. 1907; Sec. 2294, Rev. C. 1907; re-en. Sec. 7378, R. C. M. 1921.

Operation and Effect

A locator, who had misdescribed his claim as running easterly and westerly, was entitled under this section to file an amended declaratory statement that the claim ran in a northerly and southerly direction, to correspond to the staking of the claim on the ground. *Wilson v. Freeman*, 29 M 470, 476, 75 P 84.

Rejection by Federal Land Department

Where the federal land department did not merely reject an application for patent to placer mining location, but declared that the ground covered thereby was non-mineral in character and that the location

was null and void, the force and effect of the location was destroyed, and the land within its boundaries reverted to the public domain, and only the federal government could question the right of another to enter thereon and reclaim mill tailings deposited on it. *Conway v. Fabian*, 108 M 287, 318, 89 P 2d 1022.

References

Cited or applied as section 2294, Revised Codes, in *Butte & Superior Copper Co. v. Clark-Montana Realty Co.*, 248 Fed 609, 614.

Collateral References

Mines and Minerals § 44.
58 C.J.S. *Mines and Minerals* § 115.
36 Am. Jur. 369, *Mines and Minerals*, §§ 122 et seq.

50-715. (7379) Amended locations. If at any time the locator of any mining claim heretofore or hereafter located, or his successors or assigns, shall apprehend that his original declaratory statement was defective or erroneous, or that the requirements of law had not been complied with, or shall be desirous of changing his boundaries, or taking in any part of an overlapping claim which has been abandoned, or in case his original declaratory statement was filed prior to the passage of this law and he shall be desirous of securing the benefit of this act, such locator, or his successors or assigns, may file an additional or amended declaratory statement subject to the provisions of this act; provided, that such relocation or filing of the amended or additional declaratory statement shall not interfere with the existing rights of others at the time of such relocation or filing of the amended or additional declaratory statement, and no such relocation or amended or additional declaratory statement, or other record thereof, shall preclude the claimant or claimants from proving any such title as he or they may have held under the previous location and notice thereof.

History: En. Sec. 1, p. 56, L. 1901; re-en. Sec. 2295, Rev. C. 1907; re-en. Sec. 7379, R. C. M. 1921. Cal. Civ. C. Sec. 1426h.

Operation and Effect

An amended declaratory statement relates back to the date of the original location, by virtue of the locator's discovery, his prior possession, the posting of the notice, the marking of the boundaries, the doing of the necessary development work, and the attempted compliance with the law relating to the filing of the declaratory statement for record. *Butte Consolidated Min. Co. v. Barker*, 35 M 327, 336,

89 P 302. See *Giberson v. Tuolumne Copper Min. Co.*, 41 M 396, 400, 109 P 974.

The addition of a word to the name of a mining claim in an amended declaratory statement was insufficient to invalidate the statement, where such statement declares on its face that it is an amended declaratory statement, and the ground embraced therein is the same as in the original. *Butte Consolidated Min. Co. v. Barker*, 35 M 327, 337, 89 P 302.

An amended declaratory statement confers no rights which did not exist prior to the filing of the amended statement, but relates back to the first location. *Milwaukee Gold Extraction Co. v. Gordon*,

37 M 209, 224, 95 P 995. See *Giberson v. Tuolumne Copper Min. Co.*, 41 M 396, 400, 109 P 974.

Collateral References

Mines and minerals \S 21(3).
58 C.J.S. Mines and Minerals \S 53.

50-716. (7380) Effect of amended or additional declaratory statement heretofore filed. Any amended or additional declaratory statement which may have been heretofore filed by a locator, or his successors or assigns, shall have the same force and effect and be subject to the same terms and conditions as though the same had been filed under the provisions of the preceding section.

History: En. Sec. 2, p. 57, L. 1901; re-en. Sec. 2296, Rev. C. 1907; re-en. Sec. 7380, R. C. M. 1921.

References

Cited or applied in *Wilson v. Freeman*, 29 M 470, 476, 75 P 84 and in *Consolidated etc. Mining Co. v. Struthers*, 41 M 565, 575, 111 P 152.

CHAPTER 8

MINING—RIGHTS OF WAY

- Section 50-801. Owners of mines have right-of-way.
50-802. Right-of-way for road or ditch.
50-803. Proceedings to obtain right-of-way.
50-804. Proceedings before the court.
50-805. Commissioners to be appointed.
50-806. Damage to be assessed by commissioners.
50-807. Report of commissioners may be set aside.
50-808. Right-of-way may be upon payment of damages assessed.
50-809. Appeal from the assessment of damages—how taken.
50-810. Trial on appeal—costs.
50-811. Costs, how paid.
50-812. Final appeal may be taken to supreme court.

50-801. (7382) Owners of mines have right-of-way. The owner of a mining claim held under the laws of the United States by patent or other wise, or under the local laws and customs of the state, has a right-of-way over and across the land or mining claim, patented or otherwise, of another, as prescribed in this chapter.

History: En. Sec. 1, p. 597, Cod. Stat. 1871, on Jan. 12, 1872; re-en. Sec. 886, 5th Div. Rev. Stat. 1879; re-en. Sec. 1495, Comp. Stat. 1887; amd. and re-en. Sec. 3630, Pol. C. 1895; re-en. Sec. 2297, Rev. C. 1907; re-en. Sec. 7382, R. C. M. 1921.

References

Cited or applied as section 3630, Political Code, in *M. O. P. Co. v. B. & B. C. M. Co.*, 25 M 427, 429, 65 P 420.

50-802. (7383) Right-of-way for road or ditch. Whenever a mine or mining claim is so situated that it cannot be conveniently worked without a road thereto, or a ditch to convey water thereto, or a ditch or a cut to convey the water therefrom, or without a flume to carry water and tailings therefrom, or without a shaft or tunnel thereto, which road, ditch, cut, flume, or tunnel must necessarily pass over, under, through, or across any lands or mining claims owned or occupied by another, such owner is entitled to a right-of-way for said road, ditch, cut, flume, shaft, or tunnel over, under, through, and across the lands or mining claims belonging to another, upon compliance with the provisions of this chapter.

History: En. Sec. 2, p. 597, Cod. Stat. 1871, on Jan. 12, 1872; re-en. Sec. 887, 5th Div. Rev. Stat. 1879; re-en. Sec. 1496,

Comp. Stat. 1887; amd. and re-en. Sec. 3631, Pol. C. 1895; re-en. Sec. 2298, Rev. C. 1907; re-en. Sec. 7383, R. C. M. 1921.

References

Cited or applied as section 1496, Fifth Division, Compiled Statutes of 1887, in *Glass v. Basin M. & C. Co.*, 22 M 151, 55 P 1047.

Collateral References

Eminent Domain \Rightarrow 33; Mines and Minerals \Rightarrow 29, 88.
29 C.J.S. Eminent Domain § 56; 58 C.J. S. Mines and Minerals §§ 60, 240.

50-803. (7384) Proceedings to obtain right-of-way. Whenever such owner desires to work a mine or mining claim, and it is necessary to enable him to do so successfully and conveniently that he should have a right-of-way for any of the purposes mentioned in the foregoing sections; and, if such right-of-way has not been acquired by agreement between him and the owner of the land or claims over, under, across, and upon which he seeks to establish such right-of-way, it is lawful for him to present to the judge of the district court a complaint asking that such right-of-way be awarded to him. The complaint must be verified, and contain a particular description of the character and extent of the right sought, a description of the mine or mining claim of the owner, and the mining claim or claims and the lands to be affected by such right-of-way, with the names of the occupants or owners thereof, and may also set forth any tender or offer hereinafter mentioned.

History: En. Sec. 3, p. 597, Cod. Stat. 1871, on Jan. 12, 1872; re-en. Sec. 883, 5th Div. Rev. Stat. 1879; re-en. Sec. 1497, Comp. Stat. 1887; amd. and re-en. Sec. 3632, Pol. C. 1895; re-en. Sec. 2299, Rev. C. 1907; re-en. Sec. 7384, R. C. M. 1921.

Operation and Effect

Where a mine owner desires to acquire a right-of-way across the lands of another, jurisdiction to consider the petition is not conferred unless it affirmatively appears therefrom that the petitioners have endeavored in good faith to come to an

agreement with the owners of the lands therefor. *Glass v. Basin M. & C. Co.*, 22 M 151, 55 P 1047.

The proceedings prescribed by this section are not applicable to a city seeking to condemn water rights for the purpose of establishing a water supply system. *City of Helena v. Rogan*, 27 M 135, 69 P 709.

Collateral References

Eminent Domain \Rightarrow 168(1), 191.
29 C.J.S. Eminent Domain §§ 218, 251.

50-804. (7385) Proceedings before the court. Upon the receipt of the complaint and filing thereof with the clerk of the court, the judge must direct a summons to issue to the defendants named in the complaint, requiring them to appear before the judge on a day therein named, which must be not less than ten days from the service thereof, and show cause why such right-of-way should not be allowed; the summons may be served on each of the parties in the manner prescribed by law for serving summons in other actions.

History: En. Sec. 4, p. 598, Cod. Stat. 1871, on Jan. 12, 1872; re-en. Sec. 889, 5th Div. Rev. Stat. 1879; re-en. Sec. 1498, Comp. Stat. 1887; amd. and re-en. Sec. 3633, Pol. C. 1895; re-en. Sec. 2300, Rev. C. 1907; re-en. Sec. 7385, R. C. M. 1921.

Collateral References

Eminent Domain \Rightarrow 180.
29 C.J.S. Eminent Domain § 242.

50-805. (7386) Commissioners to be appointed. Upon the return of the summons, or upon any day to which the hearing is adjourned, the defendants may demur or answer, and issue must be joined, and the judge must hear the allegations and proofs of the respective parties, and if, upon such hearing, he is satisfied that the claims of the plaintiff can only be conveniently worked by means of the privilege asked for, he must make an order adjudging and awarding to the plaintiff such right-of-way, and

must appoint three commissioners, disinterested persons and residents of the county, to assess the damages to the lands or claims affected by such order.

History: En. Sec. 5, p. 598, Cod. Stat. 1871, on Jan. 12, 1872; re-en. Sec. 890, 5th Div. Rev. Stat. 1879; re-en. Sec. 1499, Comp. Stat. 1887; amd. and re-en. Sec. 3634, Pol. C. 1895; re-en. Sec. 2301, Rev. C. 1907; re-en. Sec. 7386, R. C. M. 1921.

Collateral References

Eminent Domain ⇐ 192.
29 C.J.S. Eminent Domain § 262.

50-806. (7387) Damage to be assessed by commissioners. The commissioners must be sworn to faithfully and impartially discharge their duties, and must without delay examine the property, lands, and claims, and assess the damages resulting from such right-of-way, and report the amount to the judge, and if such right-of-way affects the property of more than one person, such report must contain an assessment of damages to each person.

History: En. Sec. 6, p. 598, Cod. Stat. 1871, on Jan. 12, 1872; re-en. Sec. 891, 5th Div. Rev. Stat. 1879; re-en. Sec. 1500, Comp. Stat. 1887; amd. and re-en. Sec. 3635, Pol. C. 1895; re-en. Sec. 2302, Rev. C. 1907; re-en. Sec. 7387, R. C. M. 1921.

Collateral References

Eminent Domain ⇐ 210.
29 C.J.S. Eminent Domain § 292.

50-807. (7388) Report of commissioners may be set aside. For good cause shown, the judge may set aside the report of the commissioners and appoint three other commissioners.

History: En. Sec. 7, p. 599, Cod. Stat. 1871, on Jan. 12, 1872; re-en. Sec. 892, 5th Div. Rev. Stat. 1879; re-en. Sec. 1501,

Comp. Stat. 1887; amd. and re-en. Sec. 3636, Pol. C. 1895; re-en. Sec. 2303, Rev. C. 1907; re-en. Sec. 7388, R. C. M. 1921.

50-808. (7389) Right-of-way may be upon payment of damages assessed. Upon the payment of the sum assessed as damages, and all costs, to the persons to whom it is awarded, or the payment of the same to the clerk for the use of such person, plaintiff is entitled to the right-of-way, and may immediately proceed to occupy the same and to erect thereon such works and structures, and make therein such excavations as may be necessary to the use and enjoyment of the right-of-way so awarded.

History: En. Sec. 8, p. 599, Cod. Stat. 1871, on Jan. 12, 1872; re-en. Sec. 893, 5th Div. Rev. Stat. 1879; re-en. Sec. 1502,

Comp. Stat. 1887; amd. and re-en. Sec. 3637, Pol. C. 1895; re-en. Sec. 2304, Rev. C. 1907; re-en. Sec. 7389, R. C. M. 1921.

50-809. (7390) Appeal from the assessment of damages—how taken. An appeal from the assessment of damages made by the commissioners may be taken to the district court by any party interested at any time within ten days after the filing of the report of the commissioners. A written notice of appeal must be filed with the clerk and served upon the opposite party.

History: En. Sec. 9, p. 599, Cod. Stat. 1871, on Jan. 12, 1872; re-en. Sec. 894, 5th Div. Rev. Stat. 1879; re-en. Sec. 1503, Comp. Stat. 1887; amd. and re-en. Sec. 3638, Pol. C. 1895; re-en. Sec. 2305, Rev. C. 1907; re-en. Sec. 7390, R. C. M. 1921.

Collateral References

Eminent Domain ⇐ 238.
30 C.J.S. Eminent Domain § 343.

50-810. (7391) Trial on appeal—costs. On appeal, the question of the amount of damages may be tried by the court or jury as in other cases.

If the appellant recovers damages exceeding the amount awarded by the commissioners, the opposite party must pay the costs of appeal, otherwise the appellant.

History: En. Sec. 10, p. 599, Cod. Stat. 1871, on Jan. 12, 1872; re-en. Sec. 895, 5th Div. Rev. Stat. 1879; re-en. Sec. 1504, Comp. Stat. 1887; amd. and re-en. Sec. 3639, Pol. C. 1895; re-en. Sec. 2306, Rev. C. 1907; re-en. Sec. 7391, R. C. M. 1921.

Collateral References

Eminent Domain \Rightarrow 238, 239, 265(4).
30 C.J.S. Eminent Domain §§ 343, 372, 384.

50-811. (7392) Costs, how paid. All costs and expenses of the proceedings under the provisions of this chapter, except as provided in the next preceding section, must be paid by the plaintiff, or party making the application. The judge may, if the right-of-way asked for is denied, allow the opposite party a reasonable counsel fee.

History: En. Sec. 3640, Pol. C. 1895; re-en. Sec. 2307, Rev. C. 1907; re-en. Sec. 7392, R. C. M. 1921.

Collateral References

Eminent Domain \Rightarrow 265(2, 3).
30 C.J.S. Eminent Domain §§ 381, 386.

50-812. (7393) Final appeal may be taken to supreme court. An appeal to the supreme court may be taken by either party, as in other cases.

History: En. Sec. 3641, Pol. C. 1895; re-en. Sec. 2308, Rev. C. 1907; re-en. Sec. 7393, R. C. M. 1921.

cal Code, in M. O. P. Co. v. B. & B. C. M. Co., 25 M 427, 429, 65 P 420.

Collateral References

Eminent Domain \Rightarrow 252.
30 C.J.S. Eminent Domain § 346.

References

Cited or applied as section 3641, Politi-

CHAPTER 9

CONSOLIDATION OF BOILER AND MINES INSPECTORS UNDER CONTROL OF INDUSTRIAL ACCIDENT BOARD

- Section 50-901. Consolidation boiler, mine and coal mine inspectors.
50-902. Same—appointment by industrial accident board.
50-903. Salaries of inspectors.
50-904. Districting of state for purposes of boiler inspection—rules and regulations—reports.
50-905. Inspection fees.
50-906. Laws continued in force and repealed.

50-901. (3034) Consolidation boiler, mine and coal mine inspectors. The offices of inspector of boilers, the office of inspector of mines, and the office of state coal mine inspector are hereby combined and placed under the general supervision of the industrial accident board.

History: En. Sec. 1, Ch. 92, L. 1917; amd. Sec. 1, Ch. 47, L. 1921; re-en. Sec. 3034, R. C. M. 1921.

References

State ex rel. Nagle v. Page, 98 M 14, 37 P 2d 575.

50-902. (3035) Same—appointment by industrial accident board. The industrial accident board shall appoint not to exceed four inspectors of boilers, one coal mine inspector and two inspectors of quartz mines, all of whose terms of office shall be at the pleasure of the industrial accident board.

History: En. Sec. 2, Ch. 92, L. 1917; amd. Sec. 2, Ch. 47, L. 1921; re-en. Sec. 3035, R. C. M. 1921.

Cross-Reference

Appointment of boiler inspectors, sec. 69-1501.

References

State ex rel. Nagle v. Page, 98 M 14, 37 P 2d 575. 58 C.J.S. Mines and Minerals § 237; 82 C.J.S. Steam § 14; 71 C.J. Workmen's Compensation § 661.

Collateral References

Mines and Minerals 93; Steam 4; Workmen's Compensation 1084.

50-903. (3036) Salaries of inspectors. The said officers shall receive such annual salaries to be fixed by the industrial accident board, and approved by the governor; all of said officers to be paid monthly.

History: En. Sec. 3, Ch. 92, L. 1917; re-en. Sec. 3036, R. C. M. 1921.

References

State ex rel. Nagle v. Page, 98 M 14, 37 P 2d 575.

50-904. (3037) Districting of state for purposes of boiler inspection—rules and regulations—reports. The industrial accident board shall district the state for boiler inspection and shall assign one inspector of boilers to each such district, and may from time to time change the boundaries of said districts and change said inspector of boilers to other districts, and said board shall have the power and it shall be its duty to provide rules and regulations under which said inspectors of boilers, inspectors of mines, and coal mine inspector shall perform their duties; and the board may require them, in addition to their statutory duties, to make the annual inspections, reports, and collections required by the safety provisions of sections 92-1206 to 92-1208, 92-1210, 92-1211 and 92-1212.

History: En. Sec. 4, Ch. 92, L. 1917; re-en. Sec. 3037, R. C. M. 1921.

References

State ex rel. Nagle v. Page, 98 M 14, 37 P 2d 575.

50-905. (3038) Inspection fees. All fees collected by the inspectors of boilers, the inspectors of mines, and the coal mine inspector shall remain the same in amounts as now fixed by law, and when same are collected they shall be paid into the state treasury and credited to the industrial administration fund as other inspection fees of the industrial accident board are now paid and credited.

History: En. Sec. 5, Ch. 92, L. 1917; re-en. Sec. 3038, R. C. M. 1921.

References

State ex rel. Nagle v. Page, 98 M 14, 37 P 2d 575.

50-906. (3039) Laws continued in force and repealed. All laws that now prescribe the qualifications, powers, and duties of the inspectors of boilers, inspector of steamboats, inspectors of mines, and coal mine inspector, not inconsistent with the provisions of this act, are hereby continued in full force and effect, and all other acts and parts of acts contrary to the provisions of this act are hereby repealed.

History: En. Sec. 55, Ch. 96, L. 1915; amd. Sec. 6, Ch. 92, L. 1917; re-en. Sec. 3039, R. C. M. 1921.

References

State ex rel. Nagle v. Page, 98 M 14, 37 P 2d 575.

TITLE 51

MONOPOLIES

- Chapter 1. Unfair practices act, 51-101 to 51-118.
2. Monopolies in financing sale of motor vehicles, 51-201 to 51-206.

CHAPTER 1

UNFAIR PRACTICES ACT

- Section 51-101 Unfair competition in sale of commodities prohibited.
51-102. Persons deemed responsible.
51-103. Sales at less than cost forbidden—cost defined.
51-104. Enforced sales not basis of cost price.
51-105. Proof of intent—cost surveys.
51-106. Fair price for agricultural products, how determined.
51-107. Exceptions.
51-108. Rebates forbidden—cooperatives.
51-109. Attorney general to institute suit, when.
51-110. Illegal contracts—recovery forbidden.
51-111. Who may enjoin violations—damages—production of evidence.
51-112. Penalties for violation of act.
51-113. Montana trade commission—administration of act by—intervention—orders—review—appeals—process—finality of order.
51-114. Procedure for establishing cost survey—hearing—notice.
51-115. Hearings and investigations—contempts.
51-116. Alteration of invoices unlawful.
51-117. Construction of act.
51-118. Act how cited.

NOTE.—The penal law prohibiting and providing for the punishment of unlawful trusts and monopolies and combinations in restraint of trade is contained in sections 94-1104 to 94-1118.

51-101. Unfair competition in sale of commodities prohibited. It shall be unlawful for any person, firm, or corporation, doing business in the state of Montana and engaged in the production, manufacture, distribution or sale of any commodity, or product, or service or output of a service trade, of general use or consumption, or the product or service of any public utility, with the intent to destroy the competition of any regular established dealer in such commodity, product or service, or to prevent the competition of any person, firm, private corporation, or municipal or other public corporation, who or which in good faith, intends and attempts to become such dealer, to discriminate between different sections, communities or cities or portions thereof, or between different locations in such sections, communities, cities or portions thereof in this state, by selling or furnishing such commodity, product or service at a lower rate in one section, community or city, or any portion thereof, or in one location in such section, community, or city or any portion thereof, than in another after making allowance for difference, if any, in the grade or quality, quantity and in the actual cost of transportation from the point of production, if a raw product or commodity, or from the point of manufacture, if a manufactured product or commodity. This act shall not be construed to prohibit the meeting in good faith of a competitive rate, or to prevent a reasonable classification of service by public utilities for the purpose of

establishing rates. The inhibition hereof against locality discrimination shall embrace any scheme of special rebates, collateral contracts or any device of any nature whereby such discrimination is, in substance or fact, effected in violation of the spirit and intent of this act.

Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section 51-101, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

History: En. Sec. 1, Ch. 80, L. 1937.

NOTE.—The Montana Trade Commission referred to in this chapter is created and its duties defined by sections 70-201 to 70-233.

Cross-Reference

Fair trade act, secs. 85-201 to 85-208.

Constitutionality

The unfair practices act, section 51-101 et seq., is not a price-fixing statute, but one prohibiting sales of commodities below cost to injure competitors and destroying competition; it fixes a minimum price only, leaving in the seller the discretion to sell at whatever price above that he may choose; under its police power the state may legislate whatever economic policy curbing unrestrained and harmful competition and protecting the public against monopoly as is deemed to protect the public welfare, and the requirement of due process of law Art. III, Sec. 27, and 3, of state constitution, and federal constitution are satisfied. *Associated Merchants of Montana v. Ormesher*, 107 M 530, 542, 86 P 2d 1031.

Held Applicable to Sales Made to State

Held, that Ch. 80, Laws 1937 (51-101 et seq.), known as the unfair practices act, in the absence of an express exception in favor of those selling to the state, applies to sales made to the state, and failure of

the legislature to amend section 82-1913, providing for purchases of state supplies from the lowest bidder, is not indicative of its intention to except sales to the state from operation of the act, and that when one is read in connection with the other, it is contemplated that sellers to the state will confine their bids within the limit fixed as legitimate by the unfair practices act. *Helena Automobile Dealers Assn. v. Anderson*, 110 M 1, 3, 98 P 2d 371.

References

Board of Railroad Commissioners v. Sawyers' Stores, Inc., 114 M 562, 564, 138 P 2d 964.

Collateral References

Trade-Marks and Trade-Names and Unfair Competition § 68(2.26).

63 C.J. Trade-Marks, Trade-Names, and Unfair Competition § 136.

36 Am. Jur. 512, Monopolies, Combinations, and Restraints of Trade, § 28; 52 Am. Jur. 643, Trademarks, Tradenames, and Trade Practices, §§ 173 et seq.

Actual competition as necessary element of trademark infringement or unfair competition. 148 ALR 12.

Conflict of laws, with respect to trademark infringement or unfair competition, including the area of conflict between Federal and state law. 148 ALR 139.

51-102. Persons deemed responsible. Any person who, either as director, officer or agent of any firm or corporation or as agent of any person, violating the provisions of this act, assists or aids, directly or indirectly in such violation shall be responsible therefor equally with the person, firm or corporation for whom or which he acts.

In the prosecution of any person as officer, director or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm, or corporation for whom or which he acts.

History: En. Sec. 2, Ch. 80, L. 1937.

Collateral References

Trade-Marks and Trade-Names and Unfair Competition § 68(9).

63 C.J. Trade-Marks, Trade-Names, and Unfair Competition § 136.

51-103. Sales at less than cost forbidden—cost defined. It shall be unlawful for any person, partnership, firm, corporation, joint stock company, or other association engaged in business within this state, to sell, offer for sale or advertise for sale any article or product, or service, or output of a service trade, at less than the cost thereof to such vendor, or give, offer to give or advertise the intent to give away any article or product, or service or output of a service trade for the purpose of injuring competitors and destroying competition, and he or it shall also be guilty of a misdemeanor, and on conviction thereof shall be subject to the penalties set out in section 51-112 for any such act.

The term "cost" as applied to production is hereby defined as including the cost of raw materials, labor and all overhead expenses of the producer, and as applied to distribution, "cost" shall mean the invoice or replacement cost within ninety days prior to the date of sale and the quantity last purchased, whichever is lower, of the article or product, to the distributor and vendor, less all trade discounts, except customary cash discounts, plus the cost of doing business by said distributor and vendor.

The term "customary cash discounts" means any allowance not exceeding two per cent, whether a part of a larger discount or not, made to the wholesale or retail vendor, where the wholesale or retail vendor pays for merchandise within a limited or specified time.

The "cost of doing business" or "overhead expense" is defined as all costs of doing business incurred in the conduct of such business and must include, without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance and advertising.

History: En. Sec. 3, Ch. 80, L. 1937; amd. Sec. 1, Ch. 129, L. 1949.

"Cost of Doing Business"

The standard set by the legislature in enacting the unfair practices act, and particularly this section defining the "cost of doing business," is one of reasonableness, i. e., one "which can be determined objectively from circumstances, a common, widely-used and constitutionally valid standard in law." *Associated Merchants of Montana v. Ormesher*, 107 M 530, 549, 86 P 2d 1031.

Facts Required To Be Shown

In a proceeding under this section, the two ultimate facts to be proven in order to establish a violation of the act, are (1) a sale below cost, and (2) that the sale was made for such unlawful purpose. *Board of Railroad Commissioners v. Sawyers' Stores, Inc.*, 114 M 562, 565, 138 P 2d 964.

Collateral References

Trade-Marks and Trade-Names and Unfair Competition § 68(2.17).

63 C.J. *Trade-Marks, Trade-Names, and Unfair Competition* § 136.

51-104. Enforced sales not basis of cost price. In establishing the cost of a given article or product to the distributor and vendor, the invoice cost of said article or product purchased at a forced, bankrupt, closeout sale, or other sale outside of the ordinary channels of trade may not be used as a basis for justifying a price lower than one based upon the replacement cost as of date of said sale of said article or product replaced through the ordinary channels of trade, unless said article or product is kept separate from goods purchased in the ordinary channels of trade and unless said article or product is advertised and sold as merchandise purchased at a forced, bankrupt, closeout sale, or by means other than through the

ordinary channels of trade, and said advertising shall state the conditions under which said goods were so purchased, and the quantity of such merchandise to be sold or offered for sale.

History: En. Sec. 4, Ch. 80, L. 1937.

51-105. Proof of intent—cost surveys. In any injunction proceeding or in the prosecution of any person as officer, director or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm or corporation for whom or which he acts. Where a particular trade or industry, of which the person, firm or corporation complained against is a member, has an established cost survey for the locality and vicinity in which the offense is committed, the said cost survey shall be deemed competent evidence to be used in proving the costs of the person, firm or corporation complained against within the provisions of this act.

History: En. Sec. 5, Ch. 80, L. 1937.

Only Cost Survey Based on Locality of Particular Business Competent as Evidence

Where commission administering unfair practices act conducted a cost survey for retail grocers over the entire state and charged defendant with selling goods below cost, as established by the overhead percentage fixed by such survey, held: this section indicates that only a cost survey made for the locality and vicinity in which a business is carried on is competent evidence of cost of doing business and use of the statewide figures would not sustain the commission's case. *Board of Railroad Commissioners v. Sawyers' Stores, Inc.*, 114 M 562, 567, 138 P 2d 964.

Prescribes Rule, Not Weight of Evidence

This section providing that an "established cost survey" of a trade or industry shall be deemed competent evidence against the accused, simply establishes the admissibility of such evidence; it is a rule of evidence and does not prescribe either the weight or credibility to be given the evidence; and if the accused's business is not fairly to be governed by such cost survey because of peculiar circumstances, he is privileged to so show. *Associated Merchants of Montana v. Ormesher*, 107 M 530, 548, 86 P 2d 1031.

51-106. Fair price for agricultural products, how determined. The following method shall be used in determining fair prices for agricultural products sold on local markets, in any trade area, district or city in which the major portion of any agricultural commodity or product is produced within or adjacent to said trade area, city or district.

Whenever 75% of producers of any agricultural product or commodity marketing said products or commodities within any trade area, district or city shall determine what is a fair price based upon competitive and other factors for their product or commodity, it shall be deemed the fair price for such product or commodity under the terms of this act.

Such producers through their regular constituted agents shall file with the Montana trade commission such fair price and request a hearing for the establishment of fair prices to jobbers, wholesalers, retailers and consumers of said agricultural products or commodities. Any organization representing consumers shall not be denied representation at such a meeting.

After the establishment of such a schedule of fair prices for said agricultural products or commodities, it shall be a violation of this act for any producer, jobber, wholesaler or retailer to sell or buy any agricultural commodity or product below such price as established by the Montana trade commission and such action shall be deemed a violation of this act and punishable under the terms provided in this act.

History: En. Sec. 5-A, Ch. 80, L. 1937.

51-107. Exceptions. The provisions of sections 51-103, 51-104 and 51-105 shall not apply to any sale made:

(a) In closing out in good faith, the owner's stock or any part thereof, for the purpose of discontinuing his trade in any such stock or commodity, and in the case of the sale of seasonal goods or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation, provided notice is given to the public thereof;

(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof;

(c) By an officer acting under the orders of any court;

(d) In an endeavor made in good faith to meet the legal prices of a competitor as herein defined selling the same article or product, or service or output of a service trade, in the same locality or trade area;

(e) To the state of Montana or any of its institutions.

Any person, firm or corporation who performs work upon, renovates, alters or improves any personal property belonging to another person, firm or corporation, shall be construed to be a vendor within the meaning of this act.

History: En. Sec. 6, Ch. 80, L. 1937;
amd. Sec. 1, Ch. 100, L. 1941.

References

Associated Merchants of Montana v.
Ormesher et al., 107 M 530, 542, 86 P 2d
1031.

51-108. Rebates forbidden—cooperatives. The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is an unfair trade practice and any person, firm, partnership, corporation, or association resorting to such trade practice shall be deemed guilty of a misdemeanor and on conviction thereof shall be subject to the penalties set out in section 51-112.

Provided, however, that nothing in this act shall prevent a cooperative association, organized and operating on a true cooperative basis, from returning to the members, producers or consumers the whole or any part of the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to or through the association.

History: En. Sec. 7, Ch. 80, L. 1937.

51-109. Attorney general to institute suit, when. Upon the third violation of any of the provisions of sections 51-101 to 51-108, inclusive, by any corporation, it shall be the duty of the attorney general to institute proper suits or quo warranto proceedings in any court of competent jurisdiction for the forfeiture of its charter, rights, franchises or privileges and powers exercised by such corporation, and to permanently enjoin it from transacting business in this state. If in such action the court shall find that such corporation is violating or has violated any of the provisions of sections 51-101 to 51-108, inclusive, it must enjoin said corporation from doing business in this state permanently or for such time as the court shall

order, or must annul the charter, or revoke the franchise of such corporation.

History: En. Sec. 8, Ch. 80, L. 1937.

51-110. Illegal contracts—recovery forbidden. Any contract, express or implied, made by any person, firm or corporation in violation of any of the provisions of sections 51-101 to 51-108, inclusive, is declared to be an illegal contract and no recovery thereon shall be had.

History: En. Sec. 9, Ch. 80, L. 1937.

Collateral References

Contracts—105.

17 C.J.S. Contracts § 206.

51-111. Who may enjoin violations—damages—production of evidence. Any person, firm, private corporation or municipal or other public corporation, or trade association, may maintain an action to enjoin a continuance of any act or acts in violation of sections 51-101 to 51-108, inclusive, if injured thereby, for the recovery of damages. If, in such action, the court shall find that the defendant is violating or has violated any of the provisions of sections 51-101 to 51-108, inclusive, it shall enjoin the defendant from a continuance thereof. It shall not be necessary that actual damages to the plaintiff be alleged or proved. In addition to such injunctive relief, the plaintiff in said action shall be entitled to recover from the defendant three times the amount of the actual damages, if any, sustained.

Any defendant in an action brought under the provisions of this section may be required to testify under the provisions of the code of civil procedure of this state, in addition the books and records of any such defendant may be brought into court and introduced, by reference, into evidence; provided, however, that no information so obtained may be used against the defendant as a basis for a misdemeanor prosecution under the provisions of sections 51-101 to 51-108, inclusive, and 51-112.

History: En. Sec. 10, Ch. 80, L. 1937.

63 C.J. Trade-Marks, Trade-Names, and Unfair Competition §§ 236, 261, 273.

Collateral References

Trade-Marks and Trade-Names and Unfair Competition—88, 95(1), 98.

51-112. Penalties for violation of act. Any person, firm or corporation, whether as principal, agent, officer or director, for himself, or itself, or for another person, or for any firm or corporation, or any corporation, who or which shall violate any of the provisions of sections 51-101 to 51-108, inclusive, is guilty of a misdemeanor for each single violation and upon conviction thereof, shall be punished by a fine of not less than one hundred dollars (\$100.00), nor more than one thousand dollars (\$1,000.00), or by imprisonment not exceeding six months or by both said fine and imprisonment, in the discretion of the court.

History: En. Sec. 11, Ch. 80, L. 1937.

63 C.J. Trade-Marks, Trade-Names, and Unfair Competition § 284.

Collateral References

Trade-Marks and Trade-Names and Unfair Competition—51.

51-113. Montana trade commission—administration of act by—intervention—orders—review—appeals—process—finality of order. (1) The

Montana trade commission shall have the administration of this act; and the members thereof shall not receive any additional compensation for their services other than their salaries prescribed by law.

Said commission is empowered and directed to prevent any person, firm or corporation from violating any of the provisions of this chapter.

(2) Whenever the commission shall have reason to believe that any such person, firm or corporation has been or is engaging in any course of conduct or doing any act or acts in violation of the provisions of this chapter and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, firm or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed not less than five days after the service of said complaint. Any such complaint may be amended by the commission in its discretion at any time five days prior to the issuance of an order based thereon. The person, firm or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, firm or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, firm or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the act or conduct in question is prohibited by this chapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, firm or corporation an order requiring such person, firm or corporation to cease and desist from such acts or conduct. Until a transcript of the record in such hearing shall have been filed in a district court, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

(3) Any person, firm or corporation required by an order of the commission to cease and desist from any such act or conduct may obtain a review of such order in any district court of the state of Montana within any district where the act or conduct in question was done or carried on, or where such person, firm or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the commission. Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission, and enforcing the same to the extent that such

order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the commission as to the facts, if supported by sufficient evidence, shall be conclusive.

(4) To the extent that the order of the commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by sufficient evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the supreme court upon appeal as in other cases of judgments of such courts; provided, however, that said appeal shall be taken within thirty days from the date of the entry of such judgment or decree.

(5) Such proceedings in the district court shall be given precedence over other civil cases pending therein, and shall be in every way expedited. Complaints, orders, and other processes of the commission under this section may be served by anyone duly authorized by the commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership or corporation; or (c) by registering and mailing a copy thereof addressed to such person, partnership or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

(6) An order of the commission to cease and desist shall become final (1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; (2) upon the expiration of the time allowed for filing a notice of appeal to the supreme court, if the order of the commission has been affirmed, or the petition for review dismissed by the district court and no notice of appeal to the supreme court has been duly filed, or (3) upon the expiration of thirty days from the date of issuance of the remittitur of the supreme court, if such court directs that the order of the commission be affirmed or the petition for review dismissed.

(7) If the supreme court directs that the order of the commission be modified or set aside, the order of the commission rendered in accordance with the mandate of the supreme court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the commission shall become final when so corrected.

(8) If the order of the commission is modified or set aside by the district court and if (1) the time allowed for filing a notice of appeal to the supreme court has expired and no such notice of appeal has been duly filed or (2) the decision of the district court has been affirmed by the supreme court, then the order of the commission rendered in accordance with the mandate of the district court shall become final on the expiration of thirty days from the time such order of the commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the commission shall become final when so corrected.

(9) If the supreme court orders a rehearing; or if the case is remanded by the district court to the commission for a rehearing, and if (1) the time for filing a notice of appeal to the supreme court has expired and no such notice of appeal has been duly filed, or (2) the decision of the court has been affirmed by the supreme court, then the order of the commission rendered upon such rehearing shall become final in the same manner as though no prior order of the commission had been rendered.

(10) Any person, firm or corporation who violates an order of the commission to cease and desist after it has become final, and while such order is in effect shall forfeit and pay to the state of Montana a penalty of not more than one thousand dollars (\$1,000.00) for each violation, which shall accrue to the state of Montana and may be recovered in a civil action brought by the state of Montana.

The remedies and method of enforcement of this chapter provided for in this section shall be deemed concurrent and in addition to the other remedies provided in this chapter.

History: En. Sec. 12, Ch. 80, L. 1937; amd. Sec. 1, Ch. 50, L. 1939.

How Review of Findings by Commission May Be Had

Under this section a review may be had by filing a petition praying that the order of the commission be set aside, which need not be supported by affidavit, the proceeding not being in the nature of certiorari, the court acquiring jurisdiction upon filing of the petition and transcript of the proceedings, the whole case being laid before the court as on appeal; where

no petition to remand the case to the commission for taking of additional evidence is filed with the court, there is no ground for contention that the court did not follow the law in that behalf. Board of Railroad Commissioners v. Sawyers' Stores Inc., 114 M 562, 569, 138 P 2d 964.

Collateral References

Trade-Marks and Trade-Names and Unfair Competition § 80½.

63 C.J. Trade-Marks, Trade-Names, and Unfair Competition § 291.

51-114. Procedure for establishing cost survey—hearing—notice. (1) The Montana trade commission is hereby empowered and directed whenever application therefor shall have been made by ten or more persons, firms or corporations within any particular trade or business to establish the cost survey provided for in section 51-105 of this chapter. When peti-

tion for such cost survey has been so presented to the commission, the commission shall, as soon as possible, fix a time for a public hearing upon the question of whether such cost survey should be established. Such hearing shall be held at the office of said commission and upon such notice as the commission may by rule require; provided, however, that notice of such hearing shall be published for at least two successive weeks in such daily newspaper or newspapers as the commission may designate as most commonly circulated in the counties to be affected by such cost survey. Said notice shall further state the locality or area in respect to which said cost survey is proposed to be established and the particular trade or business to be affected thereby.

(2) At the time fixed in said notice any person, firm or corporation shall be entitled to appear and be heard by the commission upon all questions to be determined by it as provided in this section. If the commission shall determine that a cost survey shall be established, it shall at the same hearing proceed to classify and define the particular trade or business, or parts thereof, to be affected thereby, determine and delimit the particular area within which such trade or business shall be so affected, and find and determine the probable "cost of doing business" or "overhead expense," stated in percentage or percentages of invoice or replacement cost which would probably be incurred by the most efficient person, firm or corporation within such trade or business within such area.

(3) Provided, however, that where the commission shall determine that the probable "cost of doing business" or "overhead expense," stated in percentage or percentages of invoice or replacement cost which would probably be incurred by the most efficient person, firm or corporation in such trade or business is the same for the entire state, then and in that event the commission may, upon proper notice having been given as herein-before provided, create one trade area which shall embrace the entire state.

(4) The percentage or percentages so fixed and determined shall be presumed to be the actual "cost of doing business" and "overhead expense" of any person, firm or corporation in such trade or business and within the area, affected by such cost survey.

History: Sec. 12A, Ch. 80, L. 1937 added by Sec. 2, Ch. 50, L. 1939; amd. Sec. 1, Ch. 21, L. 1945; amd. Sec. 2, Ch. 129, L. 1949.

Compiler's Note

Chapter 129 of Laws 1949 purported to amend Sec. 12A of Ch. 21, Laws 1945, however, it is apparent that it was intended to amend Sec. 12A of Ch. 80, Laws 1937, as added by Sec. 2, Ch. 50, Laws 1939 as amended by Sec. 1 of Ch. 21, Laws 1945.

When Survey on Wholesale Cost, Overhead Expense, Etc., Valueless, and Evidence Thereon Incompetent

This act makes no provision for wholesale cost surveys, hence evidence based thereon was incompetent in a proceeding against a retail grocer, particularly with-

out showing that he was selling at wholesale; a finding that defendant was selling goods at less than cost price is not warranted without competent evidence of his overhead expense, because without it, the cost of each article was less than the selling price; a mere discussion between dealers on price cutting generally, not based on facts was insufficient to prove accused's intent to injure competitors and destroy competition. Board of Railroad Commissioners v. Sawyers' Stores Inc., 114 M 562, 568, 138 P 2d 964.

When Survey Too Extensive

Where the state trade commission caused a survey to be made covering the whole state instead of particular localities or areas, held that such a survey, including all retail districts widely separated and without any relation of one to

the other, would not produce a fair estimate of business cost in any particular district, and therefore was not competent evidence of defendant's cost of doing

business in his particular locality. Board of Railroad Commissioners v. Sawyers' Stores Inc., 114 M 562, 566, 138 P 2d 964.

51-115. Hearings and investigations—contempts. (1) The Montana trade commission for the purpose of conducting hearings and investigations which, in the opinion of the commission, are necessary and proper for the exercise of the powers vested in it by this chapter shall have the following powers:

(2) The commission, or its duly authorized agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the commission shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question, before the commission, or before its duly authorized agent conducting the investigation. Any member of the commission or any agent, duly authorized by the commission for such purposes, may administer oaths and affirmations, examine witnesses and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place within the state of Montana at any designated place of hearing.

(3) In any case of contumacy or refusal to obey a subpoena issued to any person, any district court of the state of Montana, within any district where the inquiry is carried on or where a person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the commission shall have jurisdiction to issue to such person, an order requiring such person to appear before the commission, or its duly authorized agent, and there to produce evidence if so ordered, or there to give testimony touching the matter under investigation; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(4) No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpoena of the commission, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

History: En. Sec. 3, Ch. 50, L. 1939.

51-116. Alteration of invoices unlawful. It shall be unlawful for any person, partnership, firm, corporation, joint stock company or other association, as defined in section 51-103, to change, alter, substitute or falsify any invoice where such practice tends to injure a competitor or to destroy competition or to mislead any court or commission. Said practice is unfair trade practice and any person, firm, partnership, corporation or association

resorting to such trade practice shall be guilty of a misdemeanor and, on conviction, shall be subject to the penalties provided in section 51-112.

History: En. Sec. 4, Ch. 50, L. 1939. 63 C.J. Trade-Marks, Trade-Names, and Unfair Competition § 284.

Collateral References

Trade-Marks and Trade-Names and Unfair Competition ⇨ 51.

51-117. Construction of act. The legislature declares that the purpose of this act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. This act shall be literally construed that its beneficial purposes may be subserved.

History: En. Sec. 14, Ch. 80, L. 1937. Sawyers' Stores Inc., 114 M 562, 564, 138 P 2d 964.

References

Associated Merchants of Montana v. Ormsher, 107 M 530, 548, 86 P 2d 1031; Board of Railroad Commissioners v. Statutes ⇨ 179.
Collateral References
 82 C.J.S. Statutes § 315.

51-118. Act how cited. This act shall be known and designated as the "Unfair Practices Act."

History: En. Sec. 15, Ch. 80, L. 1937.

CHAPTER 2

MONOPOLIES IN FINANCING SALE OF MOTOR VEHICLES

- Section 51-201. Declaration of policy.
 51-202. Definitions.
 51-203. Certain financing agreements prohibited.
 51-204. Threats prima facie evidence.
 51-205. Penalty.
 51-206. Suit for injury to business or property.

51-201. Declaration of policy. It is hereby declared to be the policy of this state that free and unrestrained competition shall prevail in the business of financing the purchase or sale of motor vehicles.

History: En. Sec. 1, Ch. 144, L. 1937.

51-202. Definitions. (a) The term "person" as used in this act means any individual, firm, corporation, partnership, association, trustee, receiver, or assignee for the benefit of creditors.

(b) The terms "sell," "sold," "buy," and "purchase" as used in this act, include exchange, barter, gift, and offer or contract to sell or buy.

(c) The term "manufacturer" shall mean any person, firm, corporation, partnership, or association engaged either directly or indirectly in the manufacture or wholesale distribution of motor vehicles.

(d) The term "wholesale distributor" shall mean any person, firm, association, corporation or other organization engaged directly or indirectly in the sale or distribution of motor vehicles to agents or to dealers.

(e) The term "dealer" shall mean any person, firm, association or corporation or other organization of any kind, character or nature regularly engaged or intending to engage in the business of selling motor vehicles at retail within this state.

(f) "Finance company" or "finance agency" shall mean any person, firm, association, corporation or other organization engaged in the business of buying, selling, assigning, dealing, financing or acquiring conditional contracts of sale or engaged in the business of purchasing or acquiring promissory notes or any other form or evidences of indebtedness of sale, either secured by vendor's lien, conditional bill of sale, chattel mortgage, or leases arising out of the sale of motor vehicles in this state.

(g) The term "motor vehicle" shall mean every self-propelled vehicle moving over the highways of this state, whether patented or unpatented.

History: En. Sec. 2, Ch. 144, L. 1937.

51-203. Certain financing agreements prohibited. It shall be unlawful for any manufacturer or wholesale distributor of motor vehicles to sell or enter into a contract for the sale of motor vehicles to any motor vehicle dealer on the condition or under an agreement, expressed or implied, that such dealer shall finance the purchase or sale of any motor vehicle or vehicles only through a designated finance company or finance agency. Any such condition, agreement or understanding is hereby declared to be against the public policy of the state and such condition, agreement or understanding shall be unlawful, void, and unenforceable, either as law or equity.

History: En. Sec. 3, Ch. 144, L. 1937.

51-204. Threats prima facie evidence. Any threat, expressed or implied, made directly or indirectly to any dealer by any manufacturer, or by any person who is engaged in the business of financing the purchase or sale of motor vehicles and is affiliated with or controlled by any manufacturer, that such manufacturer will cease to sell, or will terminate or refuse to enter into a contract to sell motor vehicles to such dealer unless such dealer finances the purchase or sale of any such motor vehicle or vehicles only with or through a designated person, shall be presumed to be made at the direction of and with the authority of such manufacturer and shall be prima facie evidence of the fact that such manufacturer has sold or intends to sell such motor vehicle or vehicles on the condition or under the agreement prohibited by the provisions of this act.

History: En. Sec. 4, Ch. 144, L. 1937.

51-205. Penalty. Any person who shall violate any of the provisions of this act, and any employee, agent, or officer of any such person who shall participate, in any manner, in making, enforcing or performing, or in aiding or abetting in the performance of any such contract, condition, agreement or understanding shall be deemed guilty of a crime and, upon conviction thereof, shall be punished for each offense by a fine of not more than five thousand dollars (\$5,000.00) or by imprisonment in the penitentiary for not more than five years or in the county jail for not more than one year, or by both such fine and imprisonment.

History: En. Sec. 5, Ch. 144, L. 1937.

51-206. Suit for injury to business or property. In addition to the criminal and civil penalties herein provided, any person who shall be injured in his business or property by any other person or corporation or

association or partnership, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any court having jurisdiction thereof in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and recover twofold the damages by him sustained, and the costs of suit. Whenever it shall appear to the court before which any proceedings under this act may be pending, that the ends of justice require that other parties shall be brought before the court, the court may cause them to be made parties defendant and summoned, whether they reside in the county where such action is pending or not.

History: En. Sec. 6, Ch. 144, L. 1937.

TITLE 52

MORTGAGES

- Chapter 1. Mortgages in general, 52-101 to 52-116.
2. Mortgages of real property, 52-201 to 52-213.
3. Mortgages of personal property, 52-301 to 52-323.

CHAPTER 1

MORTGAGES IN GENERAL

- Section 52-101. Mortgage defined.
52-102. Property adversely held may be mortgaged.
52-103. Lien of a mortgage—when special.
52-104. Transfer of interest—when mortgage, when pledge.
52-105. Transfer made subject to defeasance may be proved.
52-106. Mortgage—on what a lien.
52-107. Mortgage does not entitle mortgagee to possession.
52-108. Mortgage not a personal obligation.
52-109. Waste.
52-110. Subsequently acquired title inures to mortgagee.
52-111. Foreclosure.
52-112. Power of sale.
52-113. Power of attorney to execute.
52-114. Assignment of mortgage—recording—notice—address of assignee prerequisite to recording.
52-115. Mortgage passes by assignment of debt.
52-116. Recording of subordination or waiver agreements—real estate—personal property.

52-101. (8246) Mortgage defined. Mortgage is a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession.

History: En. Sec. 3810, Civ. C. 1895; re-en. Sec. 5731, Rev. C. 1907; re-en. Sec. 8246, R. C. M. 1921. Cal. Civ. C. Sec. 2920. Field Civ. C. Sec. 1608.

Cross-Reference

Presumption as to payment, sec. 93-1301-7.

Chattel Mortgage

A contract for the cultivation of farm land on shares by the terms of which the land owner reserves title in himself to the lessee's share as security for advances made by him to the lessee is in legal effect a chattel mortgage and as such subject to the provisions of the chattel mortgage statute with reference to execution and filing. *Crone v. Occident Elevator Co.* et al., 70 M 211, 219, 224 P 659.

Insufficient Description of Property Hypothecated

The description of personal property covered by a chattel mortgage, to be good as against subsequent purchasers or encumbrancers, must be sufficiently definite so that a third person may, from the language of the mortgage and the informa-

tion given by it and gained from the inquiry suggested by it, determine with certainty what property was intended to be included therein; description by number of species or class, such as "873 head of sheep" in a certain county, owned by the mortgagor and not stating in whose possession the unmarked animals were, was insufficient, and title on foreclosure sale was a nullity as against a subsequent encumbrancer. *Walker v. Johnson*, 108 M 398, 402, 91 P 2d 406.

Liens Include Mortgages

Under the statutes of the territory and state, a mortgage has never possessed any of the characteristics of a sale; it has been considered a mere lien, fixed on property by contract of the parties, to secure the payment of a particular obligation or the performance of a particular act. *Davidson v. Wampler*, 29 M 61, 68, 74 P 82.

In this state a mortgage does not pass title but creates a lien upon the property as security for the payment of a debt or the performance of an act, and whenever statutes refer to a "lien" upon either real or personal property, that reference must be construed to include a mortgage, un-

less the contrary intention be expressed. *Barth v. Ely*, 85 M 310, 317 et seq., 278 P 1002. See also *Jones v. Hall et al.*, 90 M 69, 76, 300 P 232.

Mortgage Does Not Create an Estate in Real Property

A mortgage itself does not create or alienate an estate in real property, but is a mere security for the payment of a debt or the discharge of an obligation. A mortgage is a conveyance of only a chattel interest. *Gallatin County v. Beattie*, 3 M 173, 175; *Holland v. Board of Commissioners*, 15 M 460, 461, 39 P 575; *State ex rel. Cruse Savings Bank v. Gilliam*, 18 M 94, 101, 44 P 394, 45 P 661; *Hull v. Diehl*, 21 M 71, 78, 52 P 782; *Wilson v. Pickering*, 28 M 435, 440, 72 P 821; *Swain v. McMillan*, 30 M 433, 439, 76 P 942; *Mueller v. Renkes*, 31 M 100, 102, 77 P 512; *Cornish v. Woolverton*, 32 M 456, 475, 81 P 4.

A mortgage does not create an estate in real property. *Swain v. McMillan*, 30 M 433, 439, 76 P 943.

Mortgage is Conveyance of Chattel Interest

A mortgage is a conveyance within the meaning of the record laws of this state, though it is a conveyance of a chattel

interest only. Title to it passes to an assignee by assignment of the debt or obligation secured by it, as the mortgage is but an incident, a security, and, independent of the debt, has no assignable quality. Such an assignment is a mere nullity. *Cornish v. Woolverton*, 32 M 456, 475, 81 P 4.

Sale and Mortgage Distinguished

Where property is sold under a contract that title shall remain in the seller until the purchase price is paid, the seller does not have a mortgage or lien upon the property within the attachment statute. *State ex. rel. Malin-Yates Co. v. Justice of Peace Court*, 51 M 133, 139, 149 P 709.

References

Cited or applied as section 5731, Revised Codes, in *Thomas v. Thomas*, 44 M 102, 110, 119 P 283; *Malvaney v. Yager et al.*, 101 M 331, 341, 54 P 2d 135; *Federal Land Bank of Spokane v. Green*, 108 M 56, 64, 90 P 2d 489.

Collateral References

Mortgages—1.
59 C.J.S. *Mortgages* § 1.
36 Am. Jur. 690, *Mortgages*, § 2.

52-102. (8247) Property adversely held may be mortgaged. A mortgage may be created upon property held adversely to the mortgagor.

History: En. Sec. 3811, Civ. C. 1895; re-en. Sec. 5732, Rev. C. 1907; re-en. Sec. 8247, R. C. M. 1921. Cal. Civ. C. Sec. 2921. Field Civ. C. Sec. 1614.

Collateral References

Mortgages—12.
59 C.J.S. *Mortgages* § 75.

52-103. (8248) Lien of a mortgage—when special. The lien of a mortgage is special, unless otherwise expressly agreed, and is independent of possession.

History: En. Sec. 3812, Civ. C. 1895; re-en. Sec. 5733, Rev. C. 1907; re-en. Sec. 8248, R. C. M. 1921. Cal. Civ. C. Sec. 2923. Field Civ. C. Sec. 1609.

Code, in *Swain v. McMillan*, 30 M 433, 439, 76 P 943.

Collateral References

Mortgages—145.
59 C.J.S. *Mortgages* § 208.

References

Cited or applied as section 3812, Civil

52-104. (8249) Transfer of interest—when mortgage, when pledge. Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is deemed a pledge.

History: En. Sec. 3813, Civ. C. 1895; re-en. Sec. 5734, Rev. C. 1907; re-en. Sec. 8249, R. C. M. 1921. Cal. Civ. C. Sec. 2924. Based on Field Civ. C. Sec. 1610.

Operation and Effect

A deed, absolute on its face but given as security for a debt, is in fact a mortgage. *Isom v. Larson*, 78 M 395, 399, 255 P 1049.

52-105. (8250) Transfer made subject to defeasance may be proved. The fact that a transfer was made subject to defeasance on a condition, may, for the purpose of showing such transfer to be a mortgage, be

proved (except as against a subsequent purchaser or encumbrancer for value and without notice), though the fact does not appear by the terms of the instrument.

History: En. Sec. 3814, Civ. C. 1895; re-en. Sec. 5735, Rev. C. 1907; re-en. Sec. 8250, R. C. M. 1921. Cal. Civ. C. Sec. 2925. Based on Field Civ. C. Sec. 1612.

Collateral References

Mortgages \hookrightarrow 37(2).
59 C.J.S. Mortgages § 50.

52-106. (8251) Mortgage—on what a lien. A mortgage is a lien upon everything that would pass by a grant of the property.

History: En. Sec. 3815, Civ. C. 1895; re-en. Sec. 5736, Rev. C. 1907; re-en. Sec. 8251, R. C. M. 1921. Cal. Civ. C. Sec. 2926. Based on Field Civ. C. Sec. 1617.

or by implication, that the mortgaged property may be sold to satisfy his debt. *Thomas v. Thomas*, 44 M 102, 110, 119 P 283.

Applies to Both Real and Chattel Mortgages

This section applies to both real estate and chattel mortgages. *Demers v. Graham*, 36 M 402, 408, 93 P 268. See also *State ex rel. Continental S. Co., v. Tullock*, 68 M 268, 276, 217 P 348.

Increase

A chattel mortgage upon cows, in which no mention was made of their increase, did not cover their calves, in gestation at the time of the execution of the mortgage, but born prior to foreclosure. *Demers v. Graham*, 36 M 402, 408, 93 P 268.

Mortgagor Contracts That Property May Be Sold to Satisfy Debt

A mortgagor contracts, either expressly

References

Cited or applied as section 3815, Civil Code, in *Bennett Bros. Co. v. Fitchett*, 24 M 457, 467, 62 P 780; *Samuell v. Moore Mercantile Co. et al.*, 62 M 232, 236, 204 P 376; *Morton v. Union Central Life Ins. Co.*, 80 M 593, 613, 261 P 278; *Barth v. Ely*, 85 M 310, 317, 278 P 1002.

Collateral References

Mortgages \hookrightarrow 126.
59 C.J.S. Mortgages § 181.
10 Am. Jur. 733, *Chattel Mortgages*, §§ 24 et seq.; 36 Am. Jur. 706, *Mortgages*, §§ 32 et seq.

52-107. (8252) Mortgage does not entitle mortgagee to possession. A mortgage does not entitle the mortgagee to the possession of the property, unless authorized by the express terms of the mortgage; but after the execution of the mortgage, the mortgagor may agree to such change of possession without a new consideration.

History: En. Sec. 3816, Civ. C. 1895; re-en. Sec. 5737, Rev. C. 1907; re-en. Sec. 8252, R. C. M. 1921. Cal. Civ. C. Sec. 2927. Based on Field Civ. C. Sec. 1620.

Contract for Possession Upon Condition

Held, under the rules prescribed by the codes for the interpretation of contracts, that where the parties to a real estate mortgage had contracted that upon the mortgagor's default the mortgagee could at his option declare the entire indebtedness due and payable without notice; that he could foreclose by judicial proceedings or sell the premises according to law, and should be entitled to immediate possession and receive the rents, issues and profits thereof, he was entitled to possession upon condition broken without foreclosure and sale. *Union Cent. Life Ins. Co. v. Jensen*, 74 M 70, 75, 78, 237 P 518.

A mortgagor of real property may by the terms of the mortgage grant to the

mortgagee the right to possession upon the happening of a contingency, and after possession has been so obtained it may be held until the debt is paid. *United States Bldg. etc. Assn. v. Stevens*, 93 M 11, 15, 17 P 2d 62.

Under authority of this section, the parties to a real estate mortgage may incorporate therein a stipulation for immediate possession by the mortgagee in case of default by the mortgagor to make payment of interest, taxes, etc., promptly, notwithstanding section 93-5841, provides that the purchaser at a foreclosure sale is not entitled to possession during the period of redemption if the mortgagor personally occupies the premises as a home for himself and family. *Kelly v. Roberts et al.*, 93 M 106, 113, 17 P 2d 65.

No Right to Possession Even on Default

In the absence of an express agreement between the parties to a mortgage upon

land that upon default on the part of the mortgagor the mortgagee shall have the right to enter and take possession, such right does not exist. *Sharp Bros., Inc. v. Bartlett*, 76 M 415, 416, 248 P 199.

Operation and Effect

In the absence of an express stipulation in a farm mortgage entitling the mortgagee to the possession of the mortgaged property, either before or after default on the part of the mortgagor, the mortgagee was not entitled to possession until sale to him on foreclosure proceedings, and therefore not entitled to rents prior thereto, a notice to the tenant of the mortgagor that the mortgagee claimed the rent having been ineffectual as a means of acquiring an interest in the crop. *Long v. W. P. Devereux Co. et al.*, 87 M 198, 205, 286 P 402.

Quaere: May Mortgagee Intervene in Ejectment?

Quaere: In an action in ejectment, may plaintiff's mortgagee intervene, in view of this section and section 93-6219, providing that a mortgagee is not entitled to the possession of the property mortgaged unless possession is specially authorized by its terms, and that a mortgage of real property shall not be deemed a conveyance? *Stack v. Coyle*, 59 M 444, 450, 197 P 747.

When Mortgagee Entitled to Maintain Action

A chattel mortgagee, entitled to the

52-108. (8253) Mortgage not a personal obligation. A mortgage does not bind the mortgagor personally to perform the act for the performance of which it is a security, unless there is an express covenant therein to that effect.

History: En. Sec. 3817, Civ. C. 1895; re-en. Sec. 5738, Rev. C. 1907; re-en. Sec. 8253, R. C. M. 1921. Cal. Civ. C. Sec. 2928.

Operation and Effect

In the instant case the note is made a part of the mortgage, and thereby the mortgagors did expressly covenant to pay the mortgage debt. But aside from this consideration, this section must be read in connection with section 93-6001, which expressly authorizes a deficiency judgment in the event the proceeds from the sale of the mortgaged property are insufficient to pay the debts and costs. In other words, although the mortgagor does not assume a primary personal liability, he is

immediate possession of personal property under the terms of the mortgage when he considers it essential to the security of the payment of the debt secured, has a sufficient interest or right which will entitle him to maintain an action in conversion or claim and delivery and will not be considered a trespasser, wrongdoer or stranger as against the one in possession of the property. *Walker v. Johnson*, 108 M 398, 405, 91 P 2d 406.

When Mortgagee May Take Possession Under Mortgage

Under a clause in a chattel mortgage entitling the mortgagee to take immediate possession of the chattels mortgaged if such action be essential to the security of the payment of the debt secured, the fact that he finds the property in the possession of a third person under a personal claim of right is alone sufficient to warrant taking immediate possession. *Walker v. Johnson*, 108 M 398, 405, 91 P 2d 406.

References

Cited or applied as section 3816, Civil Code, in *Demers v. Graham*, 36 M 402, 408, 93 P 268; *Samuell v. Moore Mercantile Co. et al.*, 62 M 232, 236, 204 P 376; *Morton v. Union Central Life Ins. Co.*, 80 M 593, 608, 261 P 278.

Collateral References

Mortgages—187.
59 C.J.S. Mortgages § 300.

held to a contingent liability, the contingency being the failure of the mortgaged property to sell for a sum sufficient to discharge the debt and costs. *Kinyon Inv. Co. v. Belmont State Bank*, 69 M 282, 288, 221 P 286.

References

Cited or applied as section 3817, Civil Code, in *Mueller v. Renkes*, 31 M 100, 103, 77 P 512.

Collateral References

Mortgages—208.
59 C.J.S. Mortgages § 341.
36 Am. Jur. 718, Mortgages, §§ 59, 60.

52-109. (8254) Waste. No person whose interest is subject to the lien of a mortgage may do any act which will substantially impair the mortgagee's security.

History: En. Sec. 3818, Civ. C. 1895; re-en. Sec. 5739, Rev. C. 1907; re-en. Sec. 8254, R. C. M. 1921. Cal. Civ. C. Sec. 2929.

Operation and Effect

When a real estate mortgage is given it constitutes a pledge of all that then is part of the realty, and while the mortgagor has the right to use the premises, he has no right to remove a building there-

from or do any other act which impairs the mortgagee's security; if he does remove it without the knowledge or consent of the mortgagee, the mortgage lien thereon is not extinguished. *Mills v. Pope et al*, 90 M 569, 573, 4 P 2d 485.

Collateral References

Mortgages ⇨ 205.

59 C.J.S. Mortgages § 334.

52-110. (8255) Subsequently acquired title inures to mortgagee. Title acquired by the mortgagor subsequent to the execution of the mortgage inures to the mortgagee as security for the debt, in like manner as if acquired before the execution.

History: En. Sec. 3819, Civ. C. 1895; re-en. Sec. 5740, Rev. C. 1907; re-en. Sec. 8255, R. C. M. 1921. Cal. Civ. C. Sec. 2930.

Estoppel Basis of Doctrine

The doctrine of the passage of after-acquired title to mortgaged property as security for the debt, embodied in this section is based on estoppel. *Midland Realty Company v. Halverson*, 101 M 49, 53, 52 P 2d 159.

Operation and Effect

A mortgage upon a desert land entry given by the entryman as security for an antecedent debt before final proof made or patent issued is enforceable against the mortgagor after patent issues to him, the title thus subsequently acquired by the mortgagor inuring to the benefit of the mortgagee, under this section, and the mortgagor being estopped to deny the validity of the mortgage. *Selway v. Daut et al*, 67 M 262, 266, 215 P 646.

The rule declared by this section, that title acquired by the mortgagor subsequent to the execution of the mortgage inures to the mortgagee as security for the debt, applies to land, title to which at the time the mortgage was given was in the federal government and was subsequently acquired therefrom under the homestead laws. *Lohman State Bank v. Grim*, 69 M 444, 447, 222 P 1052.

Where defendant in foreclosure action had executed a promissory note secured by a mortgage upon a desert land entry which, after final certificate had been issued to him, was canceled, whereupon he entered the land as a homestead and received patent, the lien of the mortgage on the desert entry attached to the homestead entry and defendant was estopped under this section to claim the benefit of section 2296, U. S. Revised Statutes, providing that lands acquired under the homestead

laws shall not in any event become liable to the satisfaction of debts contracted prior to issuance of patent. *Stockmen's Nat. Bank v. Sutherland*, 71 M 457, 459, 230 P 369.

Where an entryman of desert land conveyed it to another before patent who mortgaged it and thereafter the entry was canceled for fraud, whereupon the entryman filed upon the same land under the Enlarged Homestead Act and secured patent, the title thus acquired by him did not inure to the benefit of the mortgagee of his grantee of the desert land, the provisions of sections 67-708 and 67-709, and this section, relating to after-acquired title, having no application under such circumstances, since, to hold otherwise, would be in effect to nullify the act of congress prohibiting the alienation of public land prior to patent. *Phoenix Mut. Life Ins. Co. v. Brainard*, 82 M 39, 50, 265 P 10.

The rule declared by this section that title acquired by the mortgagor after execution of the mortgage inures to the benefit of the mortgagee is based on the doctrine of estoppel. *Grasswick v. Miller*, 82 M 364, 375, 377, 267 P 299.

One who transfers his interest in land by deed absolute or in trust to secure a debt and thereafter agrees to the execution of a mortgage thereon by the grantee is estopped by his deed from later claiming an interest in the property adverse to the mortgagee, and any title he may thereafter acquire inures to the benefit of the mortgagee as security for the payment of the grantor's debts assumed by the grantee. *First State Bank v. Mussigbrod et al*, 83 M 68, 85, 271 P 695.

Collateral References

Mortgages ⇨ 131.

59 C.J.S. Mortgages § 185.

10 Am. Jur. 736, Chattel Mortgages, §§ 29-34; 36 Am. Jur. 707, Mortgages, § 33.

52-111. (8256) Foreclosure. A mortgagee may foreclose the right of redemption of the mortgagor in the manner prescribed by the Code of Civil Procedure (Title 93).

History: En. Sec. 3820, Civ. C. 1895; re-en. Sec. 5741, Rev. C. 1907; re-en. Sec. 8256, R. C. M. 1921. Cal. Civ. C. Sec. 2931.

Cross-References

Foreclosure against estate, sec. 91-2711.
Foreclosure of mortgages, secs. 93-6001 to 93-6009.

Collateral References

Mortgages—330, 381.
59 C.J.S. Mortgages §§ 544, 604.
37 Am. Jur. 34, Mortgages, §§ 532 et seq.

52-112. (8257) Power of sale. A power of sale may be conferred by a mortgage upon the mortgagee or any other person, to be exercised after a breach of the obligation for which the mortgage is a security.

History: En. Sec. 3821, Civ. C. 1895; re-en. Sec. 5742, Rev. C. 1907; re-en. Sec. 8257, R. C. M. 1921. Cal. Civ. C. Sec. 2932. Field Civ. C. Sec. 1615.

Operation and Effect

An attorney in fact, under a general power of attorney to sell, convey, and mortgage the grantor's property, may secure the payment of his grantor's debt by executing a trust deed conveying the grantor's property, and authorizing the trustee or his successor in trust to sell the same in case of non-payment of the indebtedness. *Muth v. Goddard*, 28 M 237, 252, 72 P 621.

A mortgagor contracts, either expressly or by implication, that the mortgaged property may be sold to satisfy his debt. *Thomas v. Thomas*, 44 M 102, 110, 119 P 283.

A mortgagee may execute a power of sale contained in a chattel mortgage, and it is not necessary for him to call upon the sheriff to make the sale, nor to proceed by an action to foreclose. *Kinsman v. Stanhope*, 50 M 41, 48, 144 P 1083.

References

First National Corp. v. Ferrine et al., 99 M 454, 43 P 2d 1073.

Collateral References

Mortgages—333.
59 C.J.S. Mortgages § 544.
37 Am. Jur. 106, Mortgages, §§ 647 et seq.

What constitutes a "public sale." 4 ALR 2d 575.

52-113. (8258) Power of attorney to execute. A power of attorney to execute a mortgage must be in writing, subscribed, acknowledged, or proved, certified, and recorded in like manner as powers of attorney for grants of real property.

History: En. Sec. 3822, Civ. C. 1895; re-en. Sec. 5743, Rev. C. 1907; re-en. Sec. 8258, R. C. M. 1921. Cal. Civ. C. Sec. 2933.

Collateral References

Principal and Agent—10(2).
2 C.J.S. Agency § 27.

52-114. (8259) Assignment of mortgage—recording—notice—address of assignee prerequisite to recording. An assignment of a real estate mortgage may be recorded in like manner as a real estate mortgage and an assignment of a chattel mortgage may be filed in like manner as a chattel mortgage and the record thereof shall operate as due and legal notice to the mortgagor and all persons subsequently deriving title to the mortgage from the assignor as well as to all other persons including subsequent purchasers, encumbrancers, mortgagees or other lien holders.

Any such assignment shall contain the assignee's post office address at his place of residence, and shall not be entitled to be recorded or filed unless it contains such post office address.

History: En. Sec. 3823, Civ. C. 1895; re-en. Sec. 5744, Rev. C. 1907; re-en. Sec. 8259, R. C. M. 1921; amd. Sec. 1, Ch. 14, L. 1925; amd. Sec. 1, Ch. 159, L. 1935. Cal. Civ. C. Sec. 2934.

Operation and Effect

The record of the assignment of a mortgage is notice to a purchaser from the mortgagor, so that payments by him to the assignor are at his own risk, especially in the absence of any showing that when

the payments were made the assignor was in possession of the note which the mortgage secured. *Cornish v. Woolverton*, 32 M 456, 476, 81 P 4.

Collateral References

Mortgages⇒219.
59 C.J.S. Mortgages § 344.

52-115. (8261) Mortgage passes by assignment of debt. The assignment of a debt secured by mortgage carries with it the security.

History: En. Sec. 3825, Civ. C. 1895; re-en. Sec. 5746, Rev. C. 1907; re-en. Sec. 8261, R. C. M. 1921. Cal. Civ. C. Sec. 2936.

Assignee's Right to Assert Tolling of Statute of Limitations

Where assignee acquired title after the mortgagors, who pleaded the statute of limitations in his foreclosure suit, had in writing acknowledged the debt, he had same right to assert that such acknowledgment took the case out of the statute as assignor would in suit by himself. *Breese v. O'Brien*, 102 M 547, 557, 59 P 2d 65.

Operation and Effect

Where there is no written evidence of the debt or obligation, the mortgage is evidence both of the debt and the security for its payment. Nevertheless the debt is the principal thing, and the title to the mortgage must follow an assignment of it. *Cornish v. Woolverton*, 32 M 456, 476, 81 P 4.

A mortgage given to secure the payment of a note is but an incident, and passes to the assignee of the note. *Cornish v. Woolverton*, 32 M 456, 471, 81 P 4; *Northwest-*

ern Improvement Co. v. Rhoades, 52 M 428, 434, 158 P 832.

A real estate mortgage is a conveyance of a chattel interest only, and title to it passes to an assignee by the assignment of the debt or obligation secured by it. *First Nat. Bank of Saco v. Vagg et al.*, 65 M 34, 39, 212 P 509.

Id. While an assignment of a note secured by mortgage carries with it the mortgage, an assignment of the mortgage alone is a nullity and confers no right whatever upon the assignee.

The assignment of a debt secured by mortgage carries with it the security (this section); hence acquisition of a note by indorsement has the effect of transferring the mortgage securing it. *Ingebrightsen et al. v. Hatcher et al.*, 87 M 482, 485, 288 P 1023.

References

Sommer v. Wigen, 103 M 327, 332, 62 P 2d 333.

Collateral References

Mortgages⇒235.
59 C.J.S. Mortgages § 356.

52-116. Recording of subordination or waiver agreements—real estate—personal property. That a subordination agreement or a waiver in favor of subsequent purchasers, encumbrancers or mortgagees as regards any real estate mortgage of record of the property therein included may be recorded in like manner as a real estate mortgage, and a subordination agreement or a waiver in favor of subsequent purchasers, encumbrancers or mortgagees as regards any chattel mortgage on file, or the personal property therein described, may be filed in like manner as a chattel mortgage, and such record or such filing as the case may be, shall operate as due and legal notice to the mortgagor and the mortgagee and to all other interested persons. Any such subordination agreement or waiver shall be valid and binding so far as the mortgage therein referred to or the property covered by such mortgage is concerned, when executed by the record holder of the mortgage involved.

History: En. Sec. 1, Ch. 126, L. 1937.

NOTE.—An identical statute was enacted by Ch. 191, Laws 1935, appeared as

Sec. 8261.1, R. C. M. 1935 and was repealed by Sec. 4, Ch. 50, Laws 1947.

CHAPTER 2

MORTGAGES OF REAL PROPERTY

- Section 52-201. What real property may be mortgaged—debts secured—future advances—lien.
- 52-202. Form of mortgage.
- 52-203. Writing required for creation, extension or renewal of mortgages.
- 52-204. Defeasance, to affect grant absolute on its face, must be recorded.
- 52-205. May be recorded.
- 52-206. Period of lien of mortgage—renewal.
- 52-207. Satisfaction of mortgage—marginal entry.
- 52-208. Same—certificate of payment or discharge.
- 52-209. Record of satisfaction.
- 52-210. Satisfaction of mortgage.
- 52-211. Repealing clause.
- 52-212. Recordation of mortgages, deeds of trust and assignments for benefit of creditors required—affidavit of good faith and receipt for copy—notice—indexing and recording.
- 52-213. Execution of satisfaction of mortgage under special act.

52-201. (8262) What real property may be mortgaged—debts secured—future advances—lien. Any interest in real property which is capable of being transferred may be mortgaged. Such property or interest may be mortgaged to secure existing debts, to secure debts created simultaneously with the execution of the mortgage, and to secure advances then in contemplation but to be made in the future. The total amount of all future advances contemplated and to be subject to mortgage protection must be stated in the mortgage, provided the mortgagee may reserve the right, at the mortgagee's option, to refuse to make all or any part thereof. The lien for said stated amount of said future advances shall have priority to the same extent as if the amount thereof had been actually advanced by the mortgagee to the mortgagor at the time of the execution of the mortgage. The mortgagee shall, upon demand of the mortgagor or a creditor, furnish a statement of all such advances and amounts paid on the principal sum secured, provided such statement shall not impair or affect the lien created for all advances. Upon receipt of such statement, or at any other time following the execution and delivery of the mortgage, the mortgagor may deliver written notice, duly acknowledged, to the mortgagee plainly stating that the mortgagor does not desire to request or apply for any future advances if none have been allowed, or for any further advances if additional advances have in fact been theretofore allowed under the mortgage, clearly identifying the mortgage by reference to its date, the parties thereto and the principal amount of the original indebtedness and the limit placed on contemplated future advances, if allowed. Upon the recording of such written notice by the mortgagor in the county and counties where the mortgage is recorded, the lien of the mortgage shall continue to have priority, but only for the aggregate amount of the indebtedness then existing, including any advances theretofore made, interest due and other charges as evidenced by the original loan-contract, and indebtedness thereafter accumulating on such basis, exclusive of any other future advances originally contemplated. Any lien entitled to actual priority over the lien of mortgage by force of any express provision of the laws of this state shall continue to have priority to the extent prescribed by law.

History: En. Sec. 3840, Civ. C. 1895; re-en. Sec. 5747, Rev. C. 1907; re-en. Sec. 8262, R. C. M. 1921; am'd. Sec. 1, Ch. 150, L. 1949. Cal. Civ. C. Sec. 2947.

Cross-References

Actions to redeem, time for commencement, sec. 93-2616.

Assignment of mortgage, transfer of insurance, secs. 91-3101 to 91-3109.

Corporate property, procedure, secs. 15-901 to 15-910.

Dower rights, sec. 22-102.

Foreclosure against estate, sec. 91-2711.

Foreclosure of mortgages, secs. 93-6001 to 93-6009.

Injunction to prevent injury to property, sec. 93-6220.

Mechanics' liens and mortgages, priority, secs. 45-504, 45-506.

Mortgage does not constitute conveyance, sec. 93-6219.

Priority of mortgage for price, sec. 45-202.

Taxation, separate assessment of mortgages of real property, sec. 84-3808.

Operation and Effect

A desert land entry is a distinct interest in real estate, a property right capable of transfer; and there is no prohibition against transfer. *Selway v. Daut et al.*, 67 M 262, 268, 215 P 646.

References

Grasswick v. Miller, 82 M 364, 375, 267 P 299; *Standard Oil Co. v. Idaho Community Oil Co.*, 98 M 131, 37 P 2d 660.

Collateral References

Mortgages 42.

59 C.J.S. Mortgages § 71.

36 Am. Jur. 706, Mortgages, § 32.

52-202. (8263) Form of mortgage. A mortgage of real property may be made in substantially the following form:

"This mortgage, made the day of, in the year, by A B, of, mortgagor, to C D, of, mortgagee, witnesseth:

"That the mortgagor mortgages to the mortgagee (here describe the property), as security for the payment to him of dollars, on (or before) the day of, in the year, with interest thereon (or as security for the payment of an obligation, describing it, etc.).

A. B."

History: En. Sec. 3841, Civ. C. 1895; re-en. Sec. 5748, Rev. C. 1907; re-en. Sec. 8263, R. C. M. 1921. Cal. Civ. C. Sec. 2948.

References

Standard Oil Co. v. Idaho Community Oil Co., 98 M 131, 37 P 2d 660.

Collateral References

Mortgages 42.

59 C.J.S. Mortgages § 100.

Joining in subsequent instrument as ratification of or estoppel as to prior ineffective mortgage, deed of trust or similar encumbrance. 7 ALR 2d 333.

Effect of supplying description of property conveyed after manual delivery of mortgage. 11 ALR 2d 1372.

52-203. (8264) Writing required for creation, extension or renewal of mortgages. A mortgage of real property can be created, renewed, or extended, only by writing, with the formalities required in the case of a grant of real property.

History: En. Sec. 3842, Civ. C. 1895; re-en. Sec. 5749, Rev. C. 1907; re-en. Sec. 8264, R. C. M. 1921. Cal. Civ. C. Sec. 2922. Field Civ. C. Sec. 1623.

Affidavit of Good Faith Not Required

This section, providing for the extension of real estate mortgages by written agreement, not requiring an affidavit by the mortgagee that the extension was not made with the intent to hinder or defraud creditors, its absence did not ren-

der the agreement invalid. *Register Life Ins. Co. v. Kenniston*, 99 M 191, 198, 43 P 2d 251.

Agreement to Extend Should Be Recorded

This section, providing, inter alia, for the extension of a mortgage with the formalities required in the case of a grant of real property, contemplates the making of a contract assented to by both parties, and in order that notice of the extension

may be given to subsequent purchasers and mortgagees, the instrument must be filed with the county clerk for record. *O. M. Corwin Co. v. Brainard et al.*, 80 M 318, 322 et seq., 260 P 706.

Id. Where by agreement between the parties to a real estate mortgage, before maturity of the debt to secure which it had been given and before rights of the third parties had intervened, the payment of the debt as well as the mortgage was extended for several years, under this section, the instrument being placed of record, a mortgage given on the property after filing of the extension agreement was inferior to the former. See also dissenting opinion in *Reed v. Richardson et al.*, 94 M 34, 43, 20 P 2d 1054.

A real estate mortgage extension agreement executed under this section before maturity of the last of a series of mortgage notes, was not recorded until after the period of extension had expired. Two years prior thereto the property had been conveyed to another, subject to the mortgage, the deed, however, not being recorded until some six weeks after recordation of the agreement. Held, in an action for foreclosure of the mortgage that the extension agreement, having been valid and first placed of record, took priority over the deed, under section 73-202, even assuming that the vendee was a subsequent purchaser in good faith and for a valuable consideration. *Hastings et al. v. Wise et al.*, 91 M 430, 8 P 2d 636.

As Between Parties an Unrecorded Extension of Mortgage Binding

An agreement extending the life of a mortgage made either under this section or section 52-206, is binding between the parties though not recorded. *Aitken v. Lane*, 108 M 368, 374, 92 P 2d 628.

Bona Fide Purchaser Without Notice of Extension

In a mortgage foreclosure suit, defendant, who six months after the lien of the mortgage had expired, had purchased the property from the mortgagors by quitclaim deed and recorded it at once, in ignorance of an extension agreement between the assignee of the mortgage and the mortgagors, never recorded, held, that defendant was a bona fide purchaser without notice and entitled to prevail. *Aitken v. Lane*, 108 M 368, 377, 92 P 2d 628.

Extension of Mortgage by Agreement of Parties Not Invalid

A written agreement between mortgagor and mortgagee for the extension of a real estate mortgage under this section, the effect of which was to extend its life for more than sixteen years after its original maturity date, did not render it invalid

as against a creditor of the mortgagor holding a judgment lien acquired before the date of the agreement, the contention based on the theory that this section and section 52-206 being in *pari materia*, the provision of the latter that the life of a mortgage cannot be extended for more than sixteen years applies to the former, not being tenable; while the provision of 52-206 that the right to make the extension may only be exercised within eight years following the maturity of the debt has in effect been incorporated within this section by construction, the time to which extension may run is unlimited in the absence of legislative declaration on the subject. *Register Life Ins. Co. v. Kenniston*, 99 M 191, 197, 43 P 2d 251.

Failure of Administrator to Plead Limitation, Constructive Fraud

The administrator of an insolvent estate is duty bound to plead the statute of limitations in a suit to foreclose a mortgage where the mortgagee failed to file a renewal affidavit under section 52-206, in the absence of an extension agreement under this section, and if he permits a decree of default to be entered without defending, his conduct is constructively fraudulent as against a general creditor, and failure of the creditor to demand that the administrator plead the statute is immaterial where demand would have been useless. *Missoula Trust & Savings Bank v. Boos*, 106 M 294, 300, 77 P 2d 385.

Mortgage Extension in a Conveyance

A real estate mortgage extension agreement executed as provided by this section, is a "conveyance" within the meaning of section 73-203. *Hastings et al. v. Wise et al.*, 91 M 430, 8 P 2d 636.

Mortgage May Be Renewed Where There is No Injury to Third Persons

The parties to a real estate mortgage may, under this section, renew or extend it within the eight-year period following the maturity of the debt secured, though the rights of subsequent mortgagees have attached in the meantime, if by such renewal or extension the latter are not injured. *Vitt v. Rogers et al.*, 81 M 120, 127 et seq., 262 P 164.

Where third persons are not affected thereby, a mortgagor of lands may, under this section, by agreement with the mortgagee executed as provided therein, in effect procure a renewal of the mortgage by an extension of the time of payment of the debt secured by it, irrespective of the provisions of section 52-206, relative to the filing of a renewal affidavit. *Hastings et al. v. Wise et al.*, 89 M 325, 339 et seq., 297 P 482.

Operation and Effect

This section has no application to a mortgage on real estate renewed by extension of the note which it secured in 1890. *Wilson v. Pickering*, 28 M 435, 439, 72 P 821.

Since the renewal or extension of a mortgage requires a writing as formal as one granting real property, no extension of the lien is effected by a mere payment on account of the debt secured, after the barring of the latter by the statute of limitations. *Berkin v. Healy*, 52 M 398, 402, 158 P 1020.

Status of Purchaser of Mortgaged Lands Prior to Expiration of Eight-Year Period After Maturity of Debt

One who by deed becomes the owner of all the right, title and interest in lands of the mortgagor, at any time before the expiration of the eight-year period following the maturity of the entire mortgage indebtedness (sec. 52-206), does not become the owner of the property free and clear of the mortgage lien upon expiration of that period, where no extension agreement under this section or affidavit of renewal under section 52-206 has been filed or recorded. *Hillsdale College v. Thompson et al.*, 99 M 400, 408, 44 P 2d 753.

Where Extension Agreement Not Bar to Foreclosure for Breach of Condition to Pay Taxes and Insurance

An agreement giving mortgagors additional time for payment, and to reduce

the interest rate as well as the principal in case mortgagors could refinance the mortgage by a loan, leaving it optional with mortgagees whether a new note and mortgage would be executed or the old one incorporating the new terms extended, did not prevent foreclosure on breach of the condition requiring payment of taxes and insurance, which was unaffected by the agreement, where mortgagees elected to extend the old one but mortgagors wouldn't sign the extension. *McIntosh v. Weaver*, 108 M 328, 332, 90 P 2d 169.

References

Cited or applied as section 5749, Revised Codes, in *Ringling v. Smith River Development Co.*, 48 M 467, 476, 138 P 1098; *Morrison v. Farmers' etc. State Bank*, 70 M 146, 152, 225 P 123; *Reed v. Richardson et al.*, 94 M 34, 43, 20 P 2d 1054; *First Nat. Bk. v. Gutensohn et al.*, 97 M 453, 461 et seq., 37 P 2d 555; *Humbird et al. v. Arnet et al.*, 99 M 499, 44 P 2d 756; *Frisbee v. Coburn et al.*, 101 M 58, 69, 52 P 2d 882; *Rieckhoff v. Woodhull et al.*, 106 M 22, 27, 75 P 2d 56; *Swingley v. Riechoff*, 112 M 59, 61, 112 P 2d 1075; *Hogevoll v. Hogevoll*, 117 M 528, 534, 162 P 2d 218.

Collateral References

Frauds, Statute of §63 (5); *Mortgages* §40.
37 C.J.S. *Frauds*, Statute of 118; 59 C.J.S. *Mortgages* § 99.

52-204. (8265) Defeasance, to affect grant absolute on its face, must be recorded. When a grant of real property purports to be an absolute conveyance, but is intended to be defeasible on the performance of certain conditions, such grant is not defeated or affected as against any person other than the grantee or his heirs or devisees, or persons having actual notice, unless an instrument of defeasance, duly executed and acknowledged, shall have been recorded in the office of the county recorder of the county where the property is situated.

History: En. Sec. 3843, Civ. C. 1895; re-en. Sec. 5750, Rev. C. 1907; re-en. Sec. 8265, R. C. M. 1921. Cal. Civ. C. Sec. 2950.

Conveyance to Mortgagee by Deed Estops Mortgagor from Questioning Title of Innocent Purchaser.

Where a deed absolute to real property is given by a mortgagor to the mortgagee, unaccompanied by an instrument of defeasance duly recorded, he, by making the mortgagee the ostensible owner in fee, in effect arms the grantee with a power of attorney to convey title and, on conveyance, is estopped from questioning the title of an innocent purchaser for value under this section. *Halko v. Anderson*, 108 M 588, 593, 93 P 2d 956.

Operation and Effect

The underlying principle of this rule is that the mortgagor, by making the mortgagee the ostensible owner in fee, arms him with power of attorney by which he can convey the title, and when he has made a conveyance to a purchaser for value without notice, the mortgagor is fully divested of his title, and is clearly estopped by the deed from questioning the purchaser's title. *Harrington v. Butte & Superior Copper Co.*, 52 M 263, 278, 157 P 181.

Protection Against Oral Understandings Accompanying Reconveyance

Defendants in a quiet title action claiming that when they redeeded the

lands back to the vendor upon their inability to meet the payments on the mortgages executed by them as purchasers, without accompanying instruments of defeasance, they had an oral understanding that they should remain in possession as tenants and have the first right to repurchase the property at some indefinite time, held, that such understanding did not amount to an interest in the real estate, and plaintiff, unaware of its existence became an innocent

purchaser for value entitled to protection under this section. *Halko v. Anderson*, 108 M 588, 593, 93 P 2d 956.

References

Cited or applied as section 5750, Revised Codes, in *Gibson v. Morris State Bank*, 49 M 60, 74, 140 P 76.

Collateral References

Mortgages 90.
59 C.J.S. Mortgages § 202.

52-205. (8266) May be recorded. Mortgages of real property may be acknowledged or proved, certified, and recorded in like manner and with like effect as grants thereof.

History: En. Sec. 3844, Civ. C. 1895; re-en. Sec. 5751, Rev. C. 1907; re-en. Sec. 8266, R. C. M. 1921. Cal. Civ. C. Sec. 2952.

Cross-References

Index of mortgages, sec. 16-2905.
Recording of mortgages, sec. 73-107.

References

Standard Oil Co. v. Idaho Community Oil Co., 98 M 131, 37 P 2d 660.

Collateral References

Mortgages 91.
59 C.J.S. Mortgages § 203.

52-206. (8267) Period of lien of mortgage—renewal. Every mortgage of real property made, acknowledged, and recorded, as provided by the laws of this state, shall be good as against all from the time it is so recorded until eight years after the maturity of the entire debt or obligation secured thereby and no longer, unless the mortgagee, his heirs, executors, administrators, representatives, or assigns shall, within sixty days after the expiration of said eight years, file in the office of the county clerk where said mortgage is recorded, an affidavit, setting forth the date of said mortgage, when and where recorded, the amount of the debt secured thereby, and the amount remaining unpaid, and that the said mortgage is not renewed for the purpose of hindering, delaying, or defrauding creditors of the mortgagor or owner of the land, and upon the filing of said affidavit, the said mortgage shall be valid against all persons for a further period of eight years.

History: En. Sec. 1, Ch. 27, L. 1913; re-en. Sec. 8267, R. C. M. 1921; amd. Sec. 1, Ch. 104, L. 1933.

As Between Parties an Unrecorded Extension of Mortgage Binding

An agreement extending the life of a mortgage made either under this section or section 52-203, is binding between the parties though not recorded. *Aitken v. Lane*, 108 M 368, 374, 92 P 2d 628.

As Between Parties Mortgage Good After Eight Years from Maturity of Note

As between the mortgagor of real property and the mortgagee, if the debt for which the mortgage is given be kept alive the mortgage is good even after the expiration of eight years from the maturity of the note or obligation. *Leffek v. Luedeman*, 95 M 457, 460 et seq., 27 P

2d 511; *Breese v. O'Brien*, 102 M 547, 552, 59 P 2d 65.

Bona Fide Purchaser Without Notice of Extension

In a mortgage foreclosure suit, defendant, who six months after the lien of the mortgage had expired, had purchased the property from the mortgagors by quitclaim deed and recorded it at once, in ignorance of an extension agreement between the assignee of the mortgage and the mortgagors, never recorded, held, that defendant was a bona fide purchaser without notice and entitled to prevail. *Aitken v. Lane*, 108 M 368, 377, 92 P 2d 628.

Constitutionality

If, by this section, it was intended to enable a mortgagee whose mortgage had been extinguished by lapse of time, to re-vitalize the security and impose a lien

upon property without the owner's consent, it to that extent deprives him of his property without due process of law, and is invalid. *Berkin v. Healy*, 52 M 398, 404, 158 P 1020.

Held, that this section, construed as a statute of limitations, is not open to attack on constitutional grounds. *Morrison v. Farmers' etc. State Bank*, 70 M 146, 149, 225 P 123.

Effect of 1933 Amendment

The 1933 amendment to this section cannot constitutionally be held to apply to a mortgage executed during the effective period of the prior statute. *Hogevoll v. Hogevoll*, 117 M 528, 535, 162 P 2d 218.

Failure of Administrator to Plead Limitation, Constructive Fraud

The administrator of an insolvent estate is duty bound to plead the statute of limitations in a suit to foreclose a mortgage where the mortgagee failed to file a renewal affidavit under this section, in the absence of an extension agreement under section 52-203, and if he permits a decree of default to be entered without defending, his conduct is constructively fraudulent as against a general creditor, and failure of the creditor to demand that the administrator plead the statute is immaterial where demand would have been useless. *Missoula Trust & Savings Bank v. Boos*, 106 M 294, 300, 77 P 2d 385.

Mortgage Cannot Exist Beyond Life of Debt

A mortgage cannot exist beyond the life of the debt or obligation it was given to secure. *Rieckhoff v. Woodhull et al.*, 106 M 22, 29, 75 P 2d 56.

Mortgage Good Between Parties Until Debt Barred

As between the original parties the mortgage itself remains good and valid without filing an affidavit of renewal so long as the debt itself is not barred by the statute of limitations. *Montana Valley Land Co. v. Bestul*, 126 M 426, 253 P 2d 325, 326.

Not Exclusive Method of Extension

Held, that the method prescribed by this section for extending the life of a real estate mortgage by the filing of an affidavit by the mortgagee is not exclusive, but that under section 52-203, an extension may be effected by agreement between the parties to the mortgage by pursuing the formalities required in the case of a grant of real property. *O. M. Corwin Co. v. Brainard et al.*, 80 M 318,

322 et seq., 260 P 706; *Register Life Ins. Co. v. Kenniston*, 99 M 191, 43 P 2d 251.

Where during the life of a properly recorded real estate mortgage as fixed by this section, parties took a second mortgage on the premises, and thereafter and before the expiration of the first its life (meaning thereby the maturity of the debt) was extended by an agreement in writing between the parties thereto for a period of two years as they properly could do under section 52-203, the extension being also placed of record, the second mortgagees were then in no worse position than they were when they took their mortgage, hence were not injured by the extension and therefore their claim made in a foreclosure suit brought by the holder of the first mortgage within the two-year extension period that plaintiff's lien had become inferior to theirs by his failure to file the renewal affidavit required by this section, held without merit. *Vitt v. Rogers et al.*, 81 M 120, 126 et seq., 262 P 164.

Where third persons are not affected thereby, a mortgagor of lands may, under section 52-203, by agreement with the mortgagee executed as provided therein, in effect procure a renewal of the mortgage by an extension of the time of payment of the debt secured by it, irrespective of the provisions of this section relative to the filing of a renewal affidavit. *Hastings et al. v. Wise et al.*, 89 M 325, 335 et seq., 297 P 482.

A written agreement between mortgagor and mortgagee for the extension of a real estate mortgage under section 52-203, the effect of which was to extend its life for more than sixteen years after its original maturity date, did not render it invalid as against a creditor of the mortgagor holding a judgment lien acquired before the date of the agreement, the contention based on the theory that section 52-203 and this section being in *pari materia*, the provision of the latter that the life of a mortgage cannot be extended for more than sixteen years applies to the former, not being tenable; while the provision of this section that the right to make the extension may only be exercised within eight years following the maturity of the debt has in effect been incorporated within 52-203 by construction, the time to which extension may run is unlimited in the absence of legislative declaration on the subject. *Register Life Ins. Co. v. Kenniston*, 99 M 191, 196, 43 P 2d 251.

Under this heading see also *Frisbee v. Coburn et al.*, 101 M 58, 69, 52 P 2d 882.

Operation and Effect

This section, when read in connection with the prior law relative to recording mortgages and harmonized therewith,

merely limits the duration of record notice of the lien of recorded mortgages, and, though "subsequent purchasers" is not qualified by "in good faith," the failure of a mortgagee to file the required affidavit did not affect the lien as against a subsequent purchaser, who purchased with actual notice of the mortgage and during the time that the record of the mortgage was constructive notice. *Cullen v. Reed*, 220 Fed 356, 357.

This section, declaring the life of a mortgage on real property at an end at the close of eight years after maturity of the entire debt secured thereby, unless the mortgagee or his successors or assigns shall within sixty days after the expiration of the eight years file the affidavit of renewal therein described, contemplates action by the mortgagee alone, and after he shall have extended the life of his mortgage lien by taking the steps prescribed, he may foreclose the mortgage at his pleasure; as between him and the mortgagor, if the debt be kept alive, the mortgage is good even after the expiration of eight years from the maturity of the debt. *O. M. Corwin Co. v. Brainard et al.*, 80 M 318, 322 et seq., 260 P 706.

The purpose of the legislature in enacting this section, providing that a real estate mortgage shall be good from the time it is recorded until eight years after maturity of the debt secured by it, and no longer, unless the mortgagee or his successors in interest shall within sixty days after the expiration of the eight years, file a renewal affidavit, in which event the mortgage shall be good against all persons for another period of eight years, was definitely to limit the life of a mortgage, unless extended, to eight years from the maturity of the debt (except as between the parties themselves); that the remedy therein provided may be invoked by the mortgagee or his successors only and, if invoked, the mortgagee may foreclose at any time during the second eight-year period, and that any implication to the contrary in *Morrison v. Traders' & Farmers' Bank*, 70 M 146, must be overruled. *Vitt v. Rogers et al.*, 81 M 120, 126 et seq., 262 P 164.

Where a mortgagee fails to file the renewal affidavit required by this section within sixty days after the expiration of eight years from the date of maturity of the obligation secured thereby, the land is freed from the burden of the mortgage debt. *Pereira v. Wulf et al.*, 83 M 343, 346, 272 P 532.

Unless the affidavit of renewal of a recorded real estate mortgage is filed, within sixty days after maturity of the debt as security for which it was given, by the mortgagee, his heirs, representatives or assigns, as required by this sec-

tion, it becomes unenforceable after the lapse of eight years from the maturity of the debt as against the creditors of the mortgagor or subsequent purchasers or encumbrancers. *Skillen v. Harris*, 85 M 73, 75, 277 P 803.

As between the mortgagor and mortgagee the mortgage lien is good so long as the debt is not barred by the statute of limitations, irrespective of whether or not an affidavit extending the lien of the mortgage was filed as provided in this section. *Turner v. Powell et al.*, 85 M 241, 245, 278 P 512.

Where a short time prior to the date of maturity of a debt secured by a mortgage on lands the owner of the mortgage notes by agreement with the mortgagor extended the maturity of the debt for ten years, the agreement not, however, being placed of record until several months after the maturity of the debt as extended, the contention of the then owner of the lands who purchased subject to the mortgage, in an action to foreclose the mortgage praying for the appointment of a receiver of the rents and profits, that no affidavit of renewal of the mortgage having been filed as provided by this section, the mortgage was barred and the court in making the appointment abused its discretion, held without merit, the purchaser having had actual notice of the agreement extending payment of the mortgage debt at the time of purchase. *Hastings et al., v. Wise et al.*, 89 M 325, 335 et seq., 297 P 482.

Held, that this section, limiting the validity of a mortgage, unless renewed, to eight years after maturity of the debt which it was given to secure, affects merely the lien of the mortgage and does not extend the life of the debt, and to that extent amends section 45-306, which provides that a lien is extinguished by the lapse of time within which an action can be brought upon the principal obligation; hence where the debt dies, the mortgage dies with it. *Jones v. Hall et al.*, 90 M 69, 71 et seq., 300 P 232.

Defendant in an action to foreclose a first mortgage on real property held by him under a quitclaim deed from the purchaser on foreclosure of the second mortgage, in his answer relied on the failure of plaintiff to file an affidavit of renewal of the mortgage under this section, as a bar to the action; he did not plead the general statute of limitations. Held, that judgment for plaintiff was proper in the absence of a pleading that the debt was barred. (Mr. Chief Justice Callaway dissenting.) *Reed v. Richardson et al.*, 94 M 34, 38 et seq., 20 P 2d 1054.

Id. As between the parties to it, a mortgage is good if the debt is kept alive, even after the expiration of eight years

from the due date of the obligation; if the debt died, the mortgage died with it.

A mortgagee whose mortgage was rendered invalid for failure to file a renewal affidavit but whose debt has not become barred by the general statute of limitations may proceed against the mortgagor's administrator on the debt and is entitled to a judgment adjudicating the debt as a valid claim against the estate payable in due course of administration, as against the contention that the debt having been secured by mortgage the creditor's only remedy was by foreclosure of the mortgage. *Leffek v. Luedeman*, 95 M 457, 460 et seq., 27 P 2d 511.

One acquiring mortgaged realty within the eight-year period following the maturity of the mortgage indebtedness may not assert the invalidity of the mortgage under this section, if the mortgage debt is not barred under section 93-2603, the general statute of limitations; he is not a "subsequent purchaser" within the meaning of this section, and if he would bar the mortgage because of the statute of limitations he must plead section 93-2603. *Humbird et al. v. Arnet et al.*, 99 M 499, 514, 44 P 2d 756.

Where property was sold to save it from foreclosure, under contract which would have permitted seller to repurchase it within one year for the same amount, and suit was brought to have deed and contract declared a mortgage nine and one-half years after date of deed and mortgage, the lien would have expired even if the deed were held to be a mortgage. *Clarke v. Chamberlain*, 124 M 405, 225 P 2d 477, 481.

Party Taking Mortgage With Notice of Prior Valid and Subsisting Encumbrance Holder of Inferior Lien

Plaintiff bank, on January 22, 1922, took a mortgage on real property to secure payment of notes maturing one year after date, which were renewed in 1924 and 1926; the mortgage was recorded a few days later. The administrator of a creditor of the mortgagor had judgment against the latter and, in satisfaction thereof, on December 27, 1930, and within eight years after maturity of the debt owing the bank, accepted notes secured by mortgage on the same property covered by that of the bank. The bank never filed the affidavit of renewal provided for by this section. In the action brought by the bank on May 22, 1931, and subsequent to the expiration of eight years and sixty days after the maturity of its debt, defendant administrator contended that because of the failure of the bank to file a renewal affidavit, its mortgage had expired and that therefore his mortgage was the superior and prior lien. The court so found.

Held, under the doctrine of stare decisis, that defendant administrator having acquired his mortgage while that of the bank was valid and subsisting as against creditors and subsequent encumbrancers, he was in no position to assert the invalidity of the bank's mortgage. (Mr. Chief Justice Callaway and Mr. Justice Angstman dissenting.) *First Nat. Bk. v. Gutensohn et al.*, 97 M 453, 455 et seq., 37 P 2d 555.

Provision for Benefit of Mortgagee

The protection afforded by this section is intended for the benefit of the mortgagee, not the mortgagor, and the latter may not be heard to object to the sufficiency of the renewal affidavit provided for therein where it appears affirmatively that the debt for which the mortgage was given was not barred by the statute of limitations. (sec. 93-2603). *Skillen v. Harris*, 85 M 73, 75, 277 P 803.

Recital in Deed That Premises Subject to Mortgage Tolls Statute of Limitations

A recital in a deed that the premises are subject to a prior mortgage constitutes an acknowledgment of the mortgage by both parties and a recognition of the debt, does not impair the rights of the owner of the mortgage, and constitutes an admission which tolls the statute and removes its bar. Held, where there was a succession of conveyances containing such recital through which the premises finally became reconveyed to the mortgagor's original grantee in 1933, the life of the debt and mortgage lien was thus extended to 1941 although originally executed in 1917. *Western Holding Co. v. Northwestern Land & Loan Co.*, 113 M 24, 30, 120 P 2d 557.

Right to Attack Validity of Mortgage of Decedent for Failure to File Renewal Affidavit

An administrator of an insolvent estate may, on behalf of creditors, who cannot under the law secure a specific lien upon the estate property after the debtor's death, attack the validity of a real estate mortgage on the ground of the holder's failure to file the renewal affidavit required by this section. *Leffek v. Luedeman*, 95 M 457, 460 et seq., 27 P 2d 511.

Section is a Statute of Limitations and Not a Recording Statute

Held, that this section, declaring that a mortgage on real property, duly recorded, is good and valid against the creditors of the mortgagor or subsequent purchasers or encumbrancers, for eight years and no longer, unless the renewal affidavit provided for therein be filed, is not a recording statute, affecting notice, but is a stat-

ute of limitations, affecting the remedy, the effect of which is that such a mortgage, in the absence of the renewal affidavit, ceases to be of binding force as against the persons mentioned and becomes unenforceable by the lapse of eight years from the maturity of the debt or obligation secured. *Morrison v. Farmers' etc. State Bank*, 70 M 146, 149, 225 P 123.

Status of Purchaser of Mortgaged Lands Prior to Expiration of Eight-Year Period After Maturity of Debt

One who by deed becomes the owner of all the right, title and interest in lands of the mortgagor at any time before the expiration of the eight-year period following the maturity of the entire mortgage indebtedness, does not become the owner of the property free and clear of the mortgage lien upon expiration of that period, where no extension agreement under section 52-203 or affidavit of renewal under this section has been filed or recorded. *Hillsdale College v. Thompson et al.*, 99 M 400, 408, 44 P 2d 753.

Statute of Limitations

A real estate mortgage governed by this section prior to amendment, was not barred by the statute of limitations so long as the debt secured thereby was kept alive. *Sommer v. Wigen*, 103 M 327, 334, 62 P 2d 333.

When Mortgage Lien Superior to That of Purchaser on Execution Sale Had Before Expiration of Eight-Year Period After Maturity of Debt

Where a judgment creditor of a mortgagor of real property purchased it at execution sale prior to the expiration of eight years after maturity of the mortgage debt provided for by this section, thus leaving in the judgment debtor nothing further that could be seized by process, he ceased to be a creditor and became a purchaser, and the mortgage debt not being barred under the general statute of limitations, the mortgage lien was prior and superior to the claim of such purchaser, irrespective of an alleged prematurely filed extension affidavit, or an extension agreement improperly executed. *Hillsdale College v. Thompson et al.*, 99 M 400, 409, 44 P 2d 753.

When Mortgage Will Be Presumed to Have Expired

When the record on appeal in a fore-

closure suit was silent as to when the indebtedness secured by the mortgage became due or that a debt secured by it and a subsequent instrument of which the mortgage had been made a part by reference, had been paid, the finding that plaintiff mortgagee was entitled to a decree will be presumed supported by the evidence, rendering the contention of appellant that the mortgage had expired under this section, and that payment of the amount due on the latter instrument had been made, untenable. *First Nat. Bank v. Marlowe et al.*, 71 M 461, 472, 230 P 374.

Where Homestead Protected After Mortgage Outlawed

Where a mortgage was "executed and recorded before the declaration of homestead was filed for record," under section 33-105, subd. 4, but had lost its validity by lapse of time as a security and ceased to be a mortgage or lien under this section, held, that although the note which the mortgage was given to secure was still alive, and a money judgment obtained on the note, the homestead was not subject to execution or forced sale to satisfy such judgment, because the mortgage was outlawed and the debt therefore not "secured" by it when the judgment on the note was entered, as also required by sec. 33-105, subd. 4 supra. *Siuru v. Sell*, 108 M 438, 442, 91 P 2d 411.

References

Meyer v. Lemley et al., 86 M 83, 91, 282 P 268; *Hastings et al. v. Wise et al.*, 91 M 430, 433, 8 P 2d 636; *Matteson v. Ackerson*, 104 M 239, 242, 66 P 2d 797; *Swingley v. Riechoff*, 112 M 59, 69, 112 P 2d 1075; *Francisco v. Francisco*, 120 M 468, 191 P 2d 317, 1 ALR 2d 625; *Montana Valley Land Co. v. Bestul*, 126 M 426, 253 P 2d 325, 329.

Collateral References

Mortgages ¶147.
59 C.J.S. *Mortgages* §211.
34 Am. Jur. 317, *Limitation of Actions*, §404.

Constitutionality, construction, and application of statute modifying or limiting effect of acknowledgment, payment, or other conditions to toll or extend the period of limitation with respect to mortgage foreclosure. 150 ALR 134.

52-207. (8268) Satisfaction of mortgage—marginal entry. Any mortgage that has been or may be hereafter recorded may be discharged by an entry in the margin of the record thereof, signed by the mortgagee or his personal representative or assignee, acknowledging the satisfaction of the mortgage, in the presence of the county clerk or his deputy, who

shall subscribe the same as a witness. Such entry shall have the same effect as a deed of release duly acknowledged and recorded.

History: En. Sec. 36, p. 485, Bannack Stat.; re-en. Sec. 36, p. 402, Cod. Stat. 1871; re-en. Sec. 213, 5th Div. Rev. Stat. 1879; re-en. Sec. 271, 5th Div. Comp. Stat. 1887; re-en. Sec. 3845, Civ. C. 1895; re-en. Sec. 5752, Rev. C. 1907; re-en. Sec. 8268, R. C. M. 1921. Cal. Civ. C. Sec. 2938.

"Deed of Release"

The phrase "deed of release," as used in this section, means a writing, duly subscribed and acknowledged by the mortgagee, whereby he absolves the mortgaged property from the lien of the mortgage.

52-208. (8269) Same—certificate of payment or discharge. Any mortgage shall also be discharged upon the record thereof, by the county clerk in whose custody it shall be, whenever there shall be presented to him a certificate executed by the mortgagee, his personal representative or assignee, acknowledged, or proved and certified, as in this code prescribed, to entitle a conveyance to be recorded, specifying that such mortgage has been paid or otherwise satisfied or discharged.

History: En. Sec. 37, p. 485, Bannack Stat.; re-en. Sec. 37, p. 402, Cod. Stat. 1871; re-en. Sec. 214, 5th Div. Rev. Stat. 1879; re-en. Sec. 272, 5th Div. Comp. Stat. 1887; re-en. Sec. 3846, Civ. C. 1895; re-en. Sec. 5753, Rev. C. 1907; re-en. Sec. 8269, R. C. M. 1921. Cal. Civ. C. Sec. 2939.

52-209. (8270) Record of satisfaction. Every such certificate, and the proof and acknowledgment thereof, shall be recorded at full length, and a reference shall be made to the book containing such record, in the minutes of the discharge of such mortgage made by the county clerk upon the margin of the record thereof.

History: En. Sec. 38, p. 485, Bannack Stat.; re-en. Sec. 38, p. 402, Cod. Stat. 1871; re-en. Sec. 215, 5th Div. Rev. Stat. 1879; re-en. Sec. 273, 5th Div. Comp. Stat. 1887; re-en. Sec. 3847, Civ. C. 1895; re-en. Sec. 5754, Rev. C. 1907; re-en. Sec. 8270, R. C. M. 1921. Cal. Civ. C. Sec. 2940.

52-210. (8271) Satisfaction of mortgage. Any mortgagee or his personal representative or assignee, as the case may be, after the full performance of the conditions of the mortgage, whether before or after a breach thereof, who shall, for the space of thirty days after being requested, refuse or neglect to execute, acknowledge and deliver to the mortgagor a certificate of discharge or release thereof, shall be liable to the mortgagor, his heirs or assigns, in the sum of one hundred dollars; and also, for all actual damages occasioned by such neglect or refusal. When such discharge or release is made by the personal representative of the mortgagee, it shall be accompanied by a certified copy of his authority, unless such authority is already of record in the office of the county clerk and recorder where such mortgage is recorded. In case such discharge or release is made by

Swain v. McMillan, 30 M 433, 440, 76 P 943.

References

Cited or applied as section 3845, Civil Code, in Mueller v. Renkes, 31 M 100, 103, 77 P 512; as section 5752, Revised Codes, in Dubbels v. Thompson, 49 M 550, 555, 143 P 986.

Collateral References

Mortgages ⇨ 315 (2).
59 C.J.S. Mortgages § 472.

References

Cited or applied as section 5753, Revised Codes, in Dubbels v. Thompson, 49 M 550, 555, 143 P 986.

Collateral References

Mortgages ⇨ 314.
59 C.J.S. Mortgages § 470.

an assignee, it must be accompanied by the assignment of such mortgage, unless such assignment is already of record in the office of the county clerk and recorder where such mortgage is recorded. In the event that such discharge or release is executed by an attorney in fact, such discharge or release shall have attached to it the power of attorney under which it is made, unless such power of attorney is already of record in the office of the county clerk and recorder where such mortgage is recorded. When such discharge or release is executed by the heir or heirs of the mortgagee, such discharge or release must be accompanied by a certified copy of an order or decree of the court of competent jurisdiction, showing such authority, unless such order or decree is already of record in the office of the county clerk and recorder where such mortgage is recorded. Foreign administrators and executors may satisfy mortgages of record in Montana, provided, that the satisfaction of mortgages be accompanied by an authenticated copy of their letters of administration, or letters testamentary, with the certificate of the clerk of the court in which the appointment was made, that the same have not been revoked and are in full force, which certificate and certified copy of letters shall be presented and recorded in connection with the satisfaction of the mortgage. When so presented and recorded, they shall have the same force and effect as if the mortgage was satisfied by the mortgagee.

History: Ap. p. Sec. 39, p. 486, *Bannack Stat.*; re-en. Sec. 39, p. 402, *Cod. Stat.* 1871; re-en. Sec. 216, 5th Div. *Rev. Stat.* 1879; re-en. Sec. 274, 5th Div. *Comp. Stat.* 1887; re-en. Sec. 3748, *Civ. C.* 1895; re-en. Sec. 5755, *Rev. C.* 1907; amd. Sec. 1, Ch. 173, *L.* 1921; re-en. Sec. 8271, *R. C. M.* 1921. *Cal. Civ. C. Sec.* 2941.

References

Cited or applied as section 5755, *Revised Codes*, in *Degenhart v. Cartier*, 52 M 102, 109, 157 P 637; *Noyes Estate v. Granite*

Alaska Co., 64 M 406, 418, 210 P 96; *Solberg v. Sunburst Oil & Gas Co. et al.*, 70 M 177, 181, 183, 225 P 612; *Advance-Rumley Thresher Co., Inc. v. Hess*, 85 M 293, 297, 279 P 236; *Security Bldg. & Loan Assn. v. Shallow*, 96 M 498, 503, 31 P 2d 732; *Anderson v. Commercial Credit Co.*, 110 M 333, 338, 101 P 2d 367.

Collateral References

Mortgages 312.
59 C.J.S. *Mortgages* § 474.

52-211. (8272) Repealing clause. All acts, and parts of acts, in conflict herewith are hereby repealed; provided, however, nothing herein contained shall be construed as affecting any cause of action or litigation now pending in any court in the state of Montana.

History: En. Sec. 2, Ch. 173, *L.* 1921; re-en. Sec. 8272, *R. C. M.* 1921.

52-212. (8273) Recordation of mortgages, deeds of trust and assignments for benefit of creditors required—affidavit of good faith and receipt for copy—notice—indexing and recording. All mortgages, deeds of trust, or assignments for the benefit of creditors, of both real and personal property, executed by a corporation, association or partnership, or by an individual or individuals, are governed by the law relating to mortgages or deeds of trust of real property and must be recorded in the office of the county clerk of every county where any part of said property is situated, and the same are valid, notwithstanding the possession of such property is retained by such corporation, association or partnership, or by such individual or individuals, but any such mortgages, deeds of trust, or assignments for the benefit of creditors must be accompanied by the affidavit of

good faith required to accompany mortgages of personal property, and also by a receipt for an executed copy of the instrument signed on behalf of the corporation by its president, vice-president, secretary, assistant secretary or managing agent. The recording of such an instrument shall be notice of the rights of the parties under the same. It shall not be necessary to file any such instrument as a chattel mortgage. Such instruments shall be indexed both in the chattel and real estate mortgage indexes in the offices of the county clerks and recorders where recorded, and a reference made in the chattel mortgage record to the book and page wherein the mortgage is recorded.

History: En. Sec. 3849, Civ. C. 1895; re-en. Sec. 5756, Rev. C. 1907; amd. Sec. 1, Ch. 72, L. 1921; amd. Sec. 1, Ch. 39, L. 1927; amd. Sec. 1, Ch. 11, L. 1931.

Filing as Chattel Mortgage Not Required

A corporate trust deed covering both real and personal property, executed as provided by this section, was entitled to be recorded, and, being governed by the laws relating to deeds of trust of real property, it was not necessary to file it as a chattel mortgage. *Garry v. Musselshell Mercantile Co. et al.*, 96 M 468, 473, 31 P 2d 293.

Operation and Effect

Held, before amendment that the provisions of this section, requiring that mortgages, "of both real and personal property" executed by a corporation must be accompanied by an affidavit of good faith, applies only to mortgages covering both real and personal property; hence has no ap-

plication to one covering real estate only. *Godfrey L. Cabot, Inc. v. Gas Products Co.*, 94 M 497, 518, 19 P 2d 878.

Held, in an action to foreclose a mortgage given by a corporation covering both real and personal property, under this section before amendment by chapter 11, Laws of 1931, requiring a corporate mortgage to be accompanied by an affidavit of good faith made by the mortgagor, the mortgage was good as to the real estate but invalid as to the personal property, under the rule that a mortgage may be valid in part and invalid in part. *Standard Oil Co. v. Idaho Community Oil Co.*, 95 M 412, 414 et seq., 27 P 2d 173.

Collateral References

Mortgages \S 89.

59 C.J.S. Mortgages \S 201.

Requiring security as condition of cancelling of record mortgage or lien, or of recording payment. 2 ALR 2d 1064.

52-213. (8274) Execution of satisfaction of mortgage under special act.

Whenever under the provisions of sections 4680 to 4711 of these codes any mortgage or other security has been executed to a county or to any officers thereof, the county treasurer of such county is hereby authorized upon the payment of the debt for which the security was given, to execute an acknowledgment of satisfaction of said mortgage or other security. In case of the creation of a new county embracing the lands covered by any such mortgage, subsequent to the execution thereof, the county treasurer of such new county may execute said satisfaction in like manner and with the same effect as though executed by the treasurer of the county to which such security was originally given.

History: En. Sec. 1, Ch. 221, L. 1921; re-en. Sec. 8274, R. C. M. 1921.

NOTE.—Sections 4680 to 4711, referred to above, were included in the 1921 codi-

fication and relate to county drouth relief. These sections were repealed by chapter 22 of the Laws of 1935.

CHAPTER 3

MORTGAGES OF PERSONAL PROPERTY

Section 52-301. Chattel mortgages—interest which may be mortgaged—existing debts preferred—contents—preferred lien.

52-302. Execution—affidavit of good faith—copy of mortgage and receipt.

- 52-303. Execution of mortgage by firm of general partners—affidavit of good faith in case of corporations.
- 52-304. Filing of mortgages in office of county clerk.
- 52-305. Duration of liens.
- 52-306. Renewal of mortgages—affidavit.
- 52-307. Filing of affidavit—how construed with respect to foreclosure.
- 52-308. Payment of mortgaged debt by subsequent mortgagees, subrogation.
- 52-309. Attachment of mortgaged personal property.
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- 52-312. Foreclosure of mortgages—by action—by sale of property—indemnity bond and notice of sale.
- 52-313. Sales—commencement and postponement.
- 52-314. Report of sales, and filing thereof.
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- 52-316. Mortgage on growing crop, and the lien thereof.
- 52-317. Increase may be covered by chattel mortgage of livestock.
- 52-318. Removal or selling of mortgaged property—when misdemeanor—when felony.
- 52-319. Notices of chattel mortgages on livestock, renewals, assignments and satisfactions to be filed by recorder of marks and brands—lists to be furnished stock inspectors—livestock markets not liable for mortgages when notice thereof not filed.
- 52-320. Contents of notices.
- 52-321. Duty of mortgagees to file satisfactions of mortgages.
- 52-322. Fees—disposal of.
- 52-323. Brand recorder or livestock commission not responsible for collection or payment of money under mortgages.

52-301. (8275) Chattel mortgages—interest which may be mortgaged—existing debts preferred—contents—preferred lien. Any interest in personal property which is capable of being transferred may be mortgaged. Such property or interest may be mortgaged to secure existing debts, to secure debts created simultaneously with the execution of the mortgage, and to secure advances then in contemplation but to be made in the future. The total amount of all future advances contemplated and to be subject to mortgage protection must be stated in the mortgage, provided the mortgagee may reserve the right, at the mortgagee's option, to refuse to make all or any part thereof. The lien for said stated amount of said future advances shall have priority to the same extent as if the amount thereof had been actually advanced by the mortgagee to the mortgagor at the time of the execution of the mortgage. The mortgagee shall, upon demand of the mortgagor or a creditor, furnish a statement of all such advances and amounts paid on the principal sum secured, provided such statement shall not impair or affect the lien created for all advances. Upon receipt of such statement, or at any other time following the execution and delivery of the mortgage, the mortgagor may deliver written notice, duly acknowledged, to the mortgagee plainly stating that the mortgagor does not desire to request or apply for any future advances if none have been allowed, or for any further advances if additional advances have in fact been theretofore allowed under the mortgage, clearly identifying the mortgage by reference to its date, the parties thereto and the principal amount of the original indebtedness and the limit placed on contemplated future advances, if allowed. Upon the filing of such written notice by the mortgagor in the county and counties where the mortgage is filed, the lien of the mortgage shall continue to have priority, but only for the aggregate amount of the indebtedness then existing, including any advances thereto-

fore made, interest due and other charges as evidenced by the original loan-contract, and indebtedness thereafter accumulating on such basis, exclusive of any other future advances originally contemplated. Any lien entitled to actual priority over the lien of mortgage by force of any express provision of the laws of this state shall continue to have priority to the extent prescribed by law.

History: Earlier acts concerning chattel mortgages were Secs. 1-8, pp. 339 and 340, Bannack Stat.; re-en. as Secs. 1-9, pp. 526 and 527, Cod. Stat. 1871; re-en. with addition of one section relative to disposal of mortgaged property as Secs. 899-908, 5th Div. Rev. Stat. 1879; repealed and new law en. as Secs. 1-14, pp. 3-6, L. 1881; amd. as Secs. 1 and 2, p. 54, L. 1885. The foregoing as amd. by act of March 5, 1887, and March 10, 1887, appeared as Secs. 1538-1555, 5th Div. Comp. Stat. 1887; superseded by Secs. 3860-3876, Civ. C. 1895.

This section en. Sec. 3860, Civ. C. 1895; re-en. Sec. 5757, Rev. C. 1907; re-en. Sec. 1, Ch. 86, L. 1913; re-en. Sec. 8275, R. C. M. 1921; amd. Sec. 1, Ch. 32, L. 1923; amd. Sec. 1, Ch. 116, L. 1925; amd. Sec. 1, Ch. 149, L. 1949. Cal. Civ. C. Secs. 2955-2973.

Cross-References

Agisters' liens, priority, sec. 45-1106.

Motor vehicles, mortgage filed with registrar, sec. 53-110.

Railroad equipment, mortgage on, recording, sec. 72-303.

Range stock, acquiring possession under mortgage, sec. 93-4344.

Removal of mortgaged property, penalty, sec. 94-1811.

Chattel Mortgage on Crops Not in Existence

A mortgage on a crop not yet in existence but to be produced by the tenant mortgagor after acquisition of the right to produce crops thereon is an executory contract which will become binding only in the event the mortgagor brings such crop into existence and subject to defeasance upon his failure to do so, and if shown to have been in existence on a certain day, the lien of the mortgage attached at some time after its filing and before said day. First Nat. Bank of Columbus v. Coit, 79 M 468, 478, 257 P 469.

Purchaser Under Conditional Sales Contract Has a Mortgageable Interest

The purchaser of personal property under a conditional sale contract whereby title was reserved in the seller until full

payment made had a mortgageable interest in it (this section). Hoeller v. Moog et al., 60 M 74, 80, 198 P 367.

Purpose

The provisions governing the mortgaging of personal property are for the protection of creditors and subsequent purchasers and encumbrancers in good faith for value. Rairden v. Hedrick, 46 M 510, 514, 129 P 498.

Subsequently Acquired Property Mortgageable

Subsequently to be acquired personal property may be mortgaged, provided it is such as is capable of delivery, and such as may be taken possession of by the mortgagee upon its acquisition by the mortgagor. Security State Bank v. Mariette, 69 M 536, 539, 223 P 114.

Whether Sale or Mortgage is a Jury Question

Whether a transaction was intended as a sale, or merely as security for a loan, is a question of fact, and is properly submitted to the jury. Rairden v. Hedrick, 46 M 510, 516, 129 P 498.

References

Cited or applied as section 3860, Civil Code, in Noyes v. Ross, 23 M 425, 440, 59 P 367; as section 5757, Revised Codes, in Isbell v. Slette, 52 M 156, 162, 155 P 503; First Nat. Bk. v. Montana Emporium Co., 59 M 584, 593, 197 P 994; Samuell v. Moore Mercantile Co. et al., 62 M 232, 236, 204 P 376; Hackney v. Birely, 67 M 155, 160, 215 P 642; Yale Oil Co. v. Sedlacek et al., 99 M 411, 43 P 2d 887.

Collateral References

Chattel Mortgages—3.

14 C.J.S. Chattel Mortgages § 22.

10 Am. Jur. 733, Chattel Mortgages, §§ 24 et seq.

Chattel mortgage on livestock as covering animals subsequently acquired by means other than natural increase by generation. 1 ALR 554.

52-302. (8276) Execution—affidavit of good faith—copy of mortgage and receipt. A mortgage of personal property must be signed by the mortgagor, and be acknowledged by the mortgagor before some officer qualified to take acknowledgments, and every such mortgage must have attached

thereto the affidavit of the mortgagee, his agent, attorney, or other representative, that the same is made in good faith to secure the amount named therein, and without any design to hinder, delay, or defraud creditors; and where there are two or more mortgagees named in a mortgage, whether copartners or otherwise, any one of said mortgagees may make such affidavit on behalf of all the mortgagees named therein. And every mortgagee must surrender without cost to the mortgagor, at the time of the execution of the mortgage, a correct copy of the original mortgage so signed, with acknowledgements shown thereon. And the mortgagor must surrender to the mortgagee a receipt, which shall be attached to the original mortgage, showing that the mortgagee has surrendered to him a copy of such mortgage, and said receipt must accompany the mortgage when presented to the clerk and recorder and filed therewith. Otherwise said mortgage shall not be filed as a chattel mortgage by the clerk and recorder.

History: Ap. p. Sec. 3861, Civ. C. 1895; re-en. Sec. 5758, Rev. C. 1907; amd. Sec. 2, Ch. 86, L. 1913; amd. Sec. 1, Ch. 183, L. 1919; re-en. Sec. 8276, R. C. M. 1921.

Effect of Absence of Affidavit of Good Faith

Where one takes a second mortgage on chattels with actual notice of the existence of the prior lien, the fact that the first mortgage did not have an affidavit of good faith attached thereto does not render the second mortgage superior to the first one. *Fergus Co. v. First State Bk. of Helena*, 67 M 1, 213 P 1114.

Failure of Signature or Jurat of Officer Fatal

A statement, signed by all the parties to a chattel mortgage, but the jurat of which does not bear the signature or seal of the officer before whom it was sworn to, is not a sufficient compliance with the statute. *Reynolds v. Fitzpatrick*, 23 M 52, 59, 57 P 452.

Operation in General

A bona fide subpurchaser of chattels takes free from the lien of an unrecorded mortgage, though the first purchaser had notice. *John Caplice Co. v. Beauchamp*, 22 M 258, 261, 56 P 278.

The purpose of filing a chattel mortgage is to protect only bona fide creditors and subsequent purchasers or encumbrancers; the filing imparts notice only to such persons. The filing of a chattel mortgage on crops to be grown on land of the mortgagor, in the following season, does not give his lessee constructive notice of the mortgage. *Isbell v. Slette*, 52 M 156, 163, 155 P 503.

Id. A chattel mortgage upon crops thereafter to be planted cannot operate as an encumbrance upon the land where the crops are to be grown.

Provision Requiring Receipt before Filing Must Be Strictly Construed

The statutory requirements intended to protect the lien of a chattel mortgage on the mortgaged property against attaching creditors—such as that the mortgagor's receipt of a copy of the mortgage from the mortgagee shall be attached to the mortgage before it is entitled to filing—must be strictly followed. *Doering v. Selby et al.*, 75 M 416, 421, 244 P 485.

Id. Under the rule that an instrument not entitled to record, though actually recorded, does not impart any constructive notice whatever, held that where a chattel mortgage was not entitled to filing because of the absence of a receipt attached thereto showing that the mortgagee had surrendered to the mortgagor a copy of the mortgage (this section), its filing imparted no notice to the conditional vendor of the property, mortgaged by the vendee after the sale, and the contract of sale was properly admitted in evidence in defense to an action for the conversion of the property taken by defendant vendor under the provisions of the contract upon condition broken.

Substantial Compliance as to Affidavit of Good Faith Sufficient

In the absence of a statute requiring an affidavit to be signed by the affiant, the affidavit will be held sufficient though not signed, if it appears by the certificate of a competent attesting officer that affiant made oath thereto. *International Harvester Co. v. Embody*, 89 M 402, 298 P 348.

Id. In an action for the conversion of chattel mortgaged property against a sheriff who sold the property on execution and in which the defense was that the mortgage was invalid on the ground that the mortgagee's agent had failed to sign his name to the affidavit of good faith attached to the mortgage, although he had

written it at the head thereof, held, under the above rule, that it appearing that the notary public had administered the oath to the agent and then certified to that fact, the affidavit was sufficient.

Substantial Compliance as to Receipt Sufficient

This section provides that in order to entitle a chattel mortgage to be filed it must have attached thereto a receipt showing that the mortgagor received a copy of the mortgage. A receipt appeared immediately below the signature of the mortgagor and above the acknowledgment and affidavit of good faith and recited that a "true, full and complete copy of the foregoing mortgage" had been received. Held, that the statute must be liberally construed, that, so construed, the contention that the mortgage was not entitled to be filed because the receipt referred only to what preceded it in point of arrangement and not to what followed and was therefore incomplete has no merit, and the mortgage conformed substantially to the above requirement. *Swords v. Occident Elevator Co.*, 72 M 189, 191 et seq., 232 P 189.

Valid Between Parties Even Though Defective and Not Entitled to Record

While under this section a defective chattel mortgage is not entitled to record, it is valid as between the parties. *Hansen et al. v. Johnson et al.*, 90 M 597, 607, 4 P 2d 1088.

52-303. (8277) Execution of mortgage by firm of general partners—affidavit of good faith in case of corporations. Subject to the provisions of the preceding section, one (1) member of a firm of general partners may alone execute a mortgage of personal property on behalf of the firm, to secure all existing indebtedness of the firm, and a mortgage so executed is as valid as though executed and made by all the partners. In case of a corporation, the president, vice-president, secretary, assistant secretary, cashier, or general manager thereof may execute the mortgage, and where the corporation is the mortgagee they, or either of them, or the agent, attorney or other representative thereof may make the affidavit of good faith aforesaid.

History: En. Sec. 3862, Civ. C. 1895; re-en. Sec. 5759, Rev. C. 1907; amd. Sec. 3, Ch. 86, L. 1913; re-en. Sec. 8277, R. C. M. 1921; amd. Sec. 1, Ch. 36, L. 1941.

Words Essential to Affidavit of Good Faith

It seems that in an affidavit of good faith, the several words "hinder," "delay," and "defraud" are essential to the validity of the mortgage. *Reynolds v. Fitzpatrick*, 23 M 52, 61, 57 P 452.

References

Cited or applied as section 3861, Civil Code, before amendment, in *Westheimer v. Goodkind*, 24 M 90, 99, 60 P 813; *Bennett Bros. v. Fitchett*, 24 M 457, 467, 62 P 780; *Reynolds v. Fitzpatrick*, 28 M 170, 176, 72 P 510; *First Nat. Bank of Butte v. Beley*, 32 M 291, 294, 80 P 256; *In re Jesse*, 286 Fed 305; *Standard Oil Co. v. Idaho Community Oil Co.*, 95 M 412, 414 et seq., 27 P 2d 173.

Collateral References

Chattel Mortgages ¶57-64.
14 C.J.S. *Chattel Mortgages* §§ 77, 80, 89.
10 Am. Jur. 763, *Chattel Mortgages*, §§ 72 et seq.

Record of instrument without or having insufficient acknowledgment as notice. 19 ALR 1074.

Joining in subsequent instrument as ratification or estoppel as to prior ineffective mortgage, deed of trust or similar encumbrance. 7 ALR 2d 333.

Effect of supplying description of property conveyed after manual delivery of mortgage. 11 ALR 2d 1372.

Collateral References

Corporations ¶477(3); *Partnership* ¶142(1).
19 C.J.S. *Corporation* § 1214; 68 C.J.S. *Partnership* § 155.

52-304. (8278) Filing of mortgages in office of county clerk. Every mortgage of personal property, together with the affidavit hereinbefore mentioned, or a copy thereof certified to be correct by the officer before whom the same was acknowledged or verified, or by the county clerk and recorder with whom it is filed, must be filed in the office of the county clerk and recorder of the county where the property was situated at the

time of the execution of the mortgage, and the county clerk and recorder must, on receipt of such mortgage or certified copy, indorse thereon the time of receiving the same, and file and keep the same in his office for the inspection of all persons, and shall enter in a book, properly ruled and kept for that purpose, the names of all parties, the names of the mortgagors alphabetically arranged, the consideration thereof, and the date of the maturity and the filing of the same.

History: En. Sec. 3864, Civ. C. 1895; re-en. Sec. 5761, Rev. C. 1907; amd. Sec. 4, Ch. 86, L. 1913; re-en. Sec. 8278, R. C. M. 1921.

References

Hackney v. Birely, 67 M 155, 160, 215 P 642; National Life Ins. Co. v. Baker, 94 M 600, 604, 23 P 2d 1098; Standard Oil Co. v. Idaho Community Oil Co., 98 M 131, 37 P 2d 660.

Collateral References

Chattel Mortgages 83.
14 C.J.S. Chattel Mortgages § 131.
10 Am. Jur. 769, Chattel Mortgages, §§ 82 et seq.

Record of instrument without or having insufficient acknowledgment as notice.
19 ALR 1074.

52-305. (8279) Duration of liens. Every mortgage of personal property, made, acknowledged, and filed, as provided by the laws of this state, is thereupon, if made in good faith, good and valid as against the creditors of the mortgagor, or subsequent purchaser, or encumbrancers, from the time it is so filed, and for the period of two years and sixty days thereafter. A mortgage of personal property, executed and filed as hereinbefore provided, ceases to be valid as against creditors of the mortgagor or subsequent purchaser or encumbrancer in good faith, after the expiration of two years and sixty days from the filing thereof, except as hereinafter provided.

History: En. Sec. 1, Ch. 81, L. 1907; Sec. 5762, Rev. C. 1907; amd. Sec. 5, Ch. 86, L. 1913; amd. Sec. 1, Ch. 152, L. 1919; re-en. Sec. 8279, R. C. M. 1921.

Attachment of Property After Expiration of Mortgage

A lien secured by attachment of mortgaged personal property levied upon after two years and six months from date of filing the mortgage which had not been renewed was superior to the mortgage though at the time of levy the attaching creditor had knowledge of the pendency of a foreclosure suit; under such a state of facts the situation of the creditor was the same, under this section, as though the mortgage had never been made, though as between the parties to it the unrenewed mortgage was good and valid. Griffiths v. Thrasher, 95 M 238, 244, 26 P 2d 983.

Constructive Notice to Whom

The filing of a chattel mortgage imparts notice to those creditors of the mortgagor only, within the meaning of this section, who are seeking to enforce their claims against the mortgaged property, not to those who are not. Security State Bk. v. First Nat. Bk., 78 M 389, 392, 254 P 417.

Under this section, the filing of a chattel mortgage is constructive notice only to

creditors of the mortgagor who seek to enforce their claims against the mortgaged property, or subsequent purchasers or encumbrancers in good faith for value; hence a landlord, not falling within either of the groups mentioned, in the absence of actual notice of a mortgage on growing crops, was not bound by the mortgage nor liable in an action for conversion for taking the crops on surrender of the lease, and evidence of the surrender was properly admitted. First Nat. Bank of Columbus v. Coit, 79 M 468, 482, 257 P 469.

What May Be Recorded

The record of a chattel mortgage as provided by this section is equivalent to a delivery of the property by the mortgagor to and its retention by the mortgagee, and therefore whatever cannot be delivered and retained, except as to property potentially in being in which the mortgagor has a personal interest, cannot be placed of record. Hackney v. Birely, 67 M 155, 159 et seq., 215 P 642.

Who is a "Subsequent Encumbrancer"

To constitute one a subsequent encumbrancer "in good faith," within the meaning of this section, declaring as against whom and for what length of time a chattel mortgage is good and valid, he must

have acquired a lien upon the property without knowledge, actual or constructive, of the existence of a prior mortgage. *Hansen et al. v. Johnson et al.*, 90 M 597, 607, 4 P 2d 1088.

Words "In Good Faith" Do Not Apply to "Creditors" of the Mortgagor

Held, that the words "in good faith" found in the provision that a chattel mortgage "ceases to be valid as against creditors of the mortgagor or subsequent purchaser or encumbrancer in good faith," after the expiration of two years and sixty days from its filing, do not apply to "creditors" of the mortgagor. *Griffiths v. Thrasher*, 95 M 238, 244, 26 P 2d 983.

References

Cited or applied as Sec. 5, Ch. 86, Laws 1913, in *Chester State Bank v. Minneapolis T. M. Co.*, 58 M 44, 48, 190 P 138.

lis T. M. Co., 58 M 44, 48, 190 P 138.

Cited or applied as section 5762, Revised Codes, before amendment, in *First National Bank v. Marshall*, 51 M 224, 230, 152 P 36 and *Cullen v. Reed*, 220 Fed 356, 357; *Morrison v. Farmers' etc. State Bank*, 70 M 146, 154, 225 P 123.

Collateral References

Chattel Mortgages—135.

14 C.J.S. *Chattel Mortgages* §§ 290, 326.

34 Am. Jur. 317, *Limitation of Actions*, § 404.

Constitutionality, construction, and application of statute modifying or limiting effect of acknowledgment, payment, or other conditions to toll or extend the period of limitation with respect to mortgage foreclosure. 150 ALR 134.

52-306. (8280) Renewal of mortgages—affidavit. Every mortgage of personal property, executed and filed as provided by the laws of this state, may be renewed at any time within sixty days after the expiration of two years from the date of filing the same, in case such debt or obligation, or any part thereof, be unpaid or unfulfilled, by the filing of an affidavit showing the date of such mortgage, the names of the mortgagor and mortgagee, the date of filing the same, and the amount of the debt justly owing at the date of the making of such affidavit, or the condition of the obligation then unfulfilled, and that such mortgage was neither made nor renewed to hinder, delay, or defraud creditors or subsequent mortgagees of the said mortgagor, which affidavit must be subscribed and sworn to by the mortgagee or his assignee, or other successor in interest; or if more than one mortgagee, assignee, or successor in interest, such affidavit may be made by one of them on behalf of all. In case of the absence of the mortgagee or his assignee from the county where such mortgage is filed, the affidavit may be made by the agent or attorney or other representative of the mortgagee or his assignee, or of his successor in interest. The affidavit may be made in behalf of the corporation by the president, vice-president, secretary, assistant secretary, cashier, or general manager, and in case no such officer is within the county where the mortgage is filed, then by the agent, attorney, or other representative of such corporation; provided, that nothing shall be so construed as to prevent the mortgagee or his assignee or successor in interest or one of them, where there are more than one, from making such affidavit wherever he may, whether in or out of the county where the mortgage is filed, so long as said affidavit is filed as hereinbefore specified. The affidavit must be filed in the office where the mortgage therein described is filed, and thereupon the county clerk of such county must attach such affidavit to the mortgage therein described, and note the date of filing thereof opposite the entry of the mortgage therein described in the book provided by law for the entry of chattel mortgages, and the original mortgage shall then continue in full force and effect for the period of three years from the date of filing said affidavit.

History: En. Sec. 2, Ch. 81, L. 1907; re-en. Sec. 5763, Rev. C. 1907; amd. Sec. 6, Ch. 86, L. 1913; re-en. Sec. 8280, R. C. M. 1921.

References

Cited or applied as section 5763, Revised Codes, before amendment, in *First National Bank v. Marshall*, 51 M 224, 231, 152 P 36 and *Cullen v. Reed*, 220 Fed 356,

357; as Sec. 6, Ch. 86, Laws 1913, in *Chester State Bank v. Minneapolis T. M. Co.*, 58 M 44, 49, 190 P 136; *Griffiths v. Thrasher*, 95 M 238, 243, 26 P 2d 983.

Collateral References

Chattel Mortgages Ⓒ95.
14 C.J.S. *Chattel Mortgages* § 169.
10 Am. Jur. 794, *Chattel Mortgages*, §§ 122 et seq.

52-307. (8281) Filing of affidavit—how construed with respect to foreclosure. The filing of the affidavit, provided for in the next preceding section, shall not be construed to extend the time of the maturity of any debt or the execution of an obligation secured by such mortgage, but the same may be enforced, according to the conditions thereof, and such mortgage foreclosed according to law, at any time within the period for which such mortgage is so renewed, unless agreement be made between the mortgagor and mortgagee extending the time of payment of such debt or fulfillment of such obligation, in which case the mortgage may be foreclosed at any time after the expiration of the time fixed by such agreement within the period limited by law for the foreclosure of mortgages.

History: En. Sec. 3867, Civ. C. 1895; re-en. Sec. 5764, Rev. C. 1907; amd. Sec. 7, Ch. 86, L. 1913; re-en. Sec. 8281, R. C. M. 1921.

Operation and Effect

The statute relative to the renewal and extension of a chattel mortgage by means of an affidavit executed and filed by the mortgagee must be strictly followed in or-

der to acquire any right under it. *Rosenbaum Bros. & Co. v. Ryan Bros. Co.*, 33 M 424, 428, 84 P 1120. See *First National Bank v. Marshall*, 51 M 224, 230, 152 P 36.

The time fixed in an affidavit of renewal of a chattel mortgage makes the utmost limit of the life of the mortgage lien as against attaching creditors of the mortgagor. *Rosenbaum Bros. & Co. v. Ryan Bros. Co.*, 33 M 424, 430, 84 P 1120.

52-308. (8282) Payment of mortgaged debt by subsequent mortgagees, subrogation. Any mortgagee of personal property upon which a prior mortgage exists may, at any time during the existence of such mortgage, pay the amount of the debt and interest owing and secured thereby, or deposit the full amount thereof with the county clerk of the county wherein such affidavit and mortgage are filed, subject to the order of the mortgagee, his legal representatives or assigns, and the receipt or duplicate receipt for such payment or deposit shall be filed in said office and attached to such mortgage, and thereby such subsequent mortgagee shall be subrogated to all the rights of the prior mortgagee under such mortgage.

History: En. Sec. 3868, Civ. C. 1895; re-en. Sec. 5765, Rev. C. 1907; amd. Sec. 8, Ch. 86, L. 1913; re-en. Sec. 8282, R. C. M. 1921.

Collateral References

Subrogation Ⓒ17.
83 C.J.S. *Subrogation* § 36.

52-309. (8283) Attachment of mortgaged personal property. Personal property mortgaged may be taken on attachment or execution issued at the suit of a creditor of the mortgagor; but before the property is so taken, the officer must pay or tender to the mortgagee the amount of the mortgage debt and interest, or must deposit the same with the county treasurer of the county in which the mortgage is filed, payable to the order of the mortgagee; and when the property then taken is sold under process, the officer must apply the proceeds of the sale as follows:

1. To the repayment of the sum paid to the mortgagee, with interest from the date of such payment; and,
2. The balance, if any, in like manner as the proceeds of sales under execution are applied in other cases.

The holder of any chattel mortgage of record shall, upon fifteen days' notice in writing served upon him in person by any creditor of the mortgagor seeking to satisfy a judgment or demand of such creditor against the mortgagor, be required to make and file in the office of the county clerk and recorder of the county in which the property is situated, or in which the mortgage is filed, an affidavit showing the amount of the indebtedness then actually due and owing to the mortgagee, and such affidavit shall state the amount of the original obligation for which the chattel mortgage was given as security, and all additional advancements of money or property on the principal obligation since the date of the execution of the mortgage, and all payments of whatsoever kind, whether on principal or interest, made by the mortgagor to the date of the execution of such affidavit by the mortgagee, and showing the balance then remaining due and unpaid to the mortgagee. If within fifteen days from the service of any such demand in writing on the mortgagee by any creditor of the mortgagor the mortgagee shall fail, refuse, or neglect to file the affidavit herein required, the mortgage shall be of no force or effect as against such creditor upon the seizure of any such personal property on attachment or execution. In the event the amount shown to be due is paid to the county treasurer, or to the mortgagee, in satisfaction of the mortgage by any attaching or execution creditor against the mortgagor, the mortgagee shall be required to surrender to the county treasurer the note or other evidence of indebtedness, secured by the chattel mortgage, and pay any amount of tax due the state or county thereon at such time which said note or other evidence of indebtedness shall be delivered by the mortgagee or county treasurer to the attaching or execution creditor. In the event the property is sold on execution, such attaching creditor shall be required to deliver to the mortgagor the note or other evidence of indebtedness by him obtained from the mortgagee when the property is sold for the amount of the mortgage indebtedness, or an amount in excess thereof.

History: Ap. p. Sec. 3869, Civ. C. 1895; re-en. Sec. 5766, Rev. C. 1907; amd. Sec. 9, Ch. 86, L. 1913; amd. Sec. 1, Ch. 94, L. 1915; re-en. Sec. 8283, R. C. M. 1921.

Operation and Effect

An officer who seizes mortgaged chattels under an attachment, without paying to the mortgagee, or depositing for him in the county treasurer's office the amount of the debt, is liable to the mortgagee in an action in the nature of conversion; and in such case the measure of damages is not the amount of the mortgage debt, but the value of the chattels converted to an amount not exceeding the mortgage debt, together with such incidental expenses as immediately result from the wrongful

seizure. *Rocheleau v. Boyle*, 12 M 590, 595, 31 P 533.

A statute of this character does not refer to mortgaged property which is exempt from execution. *Cheney v. Caldwell*, 20 M 77, 79, 49 P 397.

By depositing with the county treasurer the amount of a prior mortgage on property which he seeks to attach, a creditor does not pay the debt secured thereby or discharge the mortgage, but is substituted to the rights of the mortgagee to have recourse to the mortgaged property; a destruction of this right of recourse, by connivance between the mortgagor and mortgagee, is redressible in damages. *Degenhart v. Cartier*, 52 M 102, 108, 157 P 637.

Id. The provision of a statute, requiring an attaching creditor to tender or de-

posit the amount of a prior mortgage with interest, is designed for the benefit of the mortgagee, and therefore neither the mortgagor nor a junior creditor is concerned in such deposit.

References

Baker v. Tullock, 106 M 375, 378, 77 P 2d 1041.

Collateral References

Attachment↔53, 164; Execution↔37, 129, 130.

7 C.J.S. Attachment §§ 73, 226; 33 C.J.S. Executions §§ 45, 94.

52-310. (8284) Certified copy of mortgage as evidence. A copy of any mortgage of personal property made, acknowledged, and filed as provided in this chapter, certified by the county clerk in whose office the same shall be filed, may be read in evidence in any court of this state, without further proof of the execution of the original, if said original be lost or out of the power of the person wishing to use it.

History: En. Sec. 3870, Civ. C. 1895; re-en. Sec. 5767, Rev. C. 1907; amd. Sec. 10, Ch. 86, L. 1913; re-en. Sec. 8284, R. C. M. 1921.

Collateral References

Evidence↔343(4).

32 C.J.S. Evidence § 660.

52-311. (8285) To what instruments act applies. The provisions of the foregoing sections of this chapter shall extend to all such bills of sale, deeds of trust, and other conveyances of goods, chattels, or personal property as shall have the effect of a mortgage or lien upon such property.

History: En. Sec. 3871, Civ. C. 1895; re-en. Sec. 5768, Rev. C. 1907; re-en. Sec. 11, Ch. 86, L. 1913; re-en. Sec. 8285, R. C. M. 1921.

References

Cited or applied as section 3871, Civil Code, in Bennett Bros. Co. v. Fitchett, 24 M 457, 467, 62 P 780; Baker v. Tullock, 106 M 375, 378, 77 P 2d 1041.

Operation and Effect

A bill or sale, absolute on its face, may be in fact a chattel mortgage; and so likewise a bill of sale, with an agreement to repurchase, may amount to a chattel mortgage or to a conditional sale, dependent upon the surrounding circumstances, including the intention of the parties. Rairden v. Hedrick, 46 M 510, 514, 129 P 498.

Collateral References

Chattel Mortgages↔3; Liens↔1.

14 C.J.S. Chattel Mortgages § 2; 53 C.J.S. Liens § 1.

52-312. (8286) Foreclosure of mortgages—by action—by sale of property—indemnity bond and notice of sale. An action for the foreclosure of a mortgage of personal property, or the enforcement of any lien thereon, of whatever nature, may be commenced and conducted in the same manner as provided by law for the foreclosure of mortgages upon real property, and the same may be joined in an action for the recovery of the possession of the property mortgaged; but it is lawful for the mortgagor of personal property to insert in his mortgage a clause authorizing the sheriff of the county in which said property, or any part thereof, may be, to execute the power of sale therein granted to the mortgagee, his legal representative and assigns, in which case the sheriff of such county, at the time of default, at the request of the mortgagee, must, and it is hereby made his duty to advertise and sell the whole or any part of the mortgaged property, wherever it may be, in the manner provided in such mortgage; and at such sale made as aforesaid, the mortgagee, or his representative or assigns, may, in good faith, purchase the property so sold, or any part thereof. The sheriff may require an indemnity bond from the mortgagee or his assigns before

taking possession of or selling the mortgaged property. Notice of sale shall be given by posting five notices in five public places in the county wherein the property is to be sold, one of which shall be posted at the designated place of sale.

History: En. Sec. 3872, Civ. C. 1895; re-en. Sec. 5769, Rev. C. 1907; amd. Sec. 12, Ch. 86, L. 1913; re-en. Sec. 8286, R. C. M. 1921.

Cross-References

Acquiring possession under chattel mortgages, sec. 93-4344.

Attorney's fees allowed as costs, sec. 93-8613.

Foreclosure against estates, sec. 91-2711.

Action to Foreclose a Mortgage May Be Joined With One of Conversion

As an exception to the general rule that an action in tort may not be joined with one on contract, an action to foreclose a chattel mortgage may be united with one in conversion against the purchaser of the mortgaged chattels. *Beers v. W. P. Devereux Co. et al.*, 87 M 210, 212, 286 P 406.

Action to Recover Balance Due After Sale

Where the parties to a chattel mortgage stipulated that the mortgagee might take possession of and sell the property under a power of sale whenever foreclosure became necessary, as they could properly do under this section, the complaint in an action to recover a balance due after sale, alleging that the property was so sold, was sufficient in the absence of a demurrer, an allegation that demand for payment had been made and notice of sale given not having been necessary. *Union Bank & Trust Co. v. Himmelbauer*, 56 M 82, 92, 181 P 332.

Authority of Sheriff

A sheriff had full authority to contract through his deputy with an individual for the keeping of cattle seized under a power of sale contained in a chattel mortgage, inasmuch as he was authorized to perform all his official acts, either personally or by deputy, and was held to be in the performance of an official duty under the requirements of a section similar to the above. *Bose v. Whitney*, 7 M 385, 393, 394, 17 P 557. See also *Maddox v. Rader*, 9 M 126, 135, 22 P 386.

Money received by a sheriff from a sale of chattels under a mortgage containing a clause, authorized by statute, empowering the sheriff of the county to execute the power of sale therein granted, is received by him in his official capacity, and a failure to pay over such money is a breach of official duty for which his bondsmen are liable. *Maddox v. Rader*, 9 M 126, 135, 22 P 386.

Pendency of the Foreclosure Action Did Not Accomplish a Change of Possession

That the pendency of the action to foreclose the mortgage did not ipso facto work a constructive change of possession from the mortgagor to the mortgagee is made plain by this section, which authorized the joinder in a foreclosure action of one for the recovery of the possession of the mortgaged property. If the institution of foreclosure proceedings worked a constructive change of possession, there would have been no object in authorizing the joinder of an action for the recovery of the possession of the mortgaged property. *Griffiths v. Thrasher*, 95 M 238, 247, 26 P 2d 983.

Strict Statutory Compliance Necessary

The requirements of this section, under which a mortgagee of chattels may have the same sold on default of the mortgagor in execution of the power granted to him by the terms of the mortgage, must be strictly complied with; otherwise jurisdiction to make it is absent and the sale does not divest the mortgagor of title. *Trudell v. Hingham State Bank*, 62 M 557, 560, 205 P 667.

References

Cited or applied as section 5769, Revised Codes, before amendment, in *Kerr v. Blaine*, 49 M 602, 605, 144 P 566; *Kinsman v. Stanhope*, 50 M 41, 43, 144 P 1083.

Collateral References

Chattel Mortgages—249, 250, 252, 253.
14 C.J.S. Chattel Mortgages § 355.
10 Am. Jur. 872, Chattel Mortgages, §§ 238 et seq.

What constitutes a "public sale." 4 ALR 2d 575.

52-313. (8287) Sales—commencement and postponement. All sales made under the provisions of this act shall be commenced between the hours of nine o'clock in the morning and five o'clock of the afternoon of the day specified in the notice, and within thirty days after the seizure of the property, unless the sale shall be postponed. Any sale may be postponed

at the discretion of the sheriff one week, by public announcement at the time designated for the sale to take place when there are no bidders, or when the amount offered is grossly inadequate, or upon the request of the mortgagor.

History: En. Sec. 13, Ch. 86, L. 1913;
re-en. Sec. 8287, R. C. M. 1921; amd. Sec.
1, Ch. 13, L. 1953.

Collateral References

Chattel Mortgages—262, 285.
14 C.J.S. Chattel Mortgages §§ 373, 414.

52-314. (8288) Report of sales, and filing thereof. Within ten days after the sale of any mortgaged property, as herein provided, the person making the sale shall make out in writing a full report, under oath, of all the proceedings in such foreclosure, specifying particularly the property sold, the amount received therefor, the name of the person to whom sold, the amount of the costs and expenses itemized, a copy of the notice of sale, with the statement that the same was posted as herein provided, and the disposition made by him of the proceeds of the sale, and shall file the same in the office of the county clerk and recorder where the mortgage is filed; which report shall be received in all courts as prima facie evidence of the facts therein stated. The county clerk and recorder shall properly index said report and attach the report of sale to the original mortgage on file.

History: En. Sec. 14, Ch. 86, L. 1913;
re-en. Sec. 8288, R. C. M. 1921.

Operation and Effect

Under the provisions of this section, requiring the filing of a written report of the sale of mortgaged chattels on foreclosure, including a copy of the notice of sale, and declaring that the report shall be received in all courts as prima facie evidence of the facts therein stated, only the facts relating to the things done by the person making the report, and not the recitals in the posted notice of sale showing wherein the mortgagor was in default, shall be received as prima facie true. *Advance-Rumely Thresher Co. v. Kruger*, 93 M 66, 70, 16 P 2d 1102.

Id. A mortgagee of personal property, empowered under a clause of the mortgage to seize and sell the property on default of the mortgagor before maturity of the debt, seized and had it sold. In his action to secure a deficiency judgment he, in justification of the seizure and sale, introduced a copy of the report of the sale provided for by this section, containing a copy of the notice of sale showing wherein the mortgagor was in default, as prima facie evidence of default. Held, that the notice reciting the default did not relieve plaintiff of the necessity of making proof of the mortgagor's default, and that in the absence of such proof a judgment of nonsuit was proper.

52-315. (8289) Acknowledgment of satisfaction of mortgage. Whenever the debt or obligation secured by any mortgage of personal property, which has been filed in the office of the county clerk, as provided in this chapter, shall be paid or discharged, an acknowledgment of satisfaction, signed by the mortgagee, his legal representative or assigns, must be indorsed upon the mortgage, or copy thereof, or attached thereto, filed as aforesaid, and the fact of such discharge or satisfaction noted by the county clerk in the book kept by him, as provided by this act, opposite the names of the parties to such mortgage. Any mortgagee of personal property or his personal representative or assignee, as the case may be, after the full performance of the conditions of the mortgage, whether before or after a breach thereof, who shall for the period of thirty (30) days after being requested by the mortgagor, or his personal representative, refuse or neglect to execute, acknowledge and deliver to the mortgagor, or his personal representative, an acknowledgment of satisfaction of such mort-

gage, shall be liable to the mortgagor, his heirs or assigns in the sum of one hundred dollars (\$100.00); and also, for all actual damages occasioned by such neglect or refusal.

History: En. Sec. 3874, Civ. C. 1895; re-en. Sec. 5771, Rev. C. 1907; re-en. Sec. 15, Ch. 86, L. 1913; re-en. Sec. 8289, R. C. M. 1921; amd. Sec. 1, Ch. 3, L. 1941.

References

Cited or applied as section 5771, Revised

Codes, before amendment, in *Kerr v. Blaine*, 49 M 602, 607, 144 P 566; *Degenhart v. Cartier*, 52 M 102, 109, 157 P 637.

Collateral References

Chattel Mortgages 246.
14 C.J.S. *Chattel Mortgages* § 349.

52-316. (8290) Mortgage on growing crop, and the lien thereof. A mortgage may be given upon a growing crop, or a crop to be grown, and the lien thereon continues after severance, whether remaining in its original state or threshed or otherwise prepared for market; provided, however, that the lien of such mortgage shall attach only to crops next maturing after the execution of such mortgage, except in case of mortgages to secure the purchase price or rental of land upon which such crops are to be grown.

History: Ap. p. Sec. 3876, Civ. C. 1895; re-en. Sec. 5773, Rev. C. 1907; amd. Sec. 16, Ch. 86, L. 1913; re-en. Sec. 8290, R. C. M. 1921.

Effect of Removal from Land of Mortgagor

Where mortgaged grain has been removed from the land of the mortgagor, it is prima facie free from encumbrance, and the mere fact that one who bought it after its removal had knowledge that it was once mortgaged was not alone sufficient to prevent him from being a bona fide purchaser (construction before amendment of 1913). *Brande v. Babcock Hardware Co.*, 35 M 256, 262, 88 P 949.

Exclusive Method

Annual crops are usually treated as chattels personal, subject to sale or mortgage and levy of execution as other chattels are, even while still annexed to the soil, and are not included within the definition of real property; they are mortgageable as personal property and the method thereof prescribed by this section is exclusive. *Morton v. Union Central Life Ins. Co.*, 80 M 593, 608, 261 P 278.

Lien Not Lost by Sale of Land

Held, in an action in claim and delivery to recover the value of a crop of alfalfa hay seized by the sheriff under a chattel mortgage executed prior to the sale of the land upon which it was grown, that where the mortgagor was the owner and in possession of land when he gave a mortgage on a crop to be grown thereon, the lien of the mortgage could not be defeated by a conveyance of the premises to one who had actual or constructive notice thereof. *N Bar N Land etc. Co. v. Taylor*, 94 M 350, 353, 22 P 2d 313.

Life of Lien

Under this section, the lien of a mortgage upon a growing crop for the purchase price of farm machinery attaches only to the crop next maturing after the execution of the mortgage. *Crone v. Occident Elevator Co. et al.*, 70 M 211, 221, 224 P 659.

Id. Held, in an action for the conversion of grain, that the fact that defendant had actual knowledge of a contract made in 1919 under which plaintiff lessor of farm land claimed to be entitled to the possession of a crop grown by the lessee as security for advances made by him to the lessee did not deprive him of his right as mortgagee of a crop grown by the lessee in 1921, the lien created in 1919 not attaching to the crop of 1921 under this section.

Answer in an action for the conversion of grain covered by mortgage given in July, 1927, on the crop to be grown on certain land during the year 1928, held not subject to a general demurrer for failure to allege that the 1928 crop was the crop next maturing after the execution of the mortgage (this section). *National Life Ins. Co. v. Baker*, 94 M 600, 603, 23 P 2d 1098.

Status of Crops of Wheat, etc.

Crops of wheat, oats, etc., are emblements, and as such are usually treated as chattels personal, subject to sale or mortgage, and levy of attachment or execution, even while still annexed to the soil. *Power Mercantile Co. v. Moore Mercantile Co.*, 55 M 401, 407, 177 P 406.

When Lien Attaches

Since the lien of a mortgage on a crop to be grown attached when the seed was planted, where such a mortgage was ex-

executed and recorded more than four months prior to the time the mortgagor was adjudicated a bankrupt and the seed was planted long before the adjudication, the lien related back to the date of the mortgage and was valid as against the trustee in bankruptcy. *Moccasin State Bank v. Waldron*, 81 M 579, 584, 264 P 940.

References

Cited or applied as section 3876, Civil

52-317. (8290.1) Increase may be covered by chattel mortgage of live-stock. A chattel mortgage given upon livestock, may, if specified therein, include all increase of like kind or progeny, and wool of such mortgaged animals, from year to year, during the life of the mortgage.

History: En. Sec. 1, Ch. 100, L. 1923.

References

Hackney v. Birely, 67 M 155, 159, 215 P 642.

52-318. (8291) Removal or selling of mortgaged property—when misdemeanor—when felony. Every person who, after mortgaging any personal property or having executed a conditional sale contract or agreement under the terms of which the title to said property remains in the vendor, except locomotives, engines, rolling stock or a railroad, steamboat machinery and vessels in actual use, removes or causes to be removed, or permits the removal of any such property during the existence of the lien thereon created by such mortgage, or while title to said property remains in the vendor, from the county where said property was situated at the time of the execution of such mortgage or such conditional sale contract or agreement; or, in case of a mortgaged crop, from the land on which the same was grown, or sells or removes said property or crop, or any part thereof, without the consent in writing of the mortgagee or vendor first had and obtained shall be guilty of a misdemeanor, but if such sale be made or removal had with intent to deprive the mortgagee or vendor of his claim thereto or interest therein, such person shall be guilty of larceny and shall be punished in the same manner and to the same extent as for larceny of the property so removed or disposed of.

History: En. Sec. 17, Ch. 86, L. 1913; amd. Sec. 2, Ch. 94, L. 1915; amd. Sec. 1, Ch. 125, L. 1915; re-en. Sec. 8291, R. C. M. 1921; amd. Sec. 1, Ch. 23, L. 1923.

NOTE.—This section as amended by Ch. 23, Laws 1923, held in violation of Section 23, Art. V of the Constitution insofar as it relates to conditional sales contracts. *Opinions of Attorney General*, Vol. 12, pg. 25.

Effect of Sale of Mortgaged Property

This section, forbidding the sale of mortgaged chattels without the consent of the mortgagee, is designed for his protection and does not declare such a sale void or impose any penalty upon the purchaser; and where a sale is made, the title of the mortgagor passes, the buyer acquiring

Code, before amendment, in *Demiers v. Graham*, 36 M 402, 409, 93 P 268; as section 5773, Revised Codes, before amendment, in *Rairden v. Hedrick*, 46 M 510, 514, 129 P 498; *Isbell v. Slette*, 52 M 156, 162, 155 P 503.

Collateral References

Chattel Mortgages⇒12, 135.

14 C.J.S. Chattel Mortgages §§ 32, 326.

10 Am. Jur. 734, Chattel Mortgages, § 25.

Collateral References

Chattel Mortgages⇒13.

14 C.J.S. Chattel Mortgages § 30.

whatever equity there is in the property over and above the amount due upon the mortgage. *Puckett v. Hopkins et al.*, 63 M 137, 139, 206 P 422.

References

Fergus Motor Co. v. Sorenson, 73 M 122, 132, 235 P 422.

Collateral References

Chattel Mortgages⇒230.

14 C.J.S. Chattel Mortgages § 279.

10 Am. Jur. 889, Chattel Mortgages, §§ 272, 273.

Conditional sale of personal property as creating or reserving a "lien" within criminal statute prohibiting acts tending to prevent enforcement of lien. 153 ALR 919.

52-319. (3308.1) Notices of chattel mortgages on livestock, renewals, assignments and satisfactions to be filed by recorder of marks and brands—lists to be furnished stock inspectors—livestock markets not liable for mortgages when notice thereof not filed. The general recorder of marks and brands of the state of Montana shall accept and file in the office of the general recorder of marks and brands, notices of chattel mortgages, renewals, assignments and satisfactions thereof, upon the livestock owned by any person, firm, corporation, or association, and bearing his, their, or its recorded brand, and shall list such notices on the official records of marks and brands kept by him, and also shall cause to be listed said notices in the offices of the stock inspectors, employed by the livestock commission and stationed at the several central livestock markets where records are kept of marks and brands. All forms on which such notices shall be given shall be prescribed by the livestock commission and shall be furnished by the mortgagee of livestock, who shall give such notice. No livestock market to which livestock is shipped shall be held liable to any mortgagee for the proceeds of livestock sold through such livestock market by the mortgagor unless notice of such mortgage is filed as hereinabove provided.

History: En. Sec. 1, Ch. 91, L. 1935; amd. Sec. 1, Ch. 36, L. 1949.

Actual Notice Not Sufficient

Actual notice given to the livestock market by means of a letter is not a substitute for the constructive notice imparted by the recording. Here the legislature clearly evinced an intention to require that livestock markets be notified of mortgage liens by recording with the recorder of marks and brands and in no other way. *Montana Meat Co. v. Missoula Livestock Auction Co.*, 125 M 66, 230 P 2d 955, 960.

Constitutionality

The act does not violate Sec. 26, Art. V of the Montana Constitution which prohibits special legislation. Stockyards are rigorously regulated and licensed and are in the nature of public utilities so that the legislature is justified in treating them differently from ordinary agents or factors. The classification is legitimate and reasonable; it is based upon sound principles of law and it operates equally upon every person or thing within the class and therefore meets the test of constitutionality. *Montana Meat Co. v. Missoula Livestock Auction Co.*, 125 M 66, 230 P 2d 955, 958.

A reading of the title and an examination of the act reveals that the title is adequate, expresses the subject-matter of the act, and does not relate to more than one subject. *Montana Meat Co. v. Missoula Livestock Auction Co.*, 125 M 66, 230 P 2d 955, 959.

The act does not deprive one of property without due process of law since the

chattel mortgagee still has the mortgage and a right of action against the mortgagor. It only adds the requirement of filing the chattel mortgage in the office of the general recorder of marks and brands of the state if the chattel mortgagee wants to hold a livestock market to an admittedly harsh common-law rule of agency law that an agent or broker who sells mortgaged property for the mortgagor is liable for conversion to the mortgagee. *Montana Meat Co. v. Missoula Livestock Auction Co.*, 125 M 66, 230 P 2d 955, 959.

Giving the livestock commission the power to establish certain forms for the use of the parties in the filing of their notice of chattel mortgage is not an illegal delegation of legislative authority for they are but performing a ministerial and administrative act in prescribing the forms necessary to carry out the will of the legislature. *Montana Meat Co. v. Missoula Livestock Auction Co.*, 125 M 66, 230 P 2d 955, 959.

Operation and Effect in General

Livestock markets will not be liable for the proceeds of livestock sold by such markets unless notice was given by filing a notice of the chattel mortgage in the office of the general recorder of marks and brands of the state of Montana. *Montana Meat Co. v. Missoula Livestock Auction Co.*, 125 M 66, 230 P 2d 955, 959.

References

Merrion v. Humphreys, 119 M 495, 176 P 2d 665, 668.

52-320. (3308.2) Contents of notices. Such notices shall consist of a statement showing the date of chattel mortgage, the name of the mortgagors and mortgagees, and/or holder and owner thereof, a description of the livestock covered by said mortgage, the date and county when and where said chattel mortgage is filed, and any other date and place where said chattel mortgage is filed, and in case of notice of renewal, the notice shall state the date of renewal thereof and the date of filing such renewal, and the places where filed, and in the case of a notice of assignment of a chattel mortgage, such notice shall state the date of such assignment, the date of filing the same, the places where filed, and a description of the chattel mortgage assigned and the parties to the assignment, and such other or additional information as may be required from time to time by the livestock commission of the state of Montana.

History: En. Sec. 2, Ch. 91, L. 1935.

References

Merrion v. Humphreys, 119 M 495, 176 P 2d 665, 668.

52-321. (3308.3) Duty of mortgagees to file satisfactions of mortgages. It shall be the duty of the mortgagees, who filed notices of chattel mortgages, renewals and assignments thereof, with the general recorder of marks and brands, as provided for in this act, to file notices of satisfaction of such mortgages with the general recorder of marks and brands immediately upon the satisfaction of said mortgage.

History: En. Sec. 3, Ch. 91, L. 1935.

Collateral References

References

Merrion v. Humphreys, 119 M 495, 176 P 2d 665, 668.

Animals ⇨ 8; Chattel Mortgages ⇨ 246.
3 C.J.S. Animals § 25; 14 C.J.S. Chattel Mortgages § 349.

52-322. (3308.4) Fees—disposal of. The general recorders of marks and brands shall charge for filing and listing such notices of chattel mortgages the sum of one dollar (\$1.00) for each recorded brand listed in each chattel mortgage, and for filing and listing each notice of satisfaction or renewal or assignment of such chattel mortgage, the sum of one dollar (\$1.00) for each recorded brand listed therein. All fees so charged shall be paid into the livestock commission fund.

History: En. Sec. 4, Ch. 91, L. 1935;
amd. Sec. 1, Ch. 135, L. 1953.

References

Merrion v. Humphreys, 119 M 495, 176 P 2d 665, 668.

52-323. (3308.5) Brand recorder or livestock commission not responsible for collection or payment of money under mortgages. Neither the general recorder of marks and brands nor the livestock commission, nor any of its agents or employees shall be held responsible or liable to either mortgagor or mortgagee for the collection or payment of any money due the holder of any livestock mortgage on account of the filing and listing of notices of chattel mortgage or renewals, satisfactions, or assignments thereof as provided in this act; providing the provisions of this act are carried out in good faith.

History: En. Sec. 5, Ch. 91, L. 1935.

Under Seizure and Sale by Inspector

NOTE.—For chattel mortgages of motor vehicles see section 53-110.

Where a livestock inspector seized and sold a cow under the provisions of section 3327.1, R. C. M. 1935 (since repealed),

believing it to have been stolen, and at the time there were notices of a chattel mortgage and a renewal thereof on file in the office of the state livestock commission, contention of claimant of the animal that the inspector had no reason for suspecting the animal had been stolen but acted as a collector of the mortgage

contrary to the provisions of this section, held not meritorious. *Bohart v. Songer*, 110 M 405, 411, 101 P 2d 64.

References

Merrion v. Humphreys, 119 M 495, 176 P 2d 665, 668.

TITLE 53

MOTOR VEHICLES

- Chapter 1. Registration of motor vehicles—duties of registrar, 53-101 to 53-144.
2. Use of highways by nonresident car owners—accidents—service of process, 53-201 to 53-206.
3. Labeling new motor vehicles towed into state, 53-301 to 53-302.
4. Elimination of reckless driving—responsibility of motor vehicle owners and operators (53-401 to 53-417 Repealed), 53-418 to 53-458.
5. State-owned motor vehicles—custody—regulation of use—lettering, 53-501 to 53-510.
6. Additional fees or taxes on motor vehicles (53-601 to 53-614 Superseded), 53-615 to 53-638.
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CHAPTER 1

REGISTRATION OF MOTOR VEHICLES—DUTIES OF REGISTRAR

- Section 53-101. Duties of registrar of motor vehicles—records.
- 53-102. Penalty for violations—enforcement of provisions.
- 53-103. Previous registration receipt to accompany application for registration.
- 53-104. "Motor vehicle" defined.
- 53-105. Blanks to be provided.
- 53-106. Number plates.
- 53-107. Certificates of registration and ownership—contents, issuance, entry, assignment of numbers—registration card to be signed, carried and exhibited on demand.
- 53-108. Renewal of registration.
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- 53-110. Filing of liens, rights, procedure, fees.
- 53-111. What are parts of motor vehicle.
- 53-112. Fee for original certificate of ownership and transfer of title.
- 53-113. Lost certificates.
- 53-114. Application for registration of motor vehicles and payment of license fees thereon—proportional registration of fleets of vehicles engaged in interstate commerce.
- 53-115. Time for making application.
- 53-116. Issuance of receipt and assignment of number plates.
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- 53-118. Application for dealer's license.
- 53-119. Must have license plates.
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- 53-122. Registration fees of motor vehicles—fees—disposal of proceeds—fee for half year—dealers' registration and transfer thereof—public owned vehicles exempt from license or registration fees—license or registration fees for trailers, house trailers, semitrailers and tractors—providing for transfer of funds from the motor vehicle fund of the registrar of motor vehicles to the motor vehicle recording fund (sometimes called the motor vehicle administrative fund)—providing for deposit of all fees, other than license fees, except dealer license fees, collected by the registrar of motor vehicles, in said motor vehicle recording fund for the payment of expenses of the maintenance and operation of the department of the registrar of motor vehicles.
- 53-123. Licensing of vehicles from out of state.

- 53-124. Registration of foreign vehicles—application.
- 53-125. Thirty-day license issued for foreign vehicles, when.
- 53-126. Certificate to be displayed.
- 53-127. Filing of applications for license to operate foreign vehicles.
- 53-128. Registrar of motor vehicles to enforce act.
- 53-129. Foreign vehicles used in gainful occupation—registrar of motor vehicles may make reciprocal agreements to exempt.
- 53-130. Foreign vehicles to display number plates.
- 53-131. Purpose and intent of act.
- 53-132. Penalties.
- 53-133. Definitions.
- 53-134. Certificates for dealers and manufacturers.
- 53-135. Certificate of registration for which license previously issued—fee for duplicate.
- 53-136. Alteration or forgery of certificate of title or assignment thereof and penalty therefor.
- 53-137. Report of stolen and recovered motor vehicles.
- 53-138. Licensing of second-hand dealers—keeping records of vehicles received for sale and penalty.
- 53-139. Penalty for sale of vehicle with engine number altered or changed—application for special number.
- 53-140. Dealer to furnish purchaser with bill of sale.
- 53-141. Deputy may be employed to enforce provisions of act—payment from “auto theft fund”—duty of peace officers.
- 53-142. Auto theft fund, how used.
- 53-143. Records to be opened to public.
- 53-144. False statements constitute perjury.

53-101. (1755) Duties of registrar of motor vehicles—records. 1.

The warden of the state penitentiary shall be, and is hereby constituted the registrar of motor vehicles, trailers and semitrailers, of motor and accessories dealers and of operators and chauffeurs, and as such it shall be his duty to keep a record as hereinafter specified of all motor vehicles, trailers and semi-trailers of every kind, and certificates of registration and ownership thereof, of all dealers in motor vehicles and automobile accessories and of operators and chauffeurs.

2. In the case of motor vehicles, trailers and semitrailers, the record shall show the following: Name of owner, residence by town and county, business address, name and address of conditional sales vendor, mortgagee or other lien holder and amount due under contract or lien, manufacturer of car, manufacturer's designation of style of car or vehicle, manufacturer's engine and serial number, year of manufacture, character of motive power and shipping weight of car as shown by the manufacturer and the distinctive license number assigned such car or vehicle; and, if a truck or trailer, the number of tons capacity, and such other information as may from time to time be found desirable.

3. The registrar shall file applications for registration received by him from the county treasurers of the state and register the vehicles therein described and the owners thereof in suitable books or on index cards, as follows:

(a) Under distinctive license number assigned to vehicle by the county treasurers.

(b) Alphabetically under name of owners.

(c) Numerically under make and motor number of vehicle.

(d) Such other index of registration as registrar shall deem expedient.

4. In the case of dealers the record shall show the name of the applicant, his residence and address by town and county, his business address,

the distinctive number assigned him, and the name or names of new cars handled by him.

5. The registrar of motor vehicles shall qualify by giving a bond of twenty-five thousand dollars (\$25,000.00), providing for the faithful performance of his duty. He may appoint one deputy at a salary not to exceed thirty-three hundred dollars (\$3,300.00) per year, and such number of civilian clerks, and for such time or times, at a salary of not to exceed one hundred and seventy-five dollars (\$175.00) per month each, as may be authorized by the state board of examiners, the salary of which deputy and the salaries of which clerks shall be fixed by such board of examiners. The remaining clerical help shall be selected by the registrar of motor vehicles from among the inmates of the state prison.

6. All office equipment, books, files and records belonging to the motor department shall be in the care and general custody and control of the registrar of motor vehicles at the state penitentiary. In order to prevent an accumulation of records and files which shall have ceased to be of any value the registrar of motor vehicles shall have the authority and it shall be his duty to destroy all correspondence, motor card and application card records after the expiration of five (5) years from the date thereof, and all conditional sales contracts and chattel mortgages and records pertaining thereto after the expiration of five (5) years after the date the same have ceased to be liens on the motor vehicles described therein.

7. The registrar of motor vehicles shall, at the end of each month, prepare lists of certificates of registration and ownership issued for the current month, showing the number and kind of license issued, the name and address of owner and legal owner, the make of car and engine number. Such list shall be distributed to the sheriffs and treasurers of each county of the state and to chiefs of police of each incorporated city of the state by the registrar of motor vehicles.

8. All such records shall be open to inspection during all reasonable business hours and the registrar of motor vehicles shall furnish any information from said records upon payment by the applicant of the cost of transcribing the information requested.

History: En. Sec. 1, Ch. 75, L. 1917; re-en. Sec. 1755, R. C. M. 1921; amd. Sec. 1, Ch. 177, L. 1925; amd. Sec. 1, Ch. 129, L. 1927; amd. Sec. 1, Ch. 181, L. 1929; amd. Sec. 1, Ch. 159, L. 1933; Subdivisions 5 and 6 amd. Secs. 1, 2, Ch. 62, L. 1943.

Speed and traffic regulations, secs. 31-107, 32-1101 to 32-1132.

Using without owner's consent, penalty, sec. 94-3305.

Weight and size regulations, sec. 32-1122 et seq.

Cross-References

Accidents on highways, reports, secs. 32-1201 to 32-1217.

Assessment for taxation, sec. 84-406.

Cities and towns, power to license, sec. 11-956.

Drivers' licenses, sec. 31-111 et seq.

Monopolies in motor vehicle financing, secs. 51-201 to 51-206.

Motor carriers, secs. 8-101 to 8-130.

Motor club service companies, secs. 66-1101 to 66-1115.

Motor vehicle operation, regulations, sec. 31-108.

Purpose of Registration Law

In an action to recover the penalty provided by section 53-110, for failure to surrender a certificate of ownership, which defendant claimed it did not have, held, that the purpose of automobile registration being a police regulation, is to provide a method to deter automobile thefts, and to apprehend thieves. Better had it not been enacted if it is construed in such fashion as to place onerous burdens on honest men and prevent those lawfully entitled to registry from accomplishing their objects through technicalities or

official caprice. Due process of law extends to proceedings judicial, administrative or executive in nature. *Anderson v. Commercial Credit Co.*, 110 M 333, 341, 101 P 2d 367.

References

McGinnis v. Phillips, 62 M 223, 228, 205 P 215; *State v. Pepper*, 70 M 596, 600, 226 P 1108; *Barney v. Board of Railroad Comms.*, 93 M 115, 128, 17 P 2d 82; *Firemen's Ins. Co. of Newark, N. J. v. Show*, 110 F Supp 523, 528.

Collateral References

Automobiles⌚38, 80.
60 C.J.S. Motor Vehicles §§ 97, 98.

Civil rights and liabilities as affected by failure to comply with regulations as to registration or license of motor vehicles. 16 ALR 1108.

Constitutionality of statutes and ordinances for taxation of common carriers by automobile. 75 ALR 13.

Validity and applicability of statutes relating to use of highway by private motor carriers and contract motor carriers for hire. 109 ALR 550.

Validity of automobile registration or license fee as affected by classification or discrimination. 126 ALR 1419.

Conflict between statutes and local regulations as to automobiles. 147 ALR 533.

53-102. (1755.1) Penalty for violations—enforcement of provisions.

The violation of any of the provisions of sections 53-101, 53-114, 53-115, 53-116, 53-117, 53-118, 53-119, 53-120 and 53-121, shall constitute a misdemeanor and shall be punishable by a fine of not exceeding twenty-five dollars (\$25.00). Nothing herein contained shall prevent the prosecution of a person for an offense committed under any other law.

It is hereby made mandatory upon all police and peace officers of the state, of the counties of the state, and of towns, cities and villages to carry out the provisions of section 53-101 and sections 53-114 to 53-121, inclusive.

History: En. Sec. 2, Ch. 158, L. 1931.

Collateral References

Automobiles⌚57, 108.
60 C.J.S. Motor Vehicles § 135.

53-103. (1755.2) Previous registration receipt to accompany application for registration. The treasurer of any county shall not accept any application for registration or re-registration of any motor vehicle unless such application be accompanied by the immediately previous registration receipt issued by the registrar of motor vehicles, or an affidavit upon a form prescribed by the registrar, stating under oath that the vehicle had not been operated on the highways of the state of Montana during the immediately previous year, except in cases of automobiles not previously licensed in Montana. Provided that no application for registration or re-registration of any motor vehicle hereafter need be verified.

History: En. Sec. 4, Ch. 158, L. 1931; amd. Sec. 5, Ch. 158, L. 1933; amd. Sec. 1, Ch. 13, Ex. L. 1933; amd. Sec. 1, Ch. 88, L. 1943.

Collateral References

Automobiles⌚39, 82.
60 C.J.S. Motor Vehicles §§ 101, 102.

53-104. (1755.3) "Motor vehicle" defined. The word "motor vehicle" as used in this act or any of the sections of this act shall be deemed to include trailers, semitrailers, automobiles, auto trucks, motorcycles, cycle motors, and all other vehicles propelled by their own power, used upon the public highways of the state, excepting steam or gas tractors.

History: En. Sec. 5, Ch. 158, L. 1931.

Term Excludes Trucks, Busses, Etc.

In view of the definitions of "motor vehicle" in this section and section 53-107 (c), the word "automobile" as used in the statute defining burglary (sec. 94-901, as

amended) held not to include trucks, busses and the like. *State v. Duran*, — M —, 259 P 2d 1051, 1052.

Collateral References

Automobiles⌚37, 78.
60 C.J.S. Motor Vehicles § 63.

53-105. (1756) Blanks to be provided. It shall be the duty of the registrar of motor vehicles to provide blank application forms outlining and providing for the information needed in each class of registration required, and to furnish these upon request to applicant for registration.

History: En. Sec. 2, Ch. 75, L. 1917; 226 P 1108; Barney v. Board of Railroad re-en. Sec. 1756, R. C. M. 1921; amd. Sec. Comms., 93 M 115, 128, 17 P 2d 82.
2, Ch. 88, L. 1943.

References

McGinnis v. Phillips, 62 M 223, 228,
205 P 215; State v. Pepper, 70 M 596, 600,

Collateral References

Automobiles 38, 80.
60 C.J.S. Motor Vehicles §§ 97, 98.

53-106. (1757) Number plates. (1) Every motor vehicle which shall be driven upon the streets or highways of this state shall display both front and rear a number plate, bearing the distinctive number assigned such vehicle by the registrar of motor vehicles. Such number plate shall be in six series: one series for owners of motor cars, one for owners of motor vehicles, of the motorcycle type, one for dealers in each of the two types of vehicles above named, one for trailers and one for trucks. All number plates for motor vehicles shall be renewed annually, shall bear a distinctive marking each year, and shall be furnished by the state.

(2) In the case of motor cars, number plates shall be of metal at least five inches wide and not less than thirteen inches in length, and the word "Montana" with the year shall be placed across the bottom of the plate. The background of the plate shall be of a distinctive color each year, which color shall be designated by the registrar of motor vehicles, provided the registrar of motor vehicles shall, in his discretion, choose to select permanent number or identification plates with a yearly insert plate or tab bearing the last two numbers of the year for which such license is issued and such insert plate or tab shall be serially numbered in the same manner as the numbered plates, then such permanent number or identification plates shall be made in such form and of such materials and of such color contrasts as he shall determine; provided further, that the registrar of motor vehicles may, in his discretion, designate number or identification plates for any year as the proper means of identifying the vehicle for a subsequent year or years, said plates to be validated by a windshield sticker of such size, color and design and displayed as he shall direct; such sticker shall bear a distinctive number and the registration period for which it is issued, after which period it shall be unlawful to further display same on the vehicle. The distinctive registration numbers shall begin with number 1 and be numbered consecutively for each series of plates. The distinctive registration number assigned to the vehicle and the numeral or symbol for the county in which the number plate is issued shall appear on the plate. The dimensions of such numerals and the manner of placing the same on said number plates shall be determined by the registrar of motor vehicles. For the use of dealers the number plates shall be essentially as those for motor cars and motorcycles, except that to the left of the serial number the plate shall contain the letter "D," such letter to be the same height and size as the figures composing the serial number.

(3) For the use of tax-exempt motor vehicles, in addition to the markings herein provided, number plates shall have thereon the following distinctive markings:

For vehicles owned by the state the registrar of motor vehicles may designate the prefix number for the various state departments, and all numbered plates issued to state departments shall bear the words "State Owned" and no year number will be indicated thereon as these numbered plates will be of a permanent nature, and will be renewed by the registrar of motor vehicles at such time when the physical condition of numbered plates requires same. For vehicles owned by the counties, municipalities and school districts and used and operated by officials and employees thereof in line of duty as such, there shall be placed on the number plates assigned thereto, in such position thereon as the registrar may designate, the letter "X." Distinctive registration numbers for plates assigned to motor vehicles of each of the counties in the state and those of the municipalities and school districts situated within each of said counties shall begin with number 1 and be numbered consecutively.

(4) On all number plates assigned to motor vehicles of the truck and trailer type, other than tax-exempt trucks and trailers, there shall appear the letter "T" for plates assigned to trucks and the letters "TR" for plates assigned to trailers.

Number plates assigned to any motor vehicle shall be used only on the specific motor vehicle to which originally assigned.

(5) For the purpose of this act, the several counties of the state shall be assigned numbers as follows: Silver Bow, 1; Cascade, 2; Yellowstone, 3; Missoula, 4; Lewis and Clark, 5; Gallatin, 6; Flathead, 7; Fergus, 8; Powder River, 9; Carbon, 10; Phillips, 11; Hill, 12; Ravalli, 13; Custer, 14; Lake, 15; Dawson, 16; Roosevelt, 17; Beaverhead, 18; Chouteau, 19; Valley, 20; Toole, 21; Big Horn, 22; Musselshell, 23; Blaine, 24; Madison, 25; Pondera, 26; Richland, 27; Powell, 28; Rosebud, 29; Deer Lodge, 30; Teton, 31; Stillwater, 32; Treasure, 33; Sheridan, 34; Sanders, 35; Judith Basin, 36; Daniels, 37; Glacier, 38; Fallon, 39; Sweet Grass, 40; McCone, 41; Carter, 42; Broadwater, 43; Wheatland, 44; Prairie, 45; Granite, 46; Meagher, 47; Liberty, 48; Park, 49; Garfield, 50; Jefferson, 51; Wibaux, 52; Golden Valley, 53; Mineral, 54; Petroleum, 55; Lincoln, 56; any new counties shall be assigned numbers by the registrar of motor vehicles as they may be formed, beginning with the number 57.

History: En. Sec. 3, Ch. 75, L. 1917; re-en. Sec. 1757, R. C. M. 1921; amd. Sec. 2, Ch. 158, L. 1933; amd. Sec. 1, Ch. 6, L. 1941; amd. Sec. 3, Ch. 88, L. 1943; amd. Sec. 1, Ch. 111, L. 1951; amd. Sec. 1, Ch. 29, L. 1953.

References

McGinnis v. Phillips, 62 M 223, 228,

205 P 215; State v. Pepper, 70 M 596, 600, 226 P 1108; Barney v. Board of Railroad Commrs., 93 M 115, 128, 17 P 2d 82.

Collateral References

Automobiles 41.

60 C.J.S. Motor Vehicles § 106.

53-107. (1758) Certificates of registration and ownership—contents, issuance, entry, assignment of numbers—registration card to be signed, carried and exhibited on demand. Upon receiving the original application for registration, duly executed in proper form, the registrar of motor vehicles shall cause to be entered the information contained in said application upon the corresponding records of his office and shall furnish the applicant a certificate of registration and a certificate of ownership, and said owner shall at all times retain possession of the certificate of owner-

ship, except when the same is being transmitted to and from the registrar of motor vehicles for endorsement or cancellation. In the event the said certificate of ownership be in the possession or under the control of any person other than the person entitled to operate and possess the motor vehicle the same must be surrendered to the person entitled to operate and possess such motor vehicle, upon demand, and refusal shall constitute a misdemeanor. At the same time, he shall issue to any conditional sales vendor, or other person holding the legal title to the vehicle, or any mortgagee thereof, or other lien holder, a statement of the filing of such conditional sales contract, mortgage or other lien, said certificate of registration and ownership shall meet the following requirements:

The certificate of registration and the certificate of ownership shall each contain upon the face thereof: (1) the date issued, (2) the registration number assigned to the owner and the vehicle, (3) the name and complete address of the owner and the name and complete address of any conditional sales vendor, and also the name and address of any other lienor as shown by said application, (4) a description of the registered vehicle including the year built and serial number, if any, (5) any lien against such motor vehicle and the amount due at the date of registration, and such other statement of facts as may be determined by the registrar.

The reverse side of the certificate of ownership only shall contain a form of notice to the registrar of a transfer of title or interest of the owner and such other statement on forms as may be determined by the registrar.

Registration card to be signed, carried, and exhibited on demand. (a) Every owner upon receipt of a registration card shall write his signature thereon with pen and ink in the space provided. Every such registration card shall at all times be carried in the vehicle to which it refers or shall be carried by the person driving or in control of such vehicle who shall display the same upon demand of a police officer or any officer or employee of the registrar of motor vehicles or the highway department.

(b) The provisions of this section requiring that a registration card be carried in the vehicle to which it refers or by the person driving the same shall not apply when such card is used for the purpose of making application for renewal of registration or upon a transfer of registration of said vehicle, provided that when such certificate has been surrendered for re-registration that a current official receipt of a county treasurer for such re-registration be carried in lieu of such certificate until the new certificate is received.

The term "motor vehicle" includes automobile, truck, motorcycle, semi-trailer, trailer and trailer-house.

Any trailer, semitrailer or trailer-house which does not have a manufacturer's or other identifying number thereon shall be assigned an identification number by the registrar upon registration of such motor vehicle. The owner or other person lawfully in possession of such motor vehicle shall stamp such number so assigned by the registrar upon the principal right frame member of said motor vehicle near the front end thereof where it may be clearly and readily seen, and said stamping shall be promptly accomplished after notice of the assigned number by the

registrar. The registrar may withhold registration until satisfactory proof, by affidavit, of such stamping is filed with him.

History: En. Sec. 4, Ch. 75, L. 1917; re-en. Sec. 1758, R. C. M. 1921; amd. Sec. 2, Ch. 159, L. 1933; amd. Sec. 5, Ch. 72, L. 1937; amd. Sec. 1, Ch. 148, L. 1943; amd. Sec. 1, Ch. 63, L. 1945; amd. Sec. 1, Ch. 115, L. 1953.

"Automobile" Excludes Trucks, Busses, Etc.

In view of the meanings of the words "motor vehicle" as defined in this section and in section 53-104, the word "automobile" as used in the statute defining burglary (sec. 94-901, as amended) held not to include trucks, busses and the like. *State v. Duran*, — M —, 259 P 2d 1051, 1052.

53-108. (1758.1) Renewal of registration. Every vehicle registration under this act shall expire on December thirty-first of each year and shall be renewed annually upon application and payment of license fees, as provided in sections 53-114 and 53-122, such renewal to take effect on the first day of January of each year. The certificate of registration issued hereunder shall be valid during the registration year only for which issued, and the certificates of ownership shall remain valid until cancelled by the registrar upon a transfer of any interest shown therein and need not be renewed annually. Upon annual renewal, whenever the legal owner of the vehicle is other than the registered owner, the registrar shall immediately notify such legal owner by mail of the registration number assigned to such vehicle for the ensuing year.

The owner of a vehicle registered under the provisions of this act shall be entitled to operate such vehicle between January first and February first without displaying the registration certificate of the current year, on condition that such owner shall, during said period, display upon such vehicle the number plates or plate assigned thereto for the previous year.

History: En. Subd. 2, Sec. 2, Ch. 159, L. 1933.

Note.—In the original enactment of this section (the enrolled bill) reference was made to sections 1959 and 1960, R. C. M. 1921. This was obviously an error and reference should have been made to sec-

References

McGinnis v. Phillips, 62 M 223, 228, 205 P 215; *State v. Pepper*, 70 M 596, 600, 226 P 1108; *Barney v. Board of Railroad Comms.*, 93 M 115, 128, 17 P 2d 82; *Anderson v. Commercial Credit Co.*, 110 M 333, 339, 101 P 2d 367.

Collateral References

Automobiles ¶40, 86.
60 C.J.S. Motor Vehicles § 105.

Motor vehicle certificate of title or similar document as, in hands of one other than legal owner, indicia of ownership justifying reliance by subsequent purchaser or mortgagee without actual notice of other interests. 18 ALR 2d 813.

tions 1759 and 1760 which are now sections 53-114 and 53-122. See *Opinions of the Attorney General*, Vol. 15, p. 290.

Collateral References

Automobiles ¶39, 82.
60 C.J.S. Motor Vehicles §§ 101, 102.

53-109. (1758.2) Transfer of title or interest. (a) Upon a transfer of any title or interest of an owner or owner in or to a motor vehicle registered under the provisions of this act as hereinbefore required, the person or persons whose title or interest is to be transferred shall write their signatures with pen and ink upon the certificate of ownership issued for such vehicle, in the appropriate space provided upon the reverse side of such certificate, and such signature shall be acknowledged before a notary public.

(b) Within ten (10) days thereafter, the transferee shall forward both the certificate of ownership so endorsed and the certificate of registration,

together with the information required under section 53-107, to the registrar, who shall file the same upon receipt thereof and no certificate of ownership and certificate of registration shall be issued by the registrar of motor vehicles until the outstanding certificates are surrendered to that office or their loss established to his reasonable satisfaction.

(c) The provisions of sub-division (b) of this section, requiring a transferee to forward the certificate of ownership after endorsement and the certificate of registration to the registrar, shall not apply in the event of the transfer of a motor vehicle to a duly licensed automobile dealer intending to re-sell such vehicle and who operates the same only for demonstration purposes, but every such dealer shall upon transferring such interest deliver such certificate of ownership and certificate of registration with an application for registration executed by the new owner in accordance with the provisions of section 53-107, and the registrar upon receipt of said certificate of ownership, certificate of registration and application for registration, together with the conditional sales contract or other lien, if any, shall issue a new certificate of ownership and certificate of registration together with a statement of any conditional sales contract, mortgage, or other lien as provided in said section 53-107.

(d) Until said registrar shall have issued a certificate of registration and certificate of ownership and statement as hereinbefore provided, delivery of any motor vehicle shall be deemed not to have been made and title thereto shall not have passed and said intended transfer shall be incomplete and not be valid or effective for any purpose.

(e) In the event of a transfer by operation of law of any title or interest of an owner of the legal title or owner in and to a motor vehicle registered under the provisions of this act, as upon inheritance, devise or bequest, order in bankruptcy or insolvency, execution sale, repossession upon default in the performance of the terms of a lease or executory sales contract, or otherwise than by voluntary act of the person whose title or interest is so transferred, the executor, administrator, receiver, trustee, sheriff or other representative or successor in interest of the person whose title or interest is so transferred shall forward to the registrar of motor vehicles an application for registration in the form required for an original application for registration, together with a verified or certified statement of the transfer of such title or interest which statement shall set forth the reason for such involuntary transfer, the title or interest so transferred, the name or names of the person or persons to whom such title or interest is to be transferred, the process of procedure effecting such transfer and such other information as may be requested by the registrar and with such statement shall be furnished such evidence and instruments as may otherwise be required by law to effect a transfer of legal or equitable title to or an interest in chattels as may be required in such cases, and in the event the registrar shall be satisfied that such transfer is regular and that all formalities as required by law have been complied with, he shall cause to be sent to the owner, conditional sales vendors, lessors, mortgagees and other lienors, as shown by his records notice of such intended transfer and thereafter, but not less than five (5) days thereafter, shall register such motor vehicle and shall issue a new certificate of ownership and certificate

of registration to the person or persons entitled thereto. The notice herein required shall be deemed complied with by deposit in the post office in Deer Lodge, Montana, such notice, postage prepaid, addressed to such person or persons at the respective addresses shown on his records.

In the event of the death of an owner of one or more motor vehicles and/or trailer, and/or semi-trailer, and/or trailer-house registered hereunder and not exceeding the value of one thousand dollars (\$1,000.00), without leaving other property necessitating the procuring of letters of administration or letters testamentary, then the surviving husband or wife, or other heir, unless such property is by will otherwise bequeathed, may secure transfer of the certificate of ownership and the certificate of registration of the deceased, in and to such motor vehicle in the name of the surviving husband or wife or other heir, as above mentioned, upon filing with the registrar an affidavit of such person setting forth the fact of survivorship and the name and address of any other heirs and such other facts as are hereby made necessary to entitle the affiant to a transfer and thereupon the registrar is authorized to make such transfer of the certificate of ownership and certificate of registration, subject to all contracts, leases, mortgages, or other liens as shown by his records.

Nothing in the foregoing subdivision of this section shall prevent any conditional sales vendor, mortgagee, or other lienor from assigning his interest or title in or to a motor vehicle registered under the provisions of this act to any other person without the consent of and without effecting the interest of the holder of the certificate of ownership and certificate of registration. Upon any conditional sales vendor, mortgagee, or other lienor assigning his interest in any motor vehicle registered under this act a copy of such assignment must be filed with the registrar and record thereof made upon his records.

(f) Every person who transfers any motor vehicle to a junk dealer for the purpose of scrapping said vehicle shall so notify the registrar and deliver the certificate of ownership and certificate of registration to the registrar for cancellation.

History: En. Subd. 3, Sec. 2, Ch. 159, L. 1933; amd. Sec. 6, Ch. 72, L. 1937; amd. Sec. 2, Ch. 148, L. 1943; amd. Sec. 2, Ch. 63, L. 1945.

M 333, 339, 101 P 2d 367; Firemen's Ins. Co. of Newark, N. J. v. Show, 110 F Supp 523, 528.

References

Anderson v. Commercial Credit Co., 110

Collateral References

Automobiles 54, 105.
60 C.J.S. Motor Vehicles § 123.

53-110. (1758.3) Filing of liens, rights, procedure, fees. (a) No chattel mortgage, conditional sales contract, lease or other lien on a motor vehicle shall be valid as against creditors, subsequent purchasers or encumbrancers unless and until such mortgage, conditional sales contract, lease or other lien, or a true copy thereof certified by a notary public has been filed with the registrar of motor vehicles as hereinafter provided; the registrar shall not file any mortgage, conditional sales contract, lease or other lien unless such mortgage, conditional sales contract, lease or other lien is accompanied by the certificate of ownership of such vehicle, except in the sale of a new motor vehicle by a duly licensed dealer, and when such mortgage, conditional sales contract, lease or other lien or certified copy

thereof is so presented for filing the registrar shall file the same entering upon his records the name and address of the mortgagee, conditional sales vendor, lessor, or other lienor together with the amount of the lien and he shall at the same time endorse the same information upon the face of the certificate of ownership, mailing a statement certifying to the filing of such mortgage, conditional sales contract, lease or other lien, to the mortgagee, vendor, or other lienor and mail the certificate of ownership to the owner at the address given on said certificate. The owner being the person entitled to operate and possess such motor vehicle.

(b) A chattel mortgage on a motor vehicle is hereby expressly excepted from the provisions of sections 52-304 to 52-306 inclusive and a conditional sales contract on a motor vehicle is hereby excepted from the provisions of sections 74-204 to 74-206 inclusive insofar only as they relate to the place of filing of chattel mortgages, affidavits of renewal, conditional sales contracts or releases.

(c) From and after the filing of any mortgage, conditional sales contract, lease, or other lien, or copy thereof on any motor vehicle, as herein provided, then and in that event such mortgage, conditional sales contract, lease or other lien shall be constructive notice of the said mortgage, conditional sales contract, lease or other lien and its contents to subsequent purchasers and encumbrancers.

(d) Upon default under a chattel mortgage covering a motor vehicle the mortgagee may foreclose his mortgage as in the case of other personal property, and upon default under a conditional sales contract covering a motor vehicle the vendor shall have the remedies prescribed by section 74-207 upon delivery to the sheriff of the original instrument or a copy certified by the registrar of motor vehicles, and in case of attachment of motor vehicles all the provisions of section 52-309 shall be applicable except deposits must be made with the registrar of motor vehicles instead of the county treasurer.

(e) In the event any conditional sales vendor or assignee or chattel mortgagee or assignee fails to file a satisfaction of a chattel mortgage, assignment or conditional sales contract within fifteen days after receiving final payment on such mortgage, assignment, or conditional sales contract he shall be required to pay the registrar of motor vehicles the sum of one dollar (\$1.00) for each and every day thereafter that he fails to file such satisfaction. All moneys paid to the registrar of motor vehicles under this section shall revert to the automobile theft fund.

(f) Upon receipt of any liens, or notice of liens dependent on possession, or attachments, etc., against the record of any motor vehicle registered in this state, the registrar shall within 24 hours, mail to the owner, conditional sale vendor, mortgagees, or assignees of any thereof a notice showing the name and address of the lien claimant, amount of the lien, date of execution of lien, and in the case of attachment the full title of the court and the action and the name of the attorneys for the plaintiff and/or attaching creditor.

(g) It shall not be necessary to refile with the registrar of motor vehicles any instruments on file in the offices of the county clerks and recorders at the time this law takes effect.

(h) A fee of one dollar (\$1.00) shall be paid to the registrar of motor vehicles upon and for filing any lien or lien instrument against any motor vehicle, and said fee of one dollar (\$1.00) shall further include and cover the cost of filing a satisfaction or release of the lien or lien instrument, and, also, the cost of endorsing such satisfaction or release on the face of the certificate of ownership or on the records of the registrar, or both. A fee of fifty cents (\$.50) shall be paid the registrar of motor vehicles for issuing a certified copy of a chattel mortgage, conditional sales contract or other lien, or instrument of encumbrance on file in the office of the registrar, or for filing any assignment of any instrument on file with the registrar.

History: En. Subd. 4, Sec. 2, Ch. 159, L. 1933; amd. Sec. 7, Ch. 72, L. 1937; amd. Sec. 3, Ch. 148, L. 1943; amd. Sec. 3, Ch. 63, L. 1945.

Cross-Reference

When registrar may destroy mortgages, sec. 16-2923.

Innocent Purchaser May Rely on Record Ownership

Under this section, an innocent purchaser of an automobile relying on the record ownership will be protected, particularly where he dealt with the record owner who was in the possession of the car; a mortgage covering an automobile, given by one not in the chain of title, though recorded, is not constructive notice to subsequent purchasers. *Rigney v. Swingley*, 112 M 104, 109, 113 P 2d 344.

Purchaser from Established Dealer Protected

Where finance company, assignee of conditional sale contract, left car covered by contract with established dealer who was conditional vendee and who sold car to innocent purchaser, in action for possession of the car, held: although the conditional sale contract had been filed with the registrar, the finance company was estopped to deny the dealer's apparent authority to sell, either as owner, or as agent of the conditional vendor and it is not incumbent upon one purchasing from a regular dealer to make inquiry concerning the title. *Rasmussen v. Lee & Co. Inc.*, 104 M 278, 283, 66 P 2d 119.

Subd. (e) Time Owner Delays Applying for Duplicate Certificate Not Computable in Penalty

In an action to recover the penalty

provided by this section from a commercial credit company holding a conditional sales contract covering an automobile for failing to surrender a certificate of ownership to the owner within 20 days, wherein plaintiff claimed that 383 days had elapsed before securing the certificate and was awarded the full sum of \$393, held, that under this section a demand is required before one can be pronounced guilty, and the time the owner delays making application for duplicate certificate, under section 53-113, defendant contending he does not have original, should be deducted; awarded \$34. *Anderson v. Commercial Credit Co.*, 110 M 333, 337, 101 P 2d 367.

Where Registered Owner Not Liable for Injuries.

A finance corporation to which a dealer in automobiles have assigned a conditional sale contract covering a truck which, in colliding with a car parked on the highway, caused injuries to plaintiff, held not liable in damages on the theory advanced that it being the registered owner of the offending truck, liability followed. *Coombes v. Letcher*, 104 M 371, 379, 66 P 2d 769.

References

Commercial Credit Co. v. O'Brien et al., 115 M 199, 207, 146 P 2d 637 (cited as Ch. 72, Laws 1937).

Collateral References

Chattel Mortgages—83, 89, 95, 235, 246; *Sales*—450, 472 (2).

14 C.J.S. *Chattel Mortgages* §§ 131, 155, 169, 328, 349; 78 C.J.S. *Sales* §§ 554, 577.

53-111. What are parts of motor vehicle. Tires, casings and/or tubes mounted on a motor vehicle are an integral and component part of said motor vehicle and any tire, casing and/or tube placed thereon are subject to any conditional sales contract, mortgage, lease or other lien on said motor vehicle in the order of filing with the registrar and endorsement on the certificate of ownership.

History: En. Sec. 4, Ch. 148, L. 1943.

53-112. (1758.4) Fee for original certificate of ownership and transfer of title. A charge of one (\$1.00) dollar shall be made for issuance of an original certificate of ownership of title which shall be collected by the county treasurer for the registrar of motor vehicles the first time any vehicle is registered by any owner. Said charge of one dollar (\$1.00) shall be remitted to the registrar of motor vehicles by the county treasurer with each application for registration. Upon a transfer of registration by the owner, there shall be forwarded to the registrar of motor vehicles, the certificate of ownership or title and registration card, properly filled out and executed, together with a transfer fee of one dollar (\$1.00).

History: En. Subd. 5, Sec. 2, Ch. 159, L. 1933; amd. Sec. 8, Ch. 72, L. 1937.

Collateral References

Automobiles 46, 54, 98, 105.
60 C.J.S. Motor Vehicles §§ 123, 137.

53-113. (1758.5) Lost certificates. In the event any certificate of registration or ownership shall be lost, mutilated or become illegible, the persons to whom the same shall have been issued shall immediately make application for and may obtain a duplicate thereof, upon furnishing satisfactory information to the registrar of such facts and upon payment of a fee of one dollar (\$1.00).

History: En. Subd. 6, Sec. 2, Ch. 159, L. 1933; amd. Sec. 1, Ch. 96, L. 1953.

Refers Only to Owner or Legal Owner

In an action to recover the penalty provided by section 53-110, for failure to surrender a certificate of ownership which defendant claimed it did not have, held, that this section providing for issuance of duplicate certificate refers only to issuance to owner or legal owner of the vehicle, and the registrar has no authority to issue

it to anyone else, held further, that the time during which the owner delayed in making application for a duplicate certificate should be deducted in computing the penalty in the case at bar. *Anderson v. Commercial Credit Co.*, 110 M 333, 341, 101 P 2d 367.

Collateral References

Automobiles 39, 82.
60 C.J.S. Motor Vehicles §§ 101, 102.

53-114. (1759) Application for registration of motor vehicles and payment of license fees thereon—proportional registration of fleets of vehicles engaged in interstate commerce. (1) Every owner of a motor vehicle operated or driven upon the public highways of this state shall, for each motor vehicle owned, except as herein otherwise expressly provided, file, or cause to be filed, in the office of the county treasurer of the county wherein such motor vehicle is owned or taxable, an application for registration, or re-registration, upon blank form to be prepared and furnished by the registrar of motor vehicles, executed in duplicate, which application shall contain:

(a) Name and address of owner, giving county, school district, and town or city within whose corporate limits the motor vehicle is taxable.

(b) Name and address of conditional sales vendor, mortgagee or holder of other lien against said motor vehicle, with statement of amount owing under such contract or lien.

(c) Description of motor vehicle, including make, year model, engine and serial number, manufacturer's model or letter, gross weight, type of body and, if truck, the rated capacity.

(d) In case of re-registration, the license number for the preceding year.

(e) Such other information as the registrar of motor vehicles may require.

(2) Before filing such application with the county treasurer, the applicant shall submit the same to the county assessor of said county and said county assessor shall enter on said application in a space to be provided for that purpose, the full and true and the assessed valuation of said vehicle for the year for which said application for registration is made.

(3) The applicant shall, upon the filing of said application, (1) pay to the county treasurer the registration fee, as provided in section 53-122, section 53-615, and section 53-115, and shall also at such time (2) pay the personal taxes assessed against said vehicle for the current year of registration (unless the same shall have been theretofore paid for said year) before the application for registration or re-registration may be accepted by the county treasurer. The county treasurer is hereby empowered to make full and complete investigation of the tax status of said vehicle and any applicant for registration or re-registration must submit proof with respect thereto from the tax records of the proper county at the request of the county treasurer.

(4) The amount of taxes on said motor vehicle shall be computed and determined by the county treasurer on the basis of the levy of the year preceding the current year of application for registration or re-registration and such determination shall be entered on the application form in a space provided therefor.

(5) Motor vehicles are hereby declared to be assessable for taxation as of and on the first day of January in each year irrespective of the time fixed by law for the assessment of other classes of personal property, and irrespective of whether or not the levy and tax may be a lien upon real property within the state of Montana, provided that in no event shall any motor vehicle be the subject of assessment, levy and taxation more than once in each year, viz., the first day in January in each year, which shall be the time of assessment for tax purposes of motor vehicles in stock, in dealer's possession or in dead storage, as well as in use, subsequent registrations, if any, of the same vehicle in the same year not being subject to payment of taxes.

(6) The applicant for original registration of any wholly new and unused motor vehicle acquired by original contract after the first day in January of any year, and such vehicle shall not be subject to assessment and taxation for said vehicle until the first day of January of the year next succeeding, but nothing herein contained shall exempt such vehicle from taxation in the possession of any person on said assessment date.

(7) Upon accepting application for registration or re-registration of any motor vehicle which is subject to taxation in this state on January 1st in any year, and upon payment of taxes, the county treasurer shall stamp on said application: "Taxes on this vehicle due January 1st of current year paid by applicant, prior applicant or owner and this vehicle is eligible for registration."

Upon accepting application for registration of any motor vehicle which was not subject to taxation in this state on January 1st in any year, the

county treasurer shall indicate such fact by proper entry on said application.

(8) The registrar of motor vehicles shall have authority to make proper entry on any certificate of title to any motor vehicle respecting payment of taxes in accord with the fact.

(9) (a) Any owner engaged in operating fleets of two or more vehicles in this state in interstate commerce may, in lieu of registration of such vehicles under the general provisions of this act, register and license such fleet for operation in this state by filing a sworn application with the registrar of motor vehicles, and filing a duplicate copy of said statement with the county treasurer or county treasurers of the proper counties of registration, declaring the total mileage operated by such vehicles in all states and in this state during the preceding calendar year and describing and identifying each such vehicle to be operated in this state during the ensuing license year. Such statement shall also designate a sufficient number of certain vehicles to be registered and licensed under this section to produce total fee payments not less than an amount obtained by applying the proportion of in-state fleet miles to total fleet miles, as reported in said statement, to the fees which would otherwise be required for total fleet registration in this state. The registrar of motor vehicles shall thereupon notify the proper county treasurer or county treasurers of the designated vehicles to be licensed, who, on payment of proper fees, will issue the licenses, and the registrar of motor vehicles shall upon payment of a fee of one dollar for each said vehicle, issue a distinctive sticker for each other vehicle named in said statement identifying it as an interstate fleet which shall be exempt from all further license and weight fee requirements of this state, which may be specified in Title 53 of this code, as amended, provided, that each of such vehicles is properly and duly licensed and registered in some other state, district, possession or territory of the United States or some foreign province, state or country. The proportional registration and licensing provisions of this section shall apply to vehicles added to said fleet and operated in this state during the license year. Montana operators electing to register an interstate fleet shall comply with all requirements of this section relating to the payment of property taxes on his entire fleet. The right of out-of-state operators to proportional registration hereunder shall be subject to the terms and conditions of any reciprocity agreement or declaration made and filed by the registrar of motor vehicles under the provisions of section 53-129, as herein amended.

(b) Mileage proportions for interstate fleets not operated in this state during the preceding year will be determined by the registrar of motor vehicles upon the sworn application of the applicant on forms to be supplied by the registrar of motor vehicles, which will show the operations of the preceding year in other states and the estimated operation in Montana or if no operations were conducted the previous year a full statement of the proposed method of operation.

(c) Any owner complying with and being granted proportional registration shall preserve the records on which the application is made for a period of four full years following the year upon which said application is based. Upon request of the registrar of motor vehicles, the owner agrees

to make such records available to the registrar of motor vehicles at his office for audit as to accuracy of computation and payments, or to pay the costs of an audit by the registrar of motor vehicles or his duly appointed representative at the home office of the owner. If by audit, it is determined that the owner should have registered more vehicles in Montana under provisions of this paragraph, the registrar of motor vehicles may deny such owner the right of any further benefits by reason of any reciprocal agreement or declaration until the fees for such additional vehicle or vehicles, which should have been registered are paid to the registrar of motor vehicles. All license fees which should have been paid under the provisions of this paragraph shall be a lien upon all the property of the owner and such lien shall attach at the time the license fees shall be determined by the registrar of motor vehicles and shall have the effect of an execution duly levied on such property of the owner and shall so remain until said additional fees, so determined are paid or the property sold for the payment thereof.

History: En. Sec. 5, Ch. 75, L. 1917; amd. Sec. 1, Ch. 207, L. 1919; re-en. Sec. 1759, R. C. M. 1921; amd. by repeal Subd. 4, Sec. 22, Ch. 113, L. 1925; amd. Sec. 2, Ch. 181, L. 1929; amd. Sec. 1, Ch. 158, L. 1931; amd. Sec. 1, Ch. 158, L. 1933; amd. Sec. 1, Ch. 72, L. 1937; amd. Sec. 1, Ch. 195, L. 1953.

Cross-References

Payment of additional fees on trucks and trailers, sec. 53-618.

Sales tax to be paid with application to register new vehicle, sec. 53-617.

Constitutionality

Assertion that legislature in amending this section by enacting Ch. 72, Laws 1937 (53-114) and making special provision for taxing automobiles included in class 2 of section 84-301, among other property without first amending such section, unlawfully discriminated against motor vehicles, held not well made, since the legislature may properly go even to the extent of placing identical articles in the hands of different owners, different uses resulting in different productivity. Held, not violative of Art. XII, Sec. 11 and Art. III, Sec. 27 of the Constitution. *Whier v. Dye*, 105 M 347, 354, 73 P 2d 209.

Construction

This section is not open to the construction that a dealer must pay his taxes on all cars held in stock on January 1, before he can sell any one of them; nor does it require the purchaser of one of such cars to pay the entire tax of the dealer covering other cars, before he may obtain license plates; the act not contemplating collection of automobile taxes ahead of other personal property taxes, except as to taxes due on automobiles authorized to make use of the highways, each being

treated separately. *State ex rel. Sadler v. Evans*, 106 M 286, 292, 77 P 2d 394.

County Entitled to License Automobiles Owned by Residents of Fort Peck Townsite

In an action by Valley county to enjoin McCone county and the treasurer thereof from issuing automobile licenses upon cars owned and taxable within Valley county, and to cancel such licenses already issued, or to recover from McCone county the sums Valley county would have received if the licenses had been issued by it, held, that if the motor vehicle's owner resides on Fort Peck townsite, its situs for license and tax purposes is ordinarily in the county of its owner's actual residence or domicile, under this section; its owner's voting residence or place of habitual or permanent keeping being immaterial. *Valley County v. Thomas*, 109 M 345, 387, 97 P 2d 345.

Mandamus Does Not Lie to Issue Plates if Assessor Fails to Furnish Information

A county treasurer may not be compelled by writ of mandate to issue automobile license plates to an applicant under this section, where the assessor had failed to furnish information on the application from which the amount of tax could be determined, and payment of tax not tendered. *State ex rel. Sadler v. Evans*, 106 M 286, 291, 77 P 2d 394.

Payment of Delinquent Taxes for Prior Years Not Condition Precedent

Held, under this and other sections of chapter 72, Laws of 1937, that an applicant for registration of a motor vehicle is not required to pay in addition to taxes for the current year, delinquent taxes due for prior years, even though such delinquent tax is not a lien upon real estate.

State ex rel. Kleve v. Fischl et al., 106 M 282, 283, 77 P 2d 392.

Purpose of Act

The intent and purpose of this section, held, to insure the collection of the current property taxes on automobiles authorized to use the highways. While the act fixes the first day of January as the time of assessment of "motor vehicles in stock, in dealers' possession or in dead storage, as well as in use," the obvious purpose of this provision was to make it possible to carry out the other provisions of the act coupling the registration and issuance of license plates with the payment of taxes. State ex rel. Sadler v. Evans, 106 M 286, 292, 77 P 2d 394.

Situs of Automobile for Taxation and License

Tangible property, such as an automobile, is usually considered to be owned, taxable and licensable where it is habitually kept when at rest rather than where it is temporarily kept or where it is used during the working hours of the day. Valley County v. Thomas, 109 M 345, 387, 97 P 2d 345.

Valuation for Purchaser Same as Assessed Dealer

A purchaser of an automobile from a dealer may be required to pay only the tax on the particular car for which he applies for license plates, and the tax must be on $33\frac{1}{3}$ per cent. of the valuation which should be the same as the car was assessed for against the dealer. State ex-rel. Sadler v. Evans, 106 M 286, 293, 77 P 2d 394.

References

McGinnis v. Phillips, 62 M 223, 228, 205 P 215; State v. Pepper, 70 M 596, 600, 226 P 1108; Barney v. Board of Railroad Commrs., 93 M 115, 128, 17 P 2d 82.

Collateral References

Automobiles 39, 45, 46, 48, 82, 97, 98, 100.
60 C.J.S. Motor Vehicles §§ 101, 102, 136, 137, 142.

Validity of requirement of payment of property taxes as condition precedent to issuance of automobile license. 62 ALR 304.

53-115. (1759.1) Time for making application. Registration must be renewed annually and license fees paid annually. All registrations expire on December 31 of the year in which they are issued and application for registration, or re-registration, must be filed with the county treasurer as aforesaid not later than February 1 of each year.

History: En. Subd. 2, Sec. 1, Ch. 158, L. 1933.

53-116. (1759.2) Issuance of receipt and assignment of number plates. Upon receipt of application for registration and payment of license fee and taxes as herein provided, the county treasurer shall file one copy of said application in his office and issue to the applicant a receipt executed in triplicate, delivering one copy of said receipt to the applicant, one copy to the county clerk and recorder and retaining one copy for his office; and he shall daily forward to the registrar of motor vehicles a duplicate copy of all applications for registration. The county treasurer shall also, and at the same time, assign such motor vehicle a distinctive number, viz., the license plate number, and deliver to the applicant two (2) license plates, as received from the registrar of motor vehicles which shall bear such distinctive numbers. The registrar shall ship said license plates to the various county treasurers by freight, so that they will be received by the county treasurer on or before January first of each year. It shall not be necessary for the county treasurer, in said receipt, to segregate the amount of said taxes for state, county, school district and municipal purposes.

History: En. Subd. 3, Sec. 1, Ch. 158, L. 1933; amd. Sec. 3, Ch. 72, L. 1937.

37 Am. Jur. 561, Motor Transportation, §§ 71 et seq.

Collateral References

Automobiles 41, 48, 100.
60 C.J.S. Motor Vehicles §§ 106, 142.

53-117. (1759.3) Disposition of taxes and license fees collected and method of payment of expenses of costs of making and delivering license plates and identification marks, certificates and all other expense of operating the motor vehicle department. The county treasurer shall credit all taxes on motor vehicles so collected to a motor vehicle suspense fund and, at some time between March 1 and March 10 of each year, and every sixty (60) days thereafter, the county treasurer shall distribute the same in relative proportions required by the levies for state, county, school district and municipal purposes in the same manner as other personal property taxes are distributed. All motor vehicle license fees collected by the county treasurer shall be credited to the motor vehicle license fund hereby established. The cost of making and delivering license plates and identification marks, certificates, and all other expense of operating the motor vehicle department of the state of Montana, shall be paid out of the motor vehicle recording fund (sometimes called the motor vehicle administrative fund); provided, however that each county shall receive its pro-rata share of any license fees, except dealer license fees, paid to the registrar of motor vehicles. The remainder in said county motor vehicle license fund shall be transferred by the county treasurer at the end of each month to the road fund of said county and shall be used by the county for the purpose set forth in section 53-122.

History: En. Subd. 4, Sec. 1, Ch. 158, L. 1933; amd. Sec. 4, Ch. 72, L. 1937; amd. Sec. 1, Ch. 154, L. 1943; amd. Sec. 1, Ch. 200, L. 1945.

Collateral References

Automobiles 49, 101.
60 C.J.S. Motor Vehicles § 144.

53-118. (1759.4) Application for dealer's license. Every dealer in motor vehicles or automobile accessories shall cause to be filed, by mail or otherwise, in the office of the registrar of motor vehicles, a verified application for registration as a dealer on a blank to be furnished by the registrar of motor vehicles for that purpose, and containing the information therein required. Each application must be accompanied by the registration fee hereinafter named. Dealers registration must be renewed and paid for annually, and an application for re-registration must be filed not later than January first of each year. Upon the registration of a dealer, the registrar of motor vehicles shall assign to such dealer a distinctive serial registration number as a dealer and furnish every dealer in motor vehicles with not less than two (2) sets of number plates, and as many more as the fee the dealer pays entitles the dealer to, which number plates shall be similar to number plates furnished to owners of motor vehicles but shall bear thereon, in addition to the serial number assigned such dealer, the word "dealer" or the letter "D." A dealer is hereby prohibited from using or displaying dealer's license plates on any motor vehicle for any purpose other than the sale or demonstration for sale of a new or used car or truck or a service car used in direct connection with the business of a dealer. If it shall appear to the satisfaction of the registrar that any such dealer has used the dealer's license in a manner other than the one above set forth the registrar may revoke such dealer's license. Any dealer violating the provisions of this section shall be guilty of a misdemeanor and subject to a fine of not less than twenty-five (\$25.00) dollars and not more than one hundred (\$100.00) dollars.

History: En. Subd. 5, Sec. 1, Ch. 158, L. 1933; amd. Sec. 2, Ch. 72, L. 1937.

Collateral References

Licenses⇒22, 25, 40.
53 C.J.S. Licenses §§ 39, 66, 78.

Cross-Reference

Carrying on business without license, penalty, sec. 94-1511.

53-119. (1759.5) Must have license plates. Except as otherwise provided herein, no person shall operate a motor vehicle upon the public highways of this state without a license and unless such vehicle shall have been properly registered and shall have the proper number plates conspicuously displayed, one (1) on the front and one (1) on the rear of such vehicle, each securely fastened so as to prevent the same from swinging and unobstructed from plain view, except that trailers and semi-trailers shall have but one (1) number plate conspicuously displayed on the rear. No person shall display on such vehicle at the same time any number assigned to it under any motor vehicle law, except as in this act otherwise provided. No person shall purchase or display on such vehicle any license plate bearing the number assigned to any county as provided in section 53-106, other than the county of his permanent residence at the time of application for and issuance of said license plates. Provided, however, that the owner of any motor vehicle requiring a license plate on any motor vehicle used in the public transportation of persons or property may make application therefor in any county through which said motor vehicle passes in its regular scheduled route, and the license plate so issued bearing the number assigned to said county may be displayed on said motor vehicle in any county, and that when a transfer of ownership of any used motor vehicle bearing a current year's license plate has been completed, such license plate shall be valid in any other county of the state. It is further provided that it shall be unlawful to use license plates issued to one (1) vehicle on any other vehicle, trailers or semi-trailers, or repainting old license plates to resemble current license plates and any person violating these provisions shall be deemed guilty of a misdemeanor and shall be subject to the penalty as set out in section 53-132.

History: En. Subd. 6, Sec. 1, Ch. 158, L. 1933; amd. Sec. 1, Ch. 154, L. 1937; amd. Sec. 1, Ch. 73, L. 1941.

Collateral References

Automobiles⇒326.
61 C.J.S. Motor Vehicles § 607.

53-120. (1759.6) Replacing number plates. In the event of loss, mutilation, or destruction of number plates, the owner of the registered motor vehicle may obtain from the registrar of motor vehicles, duplicates thereof upon filing sworn declaration showing such fact and payment of a fee of one dollar (\$1.00).

History: En. Subd. 7, Sec. 1, Ch. 158, L. 1933.

53-121. (1759.6) Residents operating motor vehicles under licenses issued by any state other than Montana forbidden. It shall especially be provided that a resident of the state of Montana shall not operate a motor vehicle under a license issued by any other state than Montana, except when such vehicle is a part of an interstate fleet registered in accordance with the provisions of section 53-114.

History: En. Subd. 8, Sec. 1, Ch. 158, are compiled as secs. 53-114 and 53-129
L. 1933; amd. Sec. 2, Ch. 195, L. 1953. respectively.

Compiler's Note

Sections 1 and 3 of Ch. 195, Laws 1953

53-122. (1760) Registration fees of motor vehicles—fees—disposal of proceeds—fee for half year—dealers' registration and transfer thereof—public owned vehicles exempt from license or registration fees—license or registration fees for trailers, house trailers, semitrailers and tractors—providing for transfer of funds from the motor vehicle fund of the registrar of motor vehicles to the motor vehicle recording fund (sometimes called the motor vehicle administrative fund)—providing for deposit of all fees, other than license fees, except dealer license fees, collected by the registrar of motor vehicles, in said motor vehicle recording fund for the payment of expenses of the maintenance and operation of the department of the registrar of motor vehicles. Registration or license fees shall be paid upon registration or re-registration of motor vehicles, trailers, house trailers, semitrailers and dealers in motor vehicles, trailers or automobile accessories in accordance with this act, as follows:

Dealers in motor vehicles other than motorcycles, a minimum fee of thirty dollars (\$30.00) which shall entitle such dealer to two (2) sets of number plates, and five dollars (\$5.00) additional fee for each additional set of number plates up to six sets, and two dollars (\$2.00) additional fee for each additional set of number plates, as may be applied for by such dealer; provided, that each dealer be required to furnish the registrar of motor vehicles a statement showing the makes of motor vehicles handled by him, and the total number of each make sold by him during the preceding year, and that he not be issued a license unless he so conforms:

Dealers in motorcycles, trailers including house trailers, fifteen dollars (\$15.00);

Dealers in automobile accessories, except automobile dealers, ten dollars (\$10.00);

Motor vehicles, weighing twenty-eight hundred and fifty (2850) pounds, or under, other than motor trucks, five dollars (\$5.00);

Motor vehicles, weighing over twenty-eight hundred and fifty (2850) pounds, other than motor trucks, ten dollars (\$10.00);

Electrically driven passenger vehicles, ten dollars (\$10.00);

All motorcycles, two dollars (\$2.00);

Tractors and/or trucks, ten dollars (\$10.00);

Busses shall be classed as motor trucks and licensed accordingly;

Trailers and semitrailers less than two thousand five hundred (2,500) pounds maximum gross loaded weight and house trailers of all weights, two dollars (\$2.00);

Trailers and semitrailers over two thousand five hundred (2,500) up to six thousand (6,000) pounds maximum gross loaded weight, except house trailers, five dollars (\$5.00);

Trailers and semitrailers over six thousand (6,000) pounds maximum gross loaded weight, ten dollars (\$10.00);

Trailers used exclusively in the transportation of logs in the forest or in the transportation of oil and gas well machinery, road machinery and

bridge material exclusively, new and secondhand, and trailers used exclusively for the transportation of road machinery and bridge materials, shall pay a fee of fifteen dollars (\$15.00) annually, regardless of size or capacity.

All rates to be twenty-five per cent (25%) higher for motor vehicles, trailers and semitrailers, when not equipped with pneumatic tires;

Bicycles with motor attachments, one dollar (\$1.00);

Tractors, as specified in this section, shall mean any motor vehicle, except passenger cars used for towing a trailer or semitrailer.

All license or registration fees collected by the county treasurer of the county in which any motor vehicle is registered shall be credited to the motor vehicle license fund of said county. The funds in said county motor vehicle fund shall be used as follows:

(a) Fifty per cent (50%) of the net license fees derived from the registration of motor vehicles, the owners of which reside within the boundaries of any incorporated city of the state of Montana, having a population of thirty-five thousand (35,000) or more, or the owners of which reside within the boundaries of any incorporated city of the state of Montana which lies within one (1) mile of the city limits of an incorporated city of the state of Montana having a population of thirty-five thousand (35,000) or more, according to the federal census of 1930, shall be held by the county treasurer and segregated from other county road funds and designated as "city road fund," to be used in the city from which fees were derived for the construction of permanent streets within the incorporated limits of such city.

(b) The license fees held in the city road fund, as hereinbefore provided, shall be used by the city council of such city having the population of thirty-five thousand (35,000) or more, or by the city council of such city which lies within one (1) mile of the city limits of an incorporated city of the state of Montana, having a population of thirty-five thousand (35,000) or more, according to the federal census of 1930, only for the construction of permanent highways and streets within the boundaries of such incorporated city. Provided, that all construction of public highways and streets, the cost of which is to be paid out of the fund derived from the license fees as herein provided, shall be under the supervision of the county surveyor of the county within whose boundaries such city is situated, subject to the control of the said city council and surveyor to designate the public highway or street upon which the work is to be done, and the type of pavement to be used, and provided further, that the cost of supervision of the county surveyor shall not exceed five per cent (5%) of the cost of said work.

(c) The net license fees derived from the registration of motor vehicles shall be by the registrar of motor vehicles transmitted to, and paid over to the county treasurer of the county from which the registration fee came, such fees, excepting apportionment to the city road fund, to be used by said county for the construction, repair and maintenance of all public highways, except state and federal highways, within the boundaries of said county, including city streets forming component parts of arterial highways within the corporate cities of less population than thirty-five thousand

(35,000), according to the federal census of 1930, within the boundaries of said county.

If any dealer, or motor vehicle, house trailer, trailer, or semitrailer is originally registered six (6) months after the time of registration as set by law, the registration or license fee for the remainder of such year shall be one-half ($\frac{1}{2}$) of the regular fee above given.

A dealer in motor vehicles, trailers or automobile accessories who shall maintain more than one (1) place of business or who shall maintain any branch establishment or establishments, must register and pay a registration or license fee for each such place of business or establishment.

A registered dealer, who may sell or dispose of his entire business to any other person, may have his certificate of registration transferred to such purchaser upon filing with the registrar of motor vehicles a statement containing the name of the registered dealer, the number under which such dealer is registered, the name of the purchaser, and the location of the place of business so sold. Upon the filing of such statement, accompanied by a filing fee of one dollar (\$1.00), the registrar of motor vehicles shall note upon the registration record of such dealer the change of ownership. But no certificate of registration can be transferred unless the entire business of the dealer holding such certificate of registration be sold and disposed of, and no such certificate of registration can be transferred to any person other than the purchasers of such business.

The provisions of this act with respect to the payment of registration fees shall not apply to or be binding upon motor vehicles, trailers or semitrailers or tractors owned or controlled by the United States of America or any state, county or city, but in all other respects the provisions of this act shall be applicable to and binding upon motor vehicles, tractors, trailers, and semitrailers.

All fees, other than license fees, mentioned and described in sections 53-110 and 53-112, and in section 53-135, shall hereafter be deposited in, and paid into, the motor vehicle recording fund of said registrar (sometimes called the motor vehicle administrative fund) out of which shall be paid all salaries, operating expenses, and all other expenses of the department of the registrar of motor vehicles.

There shall be immediately transferred from the motor vehicle fund of the registrar of motor vehicles to the said motor vehicle recording fund all moneys now in said motor vehicle fund which were collected by the registrar of motor vehicles as fees other than license fees.

Whenever, in the judgment of the state board of examiners, there shall be in said motor vehicle recording fund more moneys than are reasonably required or needed to pay all salaries, operating expenses, and all other expenses of the department of the registrar of motor vehicles, such board shall distribute such unneeded surplus or excess to the fifty-six (56) counties of the state in a pro rata manner based upon the total number of motor vehicles registered in each county.

History: En. Sec. 6, Ch. 75, L. 1917; amd. Sec. 2, Ch. 207, L. 1919; amd. Sec. 1, Ch. 199, L. 1921; re-en. Sec. 1760, R. C. M. 1921; amd. Sec. 1, Ch. 107, L. 1923; amd. Sec. 1, Ch. 88, L. 1927; amd. Sec. 1, Ch. 182, L. 1929; amd. Sec. 1, Ch. 103, L. 1933; amd. Sec. 1, Ch. 38, Ex. L. 1933; amd. Sec. 1, Ch. 138, L. 1937; amd. Sec. 1, Ch. 125, L. 1939; amd. Sec. 2, Ch. 154, L. 1943; amd. Sec. 2, Ch. 200, L. 1945; amd. Sec. 1, Ch. 201, L. 1945; amd. Sec. 1, Ch. 221, L. 1951; amd. Sec. 1, Ch. 215, L. 1953.

Compelling Issuance of License

The duty of the county treasurer to issue licenses is ministerial and not discretionary and he may be compelled by mandamus to issue licenses for logging trailers upon tender of the fifteen dollar fee per vehicle, since if applicant's operations did not entitle him to the special logging fee he would be subject to penalty for operating vehicles without proper license. *State ex rel. Sharp v. Cross*, 123 M 261, 211 P 2d 760.

Constitutionality

Held, that this section, requiring the registration of motor vehicles and the payment of prescribed fees, is not open to the constitutional objection that it is a revenue measure, but that it may be justified as a reasonable police regulation. *State v. Pepper*, 70 M 596, 600, 226 P 1108.

Construction

This section providing that fifty per cent. of the fees derived from registration of motor vehicles the owners of which reside in a city of 35,000 or more population shall be held by county treasurer in the "city road fund" for construction under supervision of county surveyor, held that the money in such fund is city money to be disbursed by the city authorities as provided by the act, and not by the county surveyor under his authority to supervise work. *State ex rel. City of Butte v. Healy*, 105 M 227, 231, 70 P 2d 437.

Purpose With Reference to County Surveyor

The purpose of this section in declaring that the county surveyor shall have equal

voice in the construction of city streets with the officials of the city in determining work done and character thereof and in its supervision, held to have been standardization of the work, rather than a pronouncement as to who should have absolute control of the work and the expenditure of the funds. *State ex rel. City of Butte v. Healy*, 105 M 227, 234, 70 P 2d 437.

References

McGinnis v. Phillips, 62 M 223, 228, 205 P 215; *Barney v. Board of Railroad Commrs.*, 93 M 115, 128, 17 P 2d 82.

Collateral References

Automobiles—37, 46, 49; Highways—99¼; Licenses—28, 37.

40 C.J.S. Highways § 176; 53 C.J.S. Licenses, §§ 45, 46; 60 C.J.S. Motor Vehicles §§ 63, 137, 143.

Civil rights and liabilities as affected by failure to comply with regulations as to registration or license of motor vehicles. 16 ALR 1108.

Constitutionality of statutes and ordinances for taxation of common carriers by automobile. 75 ALR 13.

Validity and applicability of statutes relating to use of highway by private motor carriers and contract motor carriers for hire. 109 ALR 550.

Validity of automobile registration or license fee as affected by classification or discrimination. 126 ALR 1419.

Conflict between statutes and local regulations as to automobiles. 147 ALR 533.

Lack of proper automobile registration or operator's license as evidence of operator's negligence. 29 ALR 2d 963.

53-123. (1760.1) Licensing of vehicles from out of state. Every motor or other vehicle of the types required to be licensed, under the laws of this state, which shall enter this state with proof of evidence that it has paid a license fee for the ensuing year, under the laws of some other state or foreign government, shall immediately after entering the state of Montana, obtain a license at the first county seat, for operation in this state, in accordance with the provisions of this act.

History: En. Sec. 1, Ch. 121, L. 1929; amd. Sec. 1, Ch. 126, L. 1933.

Collateral References

Automobiles—36.

60 C.J.S. Motor Vehicles § 66.

Constitutionality, construction and effect of statute in relation to foreign-owned ve-

hicles operating within state. 82 ALR 1091.

Isolated, occasional, or incidental transportation of person or property for compensation as within contemplation of statute requiring permits or otherwise regulating transportation of person or property on highway. 123 ALR 229.

53-124. (1760.2) Registration of foreign vehicles—application. The owner of such registered foreign motor vehicle shall, upon a form to be prepared and furnished by the registrar of motor vehicles, apply to the registrar of motor vehicles in this state, the sheriff at the first county seat

entered, who shall be a deputy registrar of motor vehicles, or such other agency or agencies as may have been designated by the registrar of motor vehicles for registration of such vehicle. Such form or application shall state, in addition to other matters that may be required, the following: The name and permanent business and residence address of the owner, number and description of the license already issued to the car.

History: En. Sec. 2, Ch. 121, L. 1929;
amd. Sec. 2, Ch. 126, L. 1933.

53-125. (1760.3) Thirty-day license issued for foreign vehicles, when. Upon receipt of the application duly signed, the registrar of motor vehicles, or his agency, if satisfied as to the truthfulness of the facts therein stated, shall, without charge, furnish to the applicant a registration certificate or device, or an identification form, indicating that the holder thereof has complied with the requirements of this act, and containing such other matters as may be deemed or considered necessary by it, the registrar of motor vehicles. Such certificate or device, so issued, shall be valid and authorize the operation of vehicles so registered within this state, without any charge or license fee, for a period of thirty (30) days from the date of issuance, but not beyond the current calendar year.

If the owner of the motor vehicle shall furnish satisfactory proof that he is not engaged in gainful occupation or business enterprise, but is in the state of Montana for recreational travel only, his foreign registration certificate may be extended an additional thirty (30) days without charge.

History: En. Sec. 3, Ch. 121, L. 1929;
amd. Sec. 3, Ch. 126, L. 1933.

Collateral References

Automobiles↪36, 39.
60 C.J.S. Motor Vehicles §§ 66, 101.

53-126. (1760.4) Certificate to be displayed. The vehicle so registered under this act shall carry the certificate, or device, or identification, in plain sight in or upon said vehicle at all times when said vehicle is being operated or driven upon the public highways of this state.

History: En. Sec. 4, Ch. 121, L. 1929;
amd. Sec. 4, Ch. 126, L. 1933.

Collateral References

Automobiles↪42.
60 C.J.S. Motor Vehicles § 109.

Validity, construction and application of statutes regarding failure or refusal of operator of motor vehicle to display license on demand. 143 ALR 1019.

53-127. (1760.5) Filing of applications for license to operate foreign vehicles. The registrar of motor vehicles shall file said application for registration by non-resident owners in his office and suitably index the same and keep and maintain filings and indices with reference thereto, which shall be open to inspection by the public during reasonable business hours.

History: En. Sec. 5, Ch. 121, L. 1929;
amd. Sec. 5, Ch. 126, L. 1933.

Collateral References

Automobiles↪39.
60 C.J.S. Motor Vehicles § 101.

53-128. (1760.6) Registrar of motor vehicles to enforce act. The registrar of motor vehicles is hereby authorized and empowered to designate and shall appoint and maintain convenient agencies for the purpose of carrying into effect the provisions of this act, and for such purpose may designate county, city or town officers, or public societies, or clubs, or other

civic activities, banks, or other business institutions as agencies therefor, and may establish and promulgate rules and regulations to carry out the purpose and intent of this act.

History: En. Sec. 6, Ch. 121, L. 1929;
amd. Sec. 6, Ch. 126, L. 1933.

Collateral References

Automobiles 38.

60 C.J.S. Motor Vehicles § 97.

53-129. (1760.7) Foreign vehicles used in gainful occupation—registrar of motor vehicles may make reciprocal agreements to exempt. (1) Before any foreign licensed motor vehicle shall be operated on the highways of this state for hire, compensation or profit, or before the owner thereof uses the vehicle while engaged in gainful occupation or business enterprise, in the state of Montana, including highway work, the owner of such vehicle shall make application to a county treasurer for registration, upon an application form furnished by the registrar of motor vehicles. Upon satisfactory evidence of ownership submitted to such county treasurer, the treasurer shall accept the application for registration and shall collect the regular license fee required for the vehicle. The treasurer shall thereupon forward to the registrar of motor vehicles such application form. The treasurer shall at the same time issue to the applicant the proper license plates or other identification markers, which shall at all times be displayed upon such vehicle, when operated or driven upon roads and highways of this state, during the period of the life of such license. Upon receipt of the application for registration, the registrar of motor vehicles shall issue to the owner of the vehicle a registration receipt. This registration receipt shall not constitute evidence of ownership, but shall only be used for registration purposes. No Montana certificate of title shall be issued for this type of registration. This paragraph shall not be applicable to any vehicle which is a part of an interstate fleet registered and licensed under the provisions of section 53-114, nor to any vehicle covered by a valid and existing reciprocal agreement or declaration entered into as hereinafter set forth.

(2) (a) The registrar of motor vehicles shall have the power to enter into agreements or arrangements with the duly authorized representatives of other states, the District of Columbia, territories or possessions of the United States and foreign states, provinces or countries granting exemption to owners of vehicles which are properly registered or licensed in such jurisdictions, and upon which evidence of registration is conspicuously displayed, from the payment, wholly or partially, of any taxes, fees or other charges imposed upon such owners with respect to the ownership or operation of such vehicles under the laws of this state. Such agreements or arrangements shall provide that owners of vehicles registered or licensed in this state who operate vehicles upon the highways of such other states, the District of Columbia, territories or possessions of the United States and foreign states, provinces or countries shall receive substantially equivalent exemptions, benefits and privileges as are extended to owners of vehicles from such jurisdictions in this state.

(b) Agreements or arrangements entered into under the authority herein granted may contain provisions authorizing an owner or owners of one of the states, district, territories or possessions of the United States or

foreign states, provinces or countries which is a party thereto to register or license vehicles in another jurisdiction which is a party thereto. Vehicles registered or licensed in one of such jurisdictions under such provision shall be exempt from registration or licensing requirements in the other jurisdiction or jurisdictions which are parties thereto and shall be entitled to all exemptions, benefits and privileges granted with respect to other vehicles registered or licensed in such jurisdiction, as to such interstate operations.

(c) Agreements or arrangements entered into under the authority herein granted may contain provisions denying the exemptions, benefits and privileges granted thereunder to any owner who violates conditions stated therein or who violates rules and regulations for the administration of reciprocal exemptions, benefits and privileges issued by the registrar of motor vehicles.

(d) The registrar of motor vehicles is authorized to examine the legal requirements of motor vehicle registration, license and weight fee statutes of states which grant reciprocal privileges to out-of-state owners but which do not authorize negotiation or execution of agreements by administrative officials and he is authorized to determine, by such examination, and to declare the extent and nature of the reciprocal exemptions, benefits and privileges to which owners of vehicles from such states shall be entitled under the laws of this state.

(e) All agreements, arrangements, declarations and rules and regulations authorized by this section shall be in writing and shall become effective when filed in the office of the registrar of motor vehicles who shall make copies available to the public upon request.

History: En. Sec. 7, Ch. 121, L. 1929;
amd. Sec. 7, Ch. 126, L. 1933; amd. Sec.
1, Ch. 93, L. 1939; amd. Sec. 1, Ch. 296,
L. 1947; amd. Sec. 3, Ch. 195, L. 1953.

Compiler's Note

Sections 1 and 2 of Ch. 195, Laws 1953
are compiled as secs. 53-114 and 53-121
respectively.

53-130. (1760.8) Foreign vehicles to display number plates. All foreign registered and licensed motor vehicles shall also carry in plain sight thereon the license plates or device from such other state or foreign country.

History: En. Sec. 8, Ch. 121, L. 1929;
amd. Sec. 8, Ch. 126, L. 1933.

Collateral References

Automobiles 41.
60 C.J.S. Motor Vehicles § 106.

53-131. (1760.9) Purpose and intent of act. This act shall be solely for the purpose of registration and identification of vehicles operated in this state that have paid a license in another state or foreign country, and otherwise than as herein specifically set forth shall not be construed as a repeal of any acts or parts of acts having to do with the registration or licensing of automobiles within the state of Montana.

History: En. Sec. 10, Ch. 121, L. 1929;
amd. Sec. 9, Ch. 126, L. 1933.

Collateral References

Automobiles 36.
60 C.J.S. Motor Vehicles § 66.

53-132. (1760.10) Penalties. Any person operating a vehicle in violation of the intent and purpose of this act shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than ten

dollars (\$10), or more than fifty dollars (\$50), or confined in the county jail for not more than thirty (30) days, or both such fine and imprisonment.

History: En. Sec. 11, Ch. 121, L. 1929;
amd. Sec. 10, Ch. 126, L. 1933.

Collateral References

Automobiles 57.

60 C.J.S. Motor Vehicles § 135.

53-133. (1763) Definitions. The words and phrases used in this act shall be construed as follows, unless the context may otherwise require:

a. The words "motor vehicle" shall include all vehicles which are self-propelled, except road rollers, traction engines and railroad cars, farm tractors, and motor cars run upon stationary rails or tracks.

b. The term "motor-cycle" shall mean a motor vehicle having not more than three (3) wheels in contact with the ground and a saddle on which the operator sits astride, or a platform on which he stands, and bicycles having a motor attachment thereto and a driving wheel in contact with the ground, in addition to the wheels of the vehicle itself, but a motor-cycle may carry one or more attachments and a seat for the conveyance of a passenger.

c. The term "motor truck" shall include all motor vehicles designed or used for the transportation of commodities, merchandise, produce, freight or animals.

d. The term "trailer" shall include every vehicle without motive power, designated to carry property or passengers wholly on its own structure and to be drawn by a motor vehicle.

e. The term "semi-trailer" shall include every vehicle of the trailer type so designed and used in conjunction with a motor vehicle that some part of its own weight and that of its own load rests upon or is carried by another vehicle.

f. The term "owner" shall include any person, firm, association or corporation owning or renting a motor vehicle, or having the exclusive use thereof, under lease or otherwise, and shall also include a contract vendee.

g. The term "dealer" shall mean and include any person, firm, or corporation engaged in whole or in part in the business of buying, selling, repairing, and reconditioning either new or used motor vehicles, or both, and who maintains a place of business with adequate facilities and equipment for the servicing, repair, maintenance, and reconditioning of new or used motor vehicles and also adequate display facilities for at least one motor vehicle, and no person, firm or corporation shall be issued a dealer's license by the registrar of motor vehicles unless they qualify as a dealer defined herein, provided, however, that a used car dealer only shall have a building as an established place of business and need no facilities for repair, maintenance and reconditioning of used cars, and shall deliver to the buyer on completion of sale a transferable title, and shall purchase a Montana store license.

h. "Trailer dealer" shall mean and include any person, firm or corporation engaged in whole or in part in the business of buying or selling trailers or semi-trailers with facilities for displaying one or more trailers or semi-trailers.

i. The term "vehicle" shall include any motor vehicle as herein defined.

j. The term "used motor vehicle" shall include any motor vehicle which has been sold, bargained, exchanged, given away or title transferred from the person who first took title to it from the manufacturer or importer, dealer or agent of the manufacturer or importer, and so used as to have become what is commonly known as "second-hand" within the ordinary meaning thereof.

k. The term "manufacturer" shall include any person, firm, corporation or association engaged in the manufacture of any motor vehicles, trailers, or semi-trailers as a regular business.

History: En. Sec. 12, Ch. 75, L. 1917; amd. Sec. 3, Ch. 207, L. 1919; re-en. Sec. 1763, R. C. M. 1921; amd. Sec. 4, Ch. 88, L. 1943; amd. Sec. 1, Ch. 139, L. 1945; amd. Sec. 1, Ch. 199, L. 1947.

Operation and Effect

Held, that this law, that is the motor vehicle law, providing inter alia for the regulation of transfer of ownership of automobiles, was intended solely as a police regulation and not to establish an exclusive method of transfer of title, and that, therefore, a dealer who intervened in an action for conversion of a car sold by him under a conditional sale contract

was not required to plead in his complaint that in making the sale he had complied with the provisions of the act. *Bond Lumber Co. v. Timmons et al.*, 82 M 497, 267 P 802.

References

McGinnis v. Phillips, 62 M 223, 228, 205 P 215; *State v. Pepper*, 70 M 596, 600, 226 P 1108; *Barney v. Board of Railroad Comms.*, 93 M 115, 128, 17 P 2d 82.

Collateral References

Automobiles ⇐1.
60 C.J.S. Motor Vehicles § 1.

53-134. (1763.2) Certificates for dealers and manufacturers. In the case of dealers in motor vehicles or motorcycles, including manufacturers who sell to others than dealers, all of whom are intended to be covered by this and all other provisions of this section, a separate certificate of title, either of such dealer's immediate vendor, or of the dealer himself, shall be required in the case of each motor vehicle in his possession, and the registrar of motor vehicles shall determine the form in which application for such certificates of title and assignments thereof shall be made; provided, however, that no such certificate shall be required in the case of new motor vehicles sold by manufacturers or dealers as the term "dealers" is defined in section 1763.1 (since repealed).

History: En. Sec. 10, Ch. 113, L. 1925.

Collateral References

Automobiles ⇐20.
60 C.J.S. Motor Vehicles § 42.

53-135. (1763.3) Certificate of registration for which license previously issued—fee for duplicate. Every person applying for a certificate of registration of any motor vehicle for which a license has previously been issued, shall present to the registrar of motor vehicles either the original or a duplicate of such certificate of registration. A charge of twenty-five cents shall be made by the registrar of motor vehicles for all duplicate certificates of title or of registration issued by him.

History: En. Sec. 11, Ch. 113, L. 1925; amd. Sec. 1, Ch. 74, L. 1927.

Collateral References

Automobiles ⇐39, 46.
60 C.J.S. Motor Vehicles §§ 101, 137.

53-136. (1763.4) Alteration or forgery of certificate of title or assignment thereof and penalty therefor. Any person who shall alter or forge or cause to be altered or forged, any certificate of title issued by the registrar of motor vehicles pursuant to the provisions of this section, or any assignment thereof, or who shall hold or use any such certificate or assignment

knowing the same to have been altered or forged, shall be deemed guilty of a felony, upon which conviction thereof shall be liable to pay a fine of not more than five thousand dollars or to imprisonment in any penal institution within the state for a period of not more than ten years, or both, in the discretion of the court.

History: En. Sec. 12, Ch. 113, L. 1925.

Collateral References

Forgery⌚7(1).

37 C.J.S. Forgery § 36.

53-137. (1763.5) Report of stolen and recovered motor vehicles. It shall be the duty of the sheriff of every county of the state and of the chief of police or commissioner of police of every city to make immediate report to the registrar of motor vehicles of all motor vehicles reported to him as stolen or recovered, upon forms provided for by the registrar of motor vehicles. Failure on the part of any officer shall be deemed to be misfeasance in office and shall constitute grounds for removal. Upon receipt of such information, the registrar of motor vehicles shall file the same in an index to be known as the "stolen and recovered motor vehicle index." It shall also be the duty of the registrar of motor vehicles to file reports of stolen and recovered motor vehicles reported to him from other states. The registrar of motor vehicles shall prepare once a month a list of all motor vehicles stolen or recovered during the previous month and forward a copy of the same to every sheriff, and all police departments in cities of the first, second and third class. Such list shall also be forwarded to the secretary of state, or other proper official, in each state of the United States. Before issuing a certificate of title, as heretofore provided, the secretary of state shall check the motor and serial number on the motor vehicle to be registered against the "stolen and recovered vehicle index."

History: En. Sec. 13, Ch. 113, L. 1925.

Collateral References

Automobiles⌚38.

60 C.J.S. Motor Vehicles § 97.

53-138. (1763.6) Licensing of second-hand dealers—keeping records of vehicles received for sale and penalty. (1) From and after the passage and approval of this act, it shall be unlawful for any person to carry on or conduct in this state the business of buying, selling or dealing in used vehicles and parts thereof, unless and until he shall have received a license from the registrar of motor vehicles authorizing the carrying on or conducting of such business. Such license shall be furnished annually by the registrar of motor vehicles and shall run from the first day of January, nineteen hundred forty-seven, and annually thereafter for each year, beginning on the first day of January.

(2) The application for said license shall be in such form as may be prescribed by the said registrar of motor vehicles and subject to such rules and regulations with respect thereto as may be so prescribed by him. Such application shall be verified by oath or affirmation and shall contain a full statement of the name or names of the person or persons applying therefor, the name of the firm or co-partnership with the names and places of residence of all the members thereof, if such applicant be a firm or co-partnership, the name and residence of the principal officers, if the applicant be a body corporate or other artificial body, the name of the state under whose

laws the corporation is organized, the location of the place or places at which such business is to be carried on and conducted, and said application shall contain such other relevant information as may be required by the registrar of motor vehicles. It shall be accompanied by a statement of two reputable persons of the community in which the principal place of business is to be located, certifying to the good moral character of the person or persons applying for such license. Upon making such application the person applying therefor shall pay to the registrar of motor vehicles in addition to the fees required of dealers under the provisions of section 53-122, a fee of five (\$5.00) dollars.

(3) A license certificate shall be issued by the registrar of motor vehicles in accordance with such application when the same shall be regular in form and in compliance with the provisions of this section, and such license, when so issued, shall entitle the licensee to carry on and conduct the business of buying and selling and dealing in used vehicles and parts thereof, for a period of one (1) year from the first day of January of the current year. The registrar of motor vehicles shall have the power to make suitable rules and regulations for the issuance of such licenses to expire upon the first day of January of the succeeding year, when the application therefor shall be made during the current year, and upon payment of a license fee of three (\$3.00) dollars provided application is made after July first of any year.

(4) Any person conducting the business of buying, selling or dealing in used vehicles and having received a license therefor, shall before removing any one (1) or more of his places of business, or shall, before opening any additional places of business, apply to the registrar of motor vehicles for, and obtain, a supplemental license, for which no fee shall be charged. Every such licensee shall keep a book or record in such form as may be prescribed or approved by the registrar of motor vehicles, in which he shall keep a record of the purchase, sale or exchange or receipt for the purpose of sale, of any second-hand vehicle or parts thereof, a description of such vehicles or parts, together with the name and address of the seller, of the purchaser, and of the alleged owner or other person from whom such vehicle or parts were purchased or received, or to whom they were sold or delivered, as the case may be. Such description in the case of motor vehicles shall also include the engine number, if any, the maker's number, if any, chassis number, if any, and such other numbers or identification marks as may be thereon, and shall also include a statement that a number has been obliterated, defaced or changed, if such is the fact. In the case of a trailer or semi-trailer, the record shall include the manufacturer's number and such other numbers or identification marks as may be thereon. He shall also have in his possession a duly assigned certificate of title from the owner of said motor vehicle in accordance with the provisions of another section of this act, from the time when the motor vehicle is delivered to him until it has been disposed of by him.

(5) Any person guilty of violating any of the provisions of this section shall be guilty of a misdemeanor.

History: En. Sec. 14, Ch. 113, L. 1925;
amd. Sec. 1, Ch. 221, L. 1947.

Cross-Reference

Carrying on business without license,
penalty, sec. 94-1511.

Collateral References

Licenses⇒16(11), 22.
53 C.J.S. Licenses §§ 30, 39.
5 Am. Jur. 579, Automobiles, § 121; 33
Am. Jur. 371, Licenses, § 50.

Validity, construction, and application of statutes or ordinances licensing, or otherwise regulating business of selling motor vehicles. 126 ALR 740.

53-139. (1763.7) Penalty for sale of vehicle with engine number altered or changed—application for special number. (1) Any person or persons, firm or corporation, who, thirty days after the taking effect of this section, shall sell or offer for sale in this state a vehicle, the original engine number of which has been destroyed, removed, altered, covered or defaced, with the exception of electrically propelled vehicles, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than two hundred dollars, nor more than five hundred dollars, and by imprisonment in the county jail for a term of not less than thirty days nor more than one hundred and eighty days, and upon a second or subsequent conviction under this section, the punishment shall be imprisonment in the state prison for a term of not less than one year nor more than five years: Provided, however, that any person or persons, firm or corporation, being the owner or custodian of or having possession of a vehicle at the time of the taking effect of this article, the original engine number of which has been previously destroyed, removed, altered or defaced, shall before the expiration of thirty days after the taking effect of this article apply to the registrar of motor vehicles on a blank to be prepared and furnished by the registrar of motor vehicles upon request, for permission to make or stamp, or cause to be made or stamped on the engine of such vehicle, a special engine number.

(2) The application for permission to make or stamp a special engine number on the engine of a vehicle under the provisions of this article shall contain a description of such vehicle including the make, style and year of model of the same, as complete a description of the original engine number, if any part of the same remain, as is possible to give, any distinguishing marks that may be on the engine or body of such vehicle and the name and post office address of the applicant, the date on which he purchased or procured possession of the same, the name and post office address of the person or persons from whom he purchased such vehicle, and such information as the registrar of motor vehicles may require, all of which description and facts shall be sworn to by said applicant before a notary public or other person authorized in this state to administer oaths or take acknowledgments.

(3) Upon receipt of such application, together with a fee of one dollar, the registrar of motor vehicles shall issue to said applicant written permission to make or stamp on the engine of such vehicle a special engine number to be designated by the registrar of motor vehicles, and when such special engine number so designated has been stamped or otherwise placed on the engine of such motor vehicle it shall become and thereafter be the lawful engine number of such vehicle, for the purpose of identification and registration and for all other purposes under the provisions of this chapter, and the owner thereof may sell or transfer the same under said special engine number so designated by the registrar of motor vehicles; and any person or persons who shall destroy, remove, cover, alter or deface any

special engine number so designated by the registrar of motor vehicles shall be deemed guilty of a felony and upon conviction thereof shall be punished by imprisonment in the state prison for a term of not less than two years nor more than ten years.

(4) In designating special engine numbers for motor vehicles under the provisions of this chapter the registrar of motor vehicles shall designate and number the same consecutively, beginning with the number (1), preceded by the letters S. N. and followed by the letters for each and every make of motor vehicle for which a special application engine number shall be made, and in the order of the filing of application therefor: Provided, that from and after the taking effect of this section, the registrar of motor vehicles shall not register any vehicle without an engine number or issue a license for the operation of the same except as specifically provided for herein; and further, before issuing said license the registrar of motor vehicles shall require of the applicant a statement that the special number assigned to be placed on the particular vehicle in question has been put on in a workmanlike manner, and this statement shall be certified to by the sheriff, chief of police, or other convenient peace officer, that he has inspected said vehicle and found said number to be on said motor vehicle as required by the registrar of motor vehicles. Nothing herein shall be construed to prevent any manufacturer or importer, or their agents other than dealers, from doing his own numbering on motor vehicles or parts removed or changed and replacing the numbered parts.

History: En. Sec. 15, Ch. 113, L. 1925.

60 C.J.S. Motor Vehicles §§ 40, 97; 61 C.J.S. Motor Vehicles § 688.

Collateral References

Automobiles 19, 38, 340.

53-140. (1763.8) Dealer to furnish purchaser with bill of sale. Every dealer upon the sale by him to any person or persons of a new motor vehicle shall furnish to such purchaser or purchasers a bill of sale or other suitable evidence of such sale upon a blank form to be furnished by the registrar of motor vehicles, which shall contain the name of such dealer, the name of the purchaser, the date of the sale, a full description of the motor vehicle, which said description shall contain the manufacturer's number, the motor number and any distinguishing marks, together with any other data which the registrar of motor vehicles may require or deem advisable.

History: En. Sec. 16, Ch. 113, L. 1925.

53-141. (1763.9) Deputy may be employed to enforce provisions of act—payment from "auto theft fund"—duty of peace officers. The registrar of motor vehicles is hereby given power to appoint and pay from the fund hereinafter designated as the "auto theft fund" one deputy in addition to the present peace officers of the law to carry out the provisions of this act and he, together with the present peace officers are hereby given police power and authority throughout the state to arrest any person in the act of violating or attempting to violate in his presence any of the provisions of this act and are hereby made peace officers of this state for that purpose. Any peace officer of this state shall have the authority and is hereby required to use reasonable diligence in ascertaining whether the owners

and operators of motor vehicles are complying with the provisions of this act.

History: En. Sec. 17, Ch. 113, L. 1925.

Collateral References

Automobiles ⇨ 38.

60 C.J.S. Motor Vehicles § 97.

53-142. (1763.10) Auto theft fund, how used. All moneys received by the registrar of motor vehicles under the provisions of this act shall be set aside and shall be known as the "auto theft fund" and shall be used first to meet the necessary additional expenses of the office of the registrar of motor vehicles incurred by the performance of duties. If at the end of any fiscal year there is a balance in said fund, said balance shall be distributed as follows: To the road fund of the counties from which the same originated. All expenses which may be incurred by the secretary of state in printing this act, and in the preparation and printing of the prescribed forms, together with the cost of postage and mailing and the necessary clerical assistance, shall be paid in the first instance out of the motor vehicle administrative fund accruing from motor vehicle license fees and as soon as sufficient funds are available from the fees and collections provided for in this act, the said motor vehicle administrative fund shall be reimbursed for the amount so paid.

History: En. Sec. 18, Ch. 113, L. 1925.

Collateral References

Automobiles ⇨ 49.

60 C.J.S. Motor Vehicles § 143.

53-143. (1763.11) Records to be opened to public. All records provided for in the foregoing shall be open to inspection during all reasonable business hours, and the registrar of motor vehicles shall furnish the information from said records upon payment by the applicant of the cost of transcribing the information asked for.

History: En. Sec. 19, Ch. 113, L. 1925.

53-144. (1763.12) False statements constitute perjury. Any person who shall make any false affidavit, or shall knowingly swear or affirm falsely, to any matter or thing required by the terms of this act to be sworn or affirmed to, shall be guilty of perjury, and upon conviction, shall be punishable by a fine and imprisonment as other persons committing perjury are punishable.

History: En. Sec. 20, Ch. 113, L. 1925.

Collateral References

References

Perjury ⇨ 7.

70 C.J.S. Perjury § 21.

Firemen's Ins. Co. of Newark, N. J. v. Show, 110 F Supp 523, 528.

CHAPTER 2

USE OF HIGHWAYS BY NONRESIDENT CAR OWNERS—ACCIDENTS —SERVICE OF PROCESS

- Section 53-201. Nonresident car owners—use of highways.
 53-202. Secretary of state attorney for service of process.
 53-203. Operation of motor vehicle as appointment of attorney for service.
 53-204. Service of process, how made—fees.
 53-205. Service fee, when taxed as costs.
 53-206. Record of summons and process.

53-201. Nonresident car owners—use of highways. Subject to a compliance with the motor vehicle laws of this state and the acceptance of the provisions of this act, nonresident owners and operators of motor vehicles hereby are granted the privilege of using the highways, roads and streets of this state and its political subdivisions, and the use of such highways, roads and streets shall be deemed and construed to be an acceptance of the provisions of this act.

History: En. Sec. 1, Ch. 10, L. 1937.

Constitutionality and Validity

Held, on application for writ of supervisory control to review refusal of district court to quash service of summons made under this chapter, that it is not so ambiguous and uncertain as to render it unconstitutional; that provision for mailing summons by plaintiff does not render it invalid; that failure to provide for delivery of copy of the complaint to defendant immaterial; that it is neither directly nor impliedly repealed by sec. 93-3007; that the fact that it does not apply to operators of all vehicles as well as motor vehicles does not render it class legislation; that it conforms to Art. III, Sec. 27, Const. and federal due process of law clauses. *State ex rel. Charette v. District Court*, 107 M 489, 496, 86 P 2d 750.

Purpose

In the absence of a provision in this chapter that it is intended solely for the benefit of resident plaintiffs against nonresident defendants, it may not be so liberally construed; it being clear that the object of the law is to further safety of highway traffic within the state, and afford a practicable remedy for damage arising from negligence, and of providing service where otherwise it would be virtually impossible. *State ex rel. Gallagher v. District Court*, 112 M 253, 264, 114 P 2d 1047.

Collateral References

Automobiles ¶52.

60 C.J.S. Motor Vehicles § 120.

53-202. Secretary of state attorney for service of process. The acceptance by a nonresident of the rights and privileges conferred by the laws of this state to use the highways, roads and streets of the state and its political subdivisions as evidenced by his operating a motor vehicle thereon shall be deemed equivalent to and construed to be an appointment by such nonresident of the secretary of state of the state of Montana to be his true and lawful attorney upon whom may be served all lawful summons and processes against him growing out of any accident, collision, or liability in which said nonresident may be involved while operating a motor vehicle upon such highways, roads or streets, and said acceptance or operation shall be a signification of his agreement that any summons or process against him which is so served shall be of the same legal force and validity as if served on him personally within the state of Montana.

History: En. Sec. 2, Ch. 10, L. 1937.

References

State ex rel. Thompson v. District Court, 108 M 362, 365, 91 P 2d 422; *Knoop v. Anderson*, 71 F Supp 832, 836.

Collateral References

Automobiles ¶235.

61 C.J.S. Motor Vehicles § 502.

5 Am. Jur. 829, *Automobiles*, §§ 590, 591.

53-203. Operation of motor vehicle as appointment of attorney for service. The operation by any person, by himself or his agent, of any motor vehicle, whether registered or unregistered, and with or without a license to operate, on any public way in this state, shall be deemed equivalent to an appointment by such person of the secretary of state, or his successor in office, to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against him, growing out of an accident or collision in which he or his agent may be involved

while operating a motor vehicle on any public way in this state, and such operation shall be a signification of an agreement by such person that any such process against him which is served upon the secretary of state or his successor in office shall be of the same force and validity as if served upon him personally. This section shall not apply in case of any cause of action, for the service of process in which provision is made by section two, nor shall it authorize service of process upon any person who may with due diligence be found and personally served with process within the state of Montana.

History: En. Sec. 3, Ch. 10, L. 1937.

Constitutionality

Held, that the prior ruling in *State ex rel. Charette v. District Court*, 107 M 489, 86 P 2d 750, that this section is not unconstitutional as unwarranted class legislation nor in violation of the due process of law clauses of the federal and state constitutions, applies to a resident motorist who prior to suit arising out of a collision leaves the state either permanently or for an indefinite time, since in such a case he becomes in effect a nonresident who cannot with due diligence be found and served within the state. *State ex rel. Thompson v. District Court*, 108 M 362, 366, 91 P 2d 422.

Ownership of Vehicle Immaterial—“Operation” by Agent

Held, that for the purpose of motion to quash service, the question of ownership of the car is immaterial; if the car at the time of the accident was being “operated” i. e. if the physical act of working its mechanism was being performed by an agent (the driver), the act applies, the

burden of proving that the driver was not defendant’s agent being upon him. *State ex rel. Gallagher v. District Court*, 112 M 253, 261, 114 P 2d 1047.

To Whom This Section Applies

Held, on supervisory control to review an order refusing to quash service of summons in an action arising out of an automobile collision, in view of the language used in the section and title thereof, that it applies to “any person” operating a motor vehicle, whether a “non-resident,” or a “resident” of the state at the time of the accident who removed therefrom prior to institution of suit against him, and who therefore may not with due diligence be found and personally served within the state. *State ex rel. Thompson v. District Court*, 108 M 362, 364, 91 P 2d 422.

References

Knoop v. Anderson, 71 F Supp 832, 836.

Collateral References

Automobiles ⇨ 235.

61 C.J.S. Motor Vehicles § 502.

53-204. Service of process, how made—fees. Service of such summons or process under sections 53-202 and 53-203 shall be made by leaving a copy thereof with a fee of two dollars (\$2.00) with the secretary of state of the state of Montana, or in his office, and such service shall be sufficient and valid personal service upon the defendant.

Provided, that notice of such service and a copy of the summons or process is forthwith sent by registered mail requiring personal delivery, by the plaintiff to the defendant and the defendant’s return receipt and plaintiff’s affidavit of compliance herewith are appended to the process and entered as a part of the return thereof:

Provided, further, that personal service outside of this state in accordance with the provisions of the statutes thereof relating to a personal service of summons outside of this state shall relieve a plaintiff from mailing a copy of the summons or process by registered mail as hereinbefore provided. The secretary of state shall forthwith send one of such copies by mail, postage prepaid, addressed to the defendant at his address if known to the secretary of state. The court in which the action is brought may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action.

History: En. Sec. 4, Ch. 10, L. 1937.

Refusal to Accept Registered Letter Deprives Defendant of Right to Complain

In an action against a nonresident of the state arising out of an automobile accident on a state highway, in which summons was served upon defendant under

this section, his refusal to accept a registered letter mailed to him to his last known address, deprived him of the right to complain that since the registry receipt did not bear his signature the provisions of the section had not been complied with. *State ex rel. Charette v. District Court*, 107 M 489, 493, 86 P 2d 750.

53-205. Service fee, when taxed as costs. The fee of two dollars (\$2.00) paid by the plaintiff to the secretary of state shall be taxed as part of his costs if he prevails in the action.

History: En. Sec. 5, Ch. 10, L. 1937.

53-206. Record of summons and process. The secretary of state shall keep a record of all such summons and process which shall show the day of service.

History: En. Sec. 6, Ch. 10, L. 1937.

CHAPTER 3

LABELING NEW MOTOR VEHICLES TOWED INTO STATE

Section 53-301. New motor vehicles towed into state must be labeled.

53-302. Not applicable to cars used for demonstration.

53-301. New motor vehicles towed into state must be labeled. Any firm, person, corporation or association of persons, or any employee of such or any of such, offering for sale or carrying on the business of selling new motor vehicles in the state of Montana, shall be required to prominently label any motor vehicle which has been driven under its own power, pushed or towed or propelled by any other means, to sufficiently identify it from other new vehicles that have not been so driven, pushed or towed; and shall be required to furnish the purchaser of any such motor vehicle with a certificate on a printed form to be furnished by the registrars of motor vehicles upon request by such dealers, showing the actual number of miles such motor vehicle has been driven under its own power and the number of miles such vehicle has been pushed, towed or otherwise propelled upon its own wheels; and any firm, person, corporation or association of persons, or employee of such or any of such who fails to so prominently label and issue such certificate, or who knowingly issues a certificate that is untrue and calculated to mislead the purchaser, shall be guilty of a misdemeanor.

History: En. Sec. 1, Ch. 26, L. 1937.

53-302. Not applicable to cars used for demonstration. The provisions of this act shall not apply to motor vehicles during the period or time that such motor vehicles are used for bona fide demonstrating purposes.

History: En. Sec. 2, Ch. 26, L. 1937.

CHAPTER 4

ELIMINATION OF RECKLESS DRIVING—RESPONSIBILITY OF MOTOR VEHICLE OWNERS AND OPERATORS

Section 53-401 to 53-417. Repealed.

53-418. Definitions.

53-419. Supervisor to administer act—appeal to court.

- 53-420. Supervisor to furnish operating record.
- 53-421. Report required following accident.
- 53-422. Determination of security required—suspension of license and registration—exceptions—liability insurance.
- 53-423. Further exceptions to requirement of security.
- 53-424. Duration of suspension.
- 53-425. Application to nonresidents, unlicensed drivers, unregistered motor vehicles and accidents in other states.
- 53-426. Form and amount of security.
- 53-427. Custody, disposition and return of security.
- 53-428. Matters not to be evidence in civil suits.
- 53-429. Courts to report nonpayment of judgments.
- 53-430. Suspension for nonpayment of judgments—exceptions.
- 53-431. Suspension to continue until judgments paid and proof given.
- 53-432. Satisfaction of judgments.
- 53-433. Installment payment of judgments—default.
- 53-434. Proof required upon certain convictions.
- 53-435. Alternate methods of giving proof.
- 53-436. Certificate of insurance as proof.
- 53-437. Certificate furnished by nonresident as proof.
- 53-438. Motor vehicle liability policy defined.
- 53-439. Notice of cancellation or termination of certified policy.
- 53-440. Act not to affect other policies.
- 53-441. Bond as proof of responsibility.
- 53-442. Money or securities as proof of responsibility.
- 53-443. Owner may give proof for others.
- 53-444. Substitution of proof of responsibility.
- 53-445. Other proof may be required.
- 53-446. Duration of proof—when proof may be cancelled or returned.
- 53-447. Transfer of registration to defeat purpose of act prohibited.
- 53-448. Surrender of license and registration.
- 53-449. Violations of act—penalties.
- 53-450. Exceptions.
- 53-451. Self-insurers.
- 53-452. Assigned risk plans.
- 53-453. Repeal of existing laws.
- 53-454. Past application of act.
- 53-455. Act not to prevent other process.
- 53-456. Uniformity of interpretation.
- 53-457. Title of act.
- 53-458. Violations not otherwise provided for—penalties.

53-401 to 53-417. Repealed—Chapter 204, Laws of 1951.

Repeal

These sections (Secs. 1 to 16, Ch. 129, L. 1937 and Sec. 1, Ch. 213, L. 1947), providing for the suspension of operators' and chauffeurs' licenses and registration certi-

icates upon conviction of certain offenses or for failure to satisfy judgment except upon proof of responsibility, were repealed by Sec. 36, Ch. 204, Laws 1951, effective October 1, 1951.

53-418. Definitions. The following words and phrases, when used in this act shall, for the purposes of this act, have the meanings respectively ascribed to them in this section, except in those instances where the context clearly indicates a different meaning:

1. "Supervisor"—The highway patrol supervisor and his executive assistant.
2. "Board"—The Montana highway patrol board.
3. "Registrar"—The registrar of motor vehicles of this state.
4. "Judgment"—Any judgment that shall have become final by expiration without appeal of the time within which an appeal might have been perfected, or by final affirmation on appeal, rendered by a court of competent jurisdiction of any state or of the United States, upon a cause of action arising out of the ownership, maintenance or use of any motor vehicle, for

damages, including damages for care and loss of services, because of bodily injury to or death of any person, or for damages because of injury to or destruction of property, including the loss of use thereof, or upon a cause of action on an agreement of settlement for such damages.

5. "License"—Any license, temporary instruction permit or temporary license issued under the laws of this state pertaining to the licensing of persons to operate motor vehicles.

6. "Motor vehicle"—Every self-propelled vehicle which is designed for use upon a highway, including trailers and semitrailers designed for use with such vehicles (except traction engines, road rollers, farm tractors, tractor cranes, power shovels, and well driller) and every vehicle which is propelled by electric power obtained from overhead wires but not operated upon rails.

7. "Nonresident"—Every person who is not a resident of this state.

8. "Nonresident's operating privilege"—The privilege conferred upon a nonresident by the laws of this state pertaining to the operation by him of a motor vehicle, or the use of a motor vehicle owned by him, in this state.

9. "Operator"—Every person who is in actual physical control of a motor vehicle.

10. "Owner"—A person who holds the legal title of a motor vehicle, or in the event a motor vehicle is the subject of an agreement for the conditional sale or lease thereof, with the right of purchase upon performance of the conditions stated in the agreement, and with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purposes of this act.

11. "Person"—Every natural person, firm, copartnership, association or corporation.

12. "Proof of financial responsibility"—Proof of ability to respond in damages for liability, on account of accidents occurring subsequent to the effective date of said proof, arising out of the ownership, maintenance or use of a motor vehicle, in the amount of five thousand dollars (\$5,000.00) because of bodily injury to or death of one person in any one accident, and, subject to said limit for one person, in the amount of ten thousand dollars (\$10,000.00) because of bodily injury to or death of two or more persons in any one accident, and in the amount of one thousand dollars (\$1,000.00) because of injury to or destruction of property of others in any one accident.

13. "Registration"—Registration certificate or certificates and registration plates issued under the laws of this state pertaining to the registration of motor vehicles.

14. "State"—Any state, territory or possession of the United States, the District of Columbia, or any province of the Dominion of Canada.

History: En. Sec. 1, Ch. 204, L. 1951.

53-419. Supervisor to administer act—appeal to court. (a) The supervisor shall administer and enforce the provisions of this act and may make rules and regulations necessary for its administration and may pro-

vide for hearings upon request of persons aggrieved by orders or acts of the supervisor under the provisions of this act.

(b) An executive assistant to the supervisor shall be appointed by the "Montana highway patrol board," subject to and in accordance with sections 31-105 and 31-106, who shall be vested with full power and authority to act for and on behalf of the supervisor in the administration of this act; and who shall perform such other and further duties as shall be prescribed by the Montana highway patrol board. The salary of the executive assistant shall be four thousand two hundred dollars (\$4,200.00) per year.

(c) At any time within sixty (60) days after the rendition of any decision or order by the supervisor under the provisions of this act, any party in interest may appeal to the district court of the judicial district of the state of Montana, in and for any county wherein any party in interest may reside, or in which any party in interest which is a corporation may have its principal office, or place of business, and said appeal may be for the purpose of having the lawfulness of any order, decision, or act of the said supervisor inquired into and determined. The court shall determine whether the filing of an appeal shall operate as a stay of any order or decision of the supervisor. Said appeal shall be taken by serving a written notice of said appeal upon the supervisor, which said service shall be made by delivering a copy of such notice to the supervisor and filing the original thereof with the clerk of the court to which said appeal is taken. A copy of such notice must also be served upon all other parties in interest, if there be any, by mailing the same to said parties in interest to such addresses of such parties as such parties shall have left with the supervisor. If such parties shall have left no address with the supervisor, then no service on such parties shall be required. The order of filing and service of said notice is immaterial. Immediately upon service upon said supervisor of said notice, the supervisor shall certify to said district court a complete record of all proceedings had by him with reference to the decision, order or act appealed from, together with all official forms or documents in the possession of said supervisor pertaining to said decision, order or act, and all correspondence and other written matter in the possession of said supervisor pertaining to said decision, order or act, with the clerk of the said district court. Immediately upon the return of such certified matter, the district court shall fix a day for the hearing of said appeal, and shall cause notice to be served upon the supervisor and upon the appellant, and also upon any other parties in interest upon whom service was required under the provisions of this section. The court may, upon the hearing, for a good cause shown, permit evidence in addition to the matter certified by the supervisor to the court, but, in the absence of such permission from the court, the cause shall be heard on the matter certified to the court by the supervisor. The trial of the matter shall be de novo, without a jury, and upon such trial the court shall determine whether or not the supervisor regularly pursued his authority, and whether or not the findings of the supervisor ought to be sustained and whether or not such findings are reasonable, under all circumstances of the case. The supervisor, and each party in interest, shall have the right to appear in

the proceeding. If the court shall find from such trial, as aforesaid, that the findings and conclusions of the supervisor are not in accordance with either the facts or the law, or that they ought to be other or different than those made by the supervisor, or that any finding and conclusion, or any decision, order, act, rule, or requirement of the supervisor is unreasonable, the court shall set aside such finding, conclusion, decision, order, act, rule or requirement of said supervisor, or shall modify or change the same as law and justice shall require, and the court shall also make and enter any finding, conclusion, order or judgment that shall be required, or shall be legal and proper in the premises. Either the supervisor, or the appellant, or any other party in interest, if there be any, may appeal to the supreme court of the state of Montana, from any final order, judgment, or decree of said district court, which said appeal shall be taken in like manner as appeals are now taken in other civil actions to the said supreme court, and upon such appeal, the said supreme court shall make such orders in reference to a stay of proceedings as it finds to be just in the premises, and may stay the operation of any order, judgment, or decree of said district court, without requiring any bond or undertaking from the applicant for such stay. When any such cause is so appealed, it shall have precedence upon the calendar of said supreme court upon the record made in said district court, and upon the matters certified to or which ought to have been certified by said supervisor to said district court, and judgment and decree shall be entered therein as expeditiously as possible.

History: En. Sec. 2, Ch. 204, L. 1951.

53-420. Supervisor to furnish operating record. The supervisor shall upon request furnish any person a certified abstract of the operating record of any person subject to the provisions of this act, which abstract shall also fully designate the motor vehicles, if any registered in the name of such person, and, if there shall be no record of any conviction of such person of violating any law relating to the operation of a motor vehicle or of any injury or damage caused by such person, the supervisor shall so certify. A fee of fifty cents (50c) shall be paid for said certified abstract.

History: En. Sec. 3, Ch. 204, L. 1951.

53-421. Report required following accident. In addition to the reports required under chapter 12, title 32 of the Revised Codes of Montana, 1947, the operator of any motor vehicle which is in any manner involved in an accident within this state, in which any person is killed or injured or in which damage to the property of any one person in excess of one hundred dollars (\$100.00) is sustained, shall within ten (10) days after such accident report the matter in writing to the supervisor. Such report, the form of which shall be prescribed by the supervisor, shall contain information to enable the supervisor to determine whether the requirements for the deposit of security under section 53-422 are inapplicable by reason of the existence of insurance or other exceptions specified in this act. The supervisor may rely upon the accuracy of the information unless and until he has reason to believe that the information is erroneous. If such operator be physically incapable of making such report, then any person may do so

for and on his behalf. The operator or the owner shall furnish such additional relevant information as the supervisor shall require.

History: En. Sec. 4, Ch. 204, L. 1951.

53-422. Determination of security required—suspension of license and registration—exceptions—liability insurance. (a) If within twenty (20) days after the receipt of a report of a motor vehicle accident within this state which has resulted in bodily injury or death, or damage to the property of any one person in excess of one hundred dollars (\$100.00), the supervisor does not have on file evidence satisfactory to him that the person who would otherwise be required to file security under subsection (b) of this section has been released from liability, or has been finally adjudicated not to be liable, or has executed a duly acknowledged written agreement providing for the payment of an agreed amount in installments with respect to all claims for injuries or damages resulting from the accident, the supervisor shall determine the amount of security which shall be sufficient in his judgment to satisfy any judgment or judgments for damages resulting from such accident as may be recovered against each operator or owner.

(b) The supervisor shall, within sixty (60) days after the receipt of such report of a motor vehicle accident, suspend the license of each operator and the registrar, upon request of the supervisor, shall suspend all registrations of each owner of a motor vehicle in any manner involved in such accident, and if such operator is a nonresident the privilege of operating a motor vehicle in any manner involved in such accident, and if such operator is a nonresident the privilege of operating a motor vehicle within this state, and if such owner is a nonresident the privilege of the use within this state of any motor vehicle owned by him, unless such operator or owner or both shall deposit security in the sum so determined by the supervisor; provided notice of the suspension of such registration or registrations shall be sent by the registrar to such operator and owner not less than ten (10) days prior to the effective date of such suspension and such notice shall state the amount required by the supervisor as security. Where erroneous information is given the supervisor with respect to the matters set forth in subdivisions 1, 2 or 3 of subsection (c) of this section, he shall take appropriate action as hereinbefore provided, within sixty (60) days after the receipt by him of correct information with respect to said matters.

(c) This section shall not apply under the conditions stated in section 53-423, nor:

1. to such operator or owner if such owner had in effect at the time of such accident an automobile liability policy with respect to the motor vehicle involved in such accident;

2. to such operator, if not the owner of such motor vehicle, if there was in effect at the time of such accident an automobile liability policy or bond with respect to his operation of motor vehicles not owned by him;

3. to such operator or owner if the liability of such operator or owner for damages resulting from such accident is, in the judgment of the supervisor, covered by any other form of liability insurance policy or bond; nor

4. to any person qualifying as a self-insurer under section 53-451, or to any person operating a motor vehicle for such self-insurer.

No such policy or bond shall be effective under this section unless issued by an insurance company or surety company authorized to do business in this state, except that if such motor vehicle was not registered in this state, or was a motor vehicle which was registered elsewhere than in this state at the effective date of the policy or bond, or the most recent renewal thereof, such policy or bond shall not be effective under this section unless the insurance company or surety company if not authorized to do business in this state shall execute a power of attorney authorizing the supervisor to accept service on its behalf of notice or process in any action upon such policy or bond arising out of such accident; provided, however, every such policy or bond is subject, if the accident has resulted in bodily injury or death, to a limit, exclusive of interest and costs, of not less than five thousand dollars (\$5,000.00) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, to a limit of not less than ten thousand dollars (\$10,000.00) because of bodily injury to or death of two or more persons in any one accident, and, if the accident has resulted in injury to or destruction of property, to a limit of not less than one thousand dollars (\$1,000.00) because of injury to or destruction of property of others in any one accident.

History: En. Sec. 5, Ch. 204, L. 1951.

Collateral References

Cross-Reference

Form of liability insurance policy, sec.

Automobiles 144.

60 C.J.S. Motor Vehicles § 160.

53-438.

53-423. Further exceptions to requirement of security. The requirements as to security and suspension in section 53-422 shall not apply:

1. to the operator or the owner of a motor vehicle involved in an accident wherein no injury or damage was caused to the person or property of any one other than such operator or owner;

2. to the operator or the owner of a motor vehicle legally parked at the time of the accident;

3. to the owner of a motor vehicle if at the time of the accident the vehicle was being operated without his permission, express or implied, or was parked by a person who has been operating such motor vehicle without such permission; nor

4. if, prior to the date that the supervisor would otherwise suspend license and request and require of the registrar suspension of registration or nonresident's operating privilege under section 53-422, there shall be filed with the supervisor evidence satisfactory to him that the person who would otherwise have to file security has been released from liability or been finally adjudicated not to be liable or has executed a duly acknowledged written agreement providing for the payment of an agreed amount in installments, with respect to all claims for injuries or damages resulting from the accident.

History: En. Sec. 6, Ch. 204, L. 1951.

53-424. Duration of suspension. The license and registration and non-resident's operating privilege suspended as provided in section 53-422 shall

remain so suspended and shall not be renewed nor shall any such license or registration be issued to such person until:

1. such person shall deposit or there shall be deposited on his behalf the security required; or

2. one year shall have elapsed following the date of such suspension and evidence satisfactory to the supervisor has been filed with him that during such period no action for damages arising out of the accident has been instituted; or

3. evidence satisfactory to the supervisor has been filed with him of a release from liability, or a final adjudication of nonliability, or a duly acknowledged written agreement, in accordance with subdivision 4 of section 53-423; provided, however, in the event there shall be any default in the payment of any installment under any duly acknowledged written agreement, then, upon notice of such default, the supervisor shall forthwith suspend the license and request and require of the registrar the suspension of registration of nonresident's operating privilege of such person defaulting which shall not be restored unless and until (1) such person deposits and thereafter maintains security as required in such amount as the supervisor may then determine; or (2) one year shall have elapsed following the date when such security was required and during such period no action upon such agreement has been instituted in a court in this state.

History: En. Sec. 7, Ch. 204, L. 1951.

53-425. Application to nonresidents, unlicensed drivers, unregistered motor vehicles and accidents in other states. (a) In case the operator or the owner of a motor vehicle involved in an accident within this state has no license or registration, or is a nonresident, he shall not be allowed a license or registration until he has complied with the requirements of this act, to the same extent that would be necessary if, at the time of the accident, he had held a license and registration.

(b) When a nonresident's operating privilege is suspended pursuant to section 53-422 or section 53-424, the supervisor shall transmit a certified copy of the record of such action to the official in charge of the issuance of licenses and registration certificates in the state in which such nonresident resides, if the law of such other state provides for action in relation thereto similar to that provided for in subsection (c) of this section.

(c) Upon receipt of such certification that the operating privilege of a resident of this state has been suspended, revoked or cancelled in any such other state pursuant to a law providing for its suspension, revocation or cancellation for failure to deposit security for the payment of judgments arising out of a motor vehicle accident, under circumstances which would require the supervisor to suspend a nonresident's operating privilege had the accident occurred in this state, the supervisor shall suspend the license of such resident if he was the operator, and request and require of the registrar the suspension of all of his registrations if he was the owner of a motor vehicle involved in such accident. Such suspension shall continue until such resident furnishes evidence of his compliance with the law of such other state relating to the deposit of such security.

History: En. Sec. 8, Ch. 204, L. 1951.

53-426. Form and amount of security. The security required under this act shall be in such form and in such amount as the supervisor may require but in no case in excess of the limits specified in section 53-422 in reference to the acceptable limits of a policy or bond. The person depositing security shall specify in writing the person or persons on whose behalf the deposit is made, and at any time while such deposit is in the custody of the state treasurer, the person depositing it may, in writing, amend the specification of the person or persons on whose behalf the deposit is made to include an additional person or persons; provided, however, that a single deposit of security shall be applicable only on behalf of persons required to furnish security because of the same accident.

The supervisor may reduce the amount of security ordered in any case within six (6) months after the date of the accident if, in his judgment, the amount ordered is excessive. In case the security originally ordered has been deposited the excess deposited over the reduced amount ordered shall be returned to the depositor or his personal representative forthwith, notwithstanding the provisions of section 53-427.

History: En. Sec. 9, Ch. 204, L. 1951.

53-427. Custody, disposition and return of security. Security deposited in compliance with the requirements of this act shall be placed in the custody of the state treasurer and shall be applicable only to the payment of a judgment or judgments rendered against the person or persons on whose behalf the deposit was made, for damages arising out of the accident in question in an action at law, begun not later than one year after the date of such accident, or within one year after the deposit of any security under subdivision 3 of section 53-424, or to the payment in settlement, agreed to by the depositor, of a claim or claims arising out of such accident. Such deposit or any balance thereof shall be returned to the depositor or his personal representative when evidence satisfactory to the supervisor has been filed with him that there has been a release from liability, or a final adjudication of nonliability, or a duly acknowledged agreement, in accordance with subdivision 4 of section 53-423, or whenever, after the expiration of one year (1) from the date of the accident, or (2) from the date of any security under subdivision 3 of section 53-424, the supervisor shall be given reasonable evidence that there is no such action pending and no judgment rendered in such action left unpaid.

History: En. Sec. 10, Ch. 204, L. 1951.

53-428. Matters not to be evidence in civil suits. Neither the report required by section 53-421, the action taken by the supervisor pursuant to this act, the findings, if any, of the supervisor upon which such action is based, nor the security filed as provided in this act shall be referred to in any way, nor be any evidence of the negligence or due care of either party, at the trial of any action at law to recover damages.

History: En. Sec. 11, Ch. 204, L. 1951.

53-429. Courts to report nonpayment of judgments. Whenever any person fails within sixty (60) days to satisfy any judgment, upon the written request of the judgment creditor or his attorney, it shall be the duty of the clerk of the court, or of the judge of a court which has no

clerk, in which any such judgment is rendered within this state, to forward to the supervisor immediately after the expiration of said sixty (60) days, a certified copy of such judgment.

If the defendant named in any certified copy of a judgment reported to the supervisor is a nonresident, the supervisor shall transmit a certified copy of the judgment to the official in charge of the issuance of licenses and registration certificates of the state of which the defendant is a resident.

History: En. Sec. 12, Ch. 204, L. 1951.

53-430. Suspension for nonpayment of judgments—exceptions. (a) The supervisor, upon the receipt of a certified copy of a judgment, shall forthwith suspend the license and registration and any nonresident's operating privilege of any person against whom such judgment was rendered, except as hereinafter otherwise provided in this section and in section 53-433.

(b) If the judgment creditor consents in writing, in such form as the supervisor may prescribe, that the judgment debtor be allowed license and registration or nonresident's operating privilege, the same may be allowed by the supervisor, in his discretion, for six (6) months from the date of such consent and thereafter until such consent is revoked in writing notwithstanding default in the payment of such judgment, or of any installments thereof prescribed in section 53-433, provided the judgment debtor furnishes proof of financial responsibility.

History: En. Sec. 13, Ch. 204, L. 1951.

53-431. Suspension to continue until judgments paid and proof given. Such license, registration and nonresident's operating privilege shall remain so suspended and shall not be renewed, nor shall any such license or registration be thereafter issued in the name of such person, including any such person not previously licensed, unless and until every such judgment is stayed, satisfied in full or to the extent hereinafter provided, and until the said person gives proof of financial responsibility subject to the exemptions stated in sections 53-430 and 53-433.

A discharge in bankruptcy following the rendering of any such judgment shall not relieve the judgment debtor from any of the requirements of this act.

History: En. Sec. 14, Ch. 204, L. 1951.

53-432. Satisfaction of judgments. Judgments herein referred to shall, for the purposes of this act only, be deemed satisfied:

1. when five thousand dollars (\$5,000.00) has been credited upon any judgment or judgments rendered in excess of that amount because of bodily injury to or death of one person as the result of any one accident; or

2. when, subject to such limit of five thousand dollars (\$5,000.00) because of bodily injury to or death of one person, the sum of ten thousand dollars (\$10,000.00) has been credited upon any judgment or judgments rendered in excess of that amount because of bodily injury or death of two or more persons as the result of any one accident; or

3. when one thousand dollars (\$1,000.00) has been credited upon any judgment or judgments rendered in excess of that amount because of

injury to or destruction of property of others as a result of any one accident;

Provided, however, payments made in settlement of any claims because of bodily injury, death or property damage arising from a motor vehicle accident shall be credited in reduction of the amounts provided for in this section.

History: En. Sec. 15, Ch. 204, L. 1951.

53-433. Installment payment of judgments—default. (a) A judgment debtor upon due notice to the judgment creditor may apply to the court in which such judgment was rendered for the privilege of paying such judgment in installments and the court, in its discretion and without prejudice to any other legal remedies which the judgment creditor may have, may so order and fix the amounts and times of payment of the installments.

(b) The supervisor shall not suspend a license, or request and require of the registrar the suspension of a registration or a nonresident's operating privilege, and shall restore any license, and request and require of the registrar the restoration of the registration or nonresident's operating privilege suspended following nonpayment of a judgment, when the judgment debtor gives proof of financial responsibility and obtains such an order permitting the payment of such judgment in installments, and while the payment of any said installment is not in default.

(c) In the event the judgment debtor fails to pay any installment as specified by such order, then upon notice of such default, the supervisor shall forthwith suspend the license, and shall request and require of the registrar the suspension of the registration or nonresident's operating privilege of the judgment debtor until such judgment is satisfied, as provided in this act.

History: En. Sec. 16, Ch. 204, L. 1951.

53-434. Proof required upon certain convictions. (a) Whenever the supervisor, under any of the laws of this state, suspends, revokes, or cancels the license of any person upon receiving record of a conviction or a forfeiture of bail, the supervisor shall also request and require of the registrar the suspension of the registration for all motor vehicles registered in the name of such person, except that the registrar shall not suspend such registration, unless otherwise required by law, if such person has previously given or shall immediately give and thereafter maintain proof of financial responsibility with respect to all motor vehicles registered by such person.

(b) Such license and registration shall remain suspended, revoked or cancelled and shall not at any time thereafter be renewed nor shall any license be thereafter issued to such person, nor shall any motor vehicle be thereafter registered in the name of such person until permitted under the motor vehicle laws of this state and not then unless and until he shall give and thereafter maintain proof of financial responsibility.

(c) If a person is not licensed, but by final order or judgment is convicted of or forfeits any bail or collateral deposited to secure an appearance for trial for any offense requiring the suspension, revocation or

cancellation of a license, or for operating a motor vehicle upon the highways without being licensed to do so, or for operating an unregistered motor vehicle upon the highways, no license shall be thereafter issued to such person and no motor vehicle shall continue to be registered or thereafter be registered in the name of such person until he shall give and thereafter maintain proof of financial responsibility.

(d) Whenever the supervisor suspends, revokes or cancels a nonresident's operating privilege by reason of a conviction or forfeiture of bail, such privilege shall remain so suspended, revoked or cancelled unless such person shall have previously given or shall immediately give and thereafter maintain proof of financial responsibility.

History: En. Sec. 17, Ch. 204, L. 1951.

53-435. Alternate methods of giving proof. Proof of financial responsibility when required under this act with respect to a motor vehicle or with respect to a person who is not the owner of a motor vehicle may be given by filing:

1. a certificate of insurance as provided in section 53-436 or section 53-437; or
2. a bond as provided in section 53-441; or
3. a certificate or deposit of money or securities as provided in section 53-442; or
4. a certificate of self-insurance, as provided in section 53-451, supplemented by an agreement by the self-insurer that, with respect to accidents occurring while the certificate is in force, he will pay the same judgments and in the same amounts that an insurer would have been obligated to pay under an owner's motor vehicle liability policy if it had issued such a policy to said self-insurer.

No motor vehicle shall be or continue to be registered in the name of any person required to file proof of financial responsibility unless such proof shall be furnished for such motor vehicle.

History: En. Sec. 18, Ch. 204, L. 1951.

53-436. Certificate of insurance as proof. (a) Proof of financial responsibility may be furnished by filing with the supervisor the written certificate of any insurance carrier duly authorized to do business in this state certifying that there is in effect a motor vehicle liability policy for the benefit of the person required to furnish proof of financial responsibility. Such certificate shall give the effective date of such motor vehicle liability policy, which date shall be the same as the effective date of the certificate, and shall designate by explicit description or by appropriate reference all motor vehicles covered thereby, unless the policy is issued to a person who is not the owner of a motor vehicle.

(b) No motor vehicle shall be or continue to be registered in the name of any person required to file proof of financial responsibility unless such motor vehicle is so designated in such a certificate.

History: En. Sec. 19, Ch. 204, L. 1951.

53-437. Certificate furnished by nonresident as proof. (a) The nonresident owner of a motor vehicle not registered in this state may give proof of financial responsibility by filing with the supervisor a written

certificate or certificates of an insurance carrier authorized to transact business in the state in which the motor vehicle or motor vehicles described in such certificate is registered, or if such nonresident does not own a motor vehicle, then in the state in which the insured resides, provided such certificate otherwise conforms to the provisions of this act, and the supervisor shall accept the same upon condition that said insurance carrier complies with the following provisions with respect to the policies so certified:

1. said insurance carrier shall execute a power of attorney authorizing the supervisor to accept service on its behalf of notice or process in any action arising out of a motor vehicle accident in this state; and

2. said insurance carrier shall agree in writing that such policies shall be deemed to conform with the laws of this state relating to the terms of motor vehicle liability policies issued herein.

(b) If any insurance carrier not authorized to transact business in this state, which has qualified to furnish proof of financial responsibility, defaults in any said undertaking or agreements, the supervisor shall not thereafter accept as proof any certificate of said carrier whether theretofor filed or thereafter tendered as proof, so long as such default continues.

History: En. Sec. 20, Ch. 204, L. 1951.

53-438. Motor vehicle liability policy defined. (a) A "motor vehicle liability policy" as said term is used in this act shall mean an owner's or operator's policy of liability insurance, certified as provided in section 53-436 or section 53-437 as proof of financial responsibility and issued, except as otherwise provided in section 53-437, by an insurance carrier duly authorized to transact business in this state, to or for the benefit of the person named therein as insured.

(b) Such owner's policy of liability insurance: 1. shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted; and 2. shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles within the United States of America or the Dominion of Canada, subject to limits exclusive of interest and costs, with respect to each such motor vehicle, as follows: five thousand dollars (\$5,000.00) because of bodily injury to or death of one person in any one accident and subject to said limit for one person, ten thousand dollars (\$10,000.00) because of bodily injury to or death of two or more persons in any one accident, and one thousand dollars (\$1,000.00) because of injury to or destruction of property of others in any one accident.

(c) Such operator's policy of liability insurance shall insure the person named as insured therein against loss from the liability imposed upon him by law for damages arising out of the use by him of any motor vehicle not owned by him, within the same territorial limits and subject to the same limits of liability as are set forth above with respect to an owner's policy of liability insurance.

(d) Such motor vehicle liability policy shall state the name and address of the named insured, the coverage afforded by the policy, the premium charged therefor, the policy period and the limits of liability, and shall contain an agreement or be endorsed that insurance is provided thereunder in accordance with the coverage defined in this act as respects bodily injury and death or property damage, or both, and is subject to all the provisions of this act.

(e) Such motor vehicle liability policy need not insure any liability under any workmen's compensation law nor any liability on account of bodily injury to or death of an employee of the insured while engaged in the employment, other than domestic, of the insured, or while engaged in the operation, maintenance or repair of any such motor vehicle nor any liability for damage to property owned by, rented to, in charge of or transported by the insured.

(f) Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein: 1. the liability of the insurance carrier with respect to the insurance required by this act shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; said policy may not be cancelled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy;

2. the satisfaction by the insured of a judgment for such injury or damage shall not be a condition precedent to the right or duty of the insurance carrier to make payment on account of such injury or damage;

3. the insurance carrier shall have the right to settle any claim covered by the policy, and if such settlement is made in good faith, the amount thereof shall be deductible from the limits of liability specified in subdivision 2 of subsection (b) of this section;

4. the policy, the written application therefor, if any, and any rider or endorsement which does not conflict with the provisions of the act shall constitute the entire contract between the parties.

(g) Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and such excess or additional coverage shall not be subject to the provisions of this act. With respect to a policy which grants such excess or additional coverage the term "motor vehicle liability policy" shall apply only to that part of the coverage which is required by this section.

(h) Any motor vehicle liability policy may provide that the insured shall reimburse the insurance carrier for any payment the insurance carrier would not have been obligated to make under the terms of the policy except for the provisions of this act.

(i) Any motor vehicle liability policy may provide for the prorating of the insurance thereunder with other valid and collectible insurance.

(j) The requirements for a motor vehicle liability policy may be fulfilled by the policies of one or more insurance carriers which policies together meet such requirements.

(k) Any binder issued pending the issuance of a motor vehicle liability policy shall be deemed to fulfill the requirements for such a policy.

History: En. Sec. 21, Ch. 204, L. 1951.

53-439. Notice of cancellation or termination of certified policy. When an insurance carrier has certified a motor vehicle liability policy under section 53-436 or a policy under section 53-437, the insurance so certified shall not be cancelled or terminated until at least ten (10) days after a notice of cancellation or termination of the insurance so certified shall be filed in the office of the supervisor, except that such a policy subsequently procured and certified shall, on the effective date of its certification, terminate the insurance previously certified with respect to any motor vehicle designated in both certificates.

History: En. Sec. 22, Ch. 204, L. 1951.

53-440. Act not to affect other policies. (a) This act shall not be held to apply to or affect policies of automobile insurance against liability which may now or hereafter be required by any other law of this state, and such policies, if they contain an agreement or are endorsed to conform to the requirements of this act, may be certified as proof of financial responsibility under this act.

(b) This act shall not be held to apply to or affect policies insuring solely the insured named in the policy against liability resulting from the maintenance or use by persons in the insured's employ or on his behalf of motor vehicles not owned by the insured.

History: En. Sec. 23, Ch. 204, L. 1951.

53-441. Bond as proof of responsibility. (a) Proof of financial responsibility may be furnished by filing with the supervisor the bond of a surety company duly authorized to transact business in the state, or a bond with at least two individual sureties each owning real estate within this state, and together having equities equal in value to at least twice the amount of such bond, which real estate shall be scheduled in the bond approved by a judge of a court of record. Such bond shall be conditioned for payments in amounts and under the same circumstances as would be required in a motor vehicle liability policy, and shall not be cancellable except after ten (10) days' written notice to the supervisor. Upon the filing of notice to such effect by the registrar in the office of the county clerk and recorder of the county wherein such real estate shall be located, such bond shall constitute a lien in favor of the state upon the real estate so scheduled of any surety, which lien shall exist in favor of any holder of a judgment against the person who has filed such bond.

(b) The person in whose favor said lien shall exist may for his own use and benefit and at his sole expense bring an action or actions in the name of the state against the company or persons executing such bond, including an action or proceeding to foreclose any lien that may exist upon the real estate of any person who has executed such bond. The provisions of the Code of Civil Procedure (title 93), except insofar as the same are inconsistent with the provisions of this act, are applicable to and constitute the rules of practice in the said foreclosure actions or proceedings. The provisions of the Code of Civil Procedure (title 93) relative to new trials

and appeals, except insofar as the same are inconsistent with the provisions of this act, apply to said actions or proceedings.

History: En. Sec. 24, Ch. 204, L. 1951.

53-442. Money or securities as proof of responsibility. (a) Proof of financial responsibility may be evidenced by the certificate of the state treasurer that the person named therein has deposited with him eleven thousand dollars (\$11,000.00) in cash, or securities such as may legally be purchased by savings banks or for trust funds of a market value of eleven thousand dollars (\$11,000.00). The state treasurer shall not accept any such deposit and issue a certificate therefor and the supervisor shall not accept such certificate unless accompanied by evidence that there are no unsatisfied judgments of any character against the depositor in the county where the depositor resides.

(b) Such deposit shall be held by the state treasurer to satisfy, in accordance with the provisions of this act, any execution on a judgment issued against such person making the deposit, for damages, including damages for care and loss of services, because of bodily injury to or death of any person, or for damages because of injury to or destruction of property, including the loss of use thereof, resulting from the ownership, maintenance, use or operation of a motor vehicle after such deposit was made. Money or securities so deposited shall not be subject to attachment or execution unless such attachment or execution shall arise out of a suit for damages as aforesaid.

History: En. Sec. 25, Ch. 204, L. 1951.

53-443. Owner may give proof for others. Whenever any person required to give proof of financial responsibility hereunder is or later becomes an operator in the employ of any owner, or is or later becomes a member of the immediate family or household of the owner, the supervisor shall accept proof given by such owner in lieu of proof by such other person to permit such other person to operate a motor vehicle for which the owner has given proof as herein provided. The supervisor shall designate the restrictions imposed by this section on the face of such person's license.

History: En. Sec. 26, Ch. 204, L. 1951.

53-444. Substitution of proof of responsibility. The supervisor shall consent to the cancellation of any bond or certificate of insurance or the supervisor shall direct and the state treasurer shall return any money or securities to the person entitled thereto upon the substitution and acceptance of other adequate proof of financial responsibility pursuant to this act.

History: En. Sec. 27, Ch. 204, L. 1951.

53-445. Other proof may be required. Whenever any proof of financial responsibility filed under the provisions of this act no longer fulfills the purposes for which required, the supervisor shall for the purpose of this act, require other proof as required by this act and shall suspend the license and request and require of the registrar the suspension of registration or the nonresident's operating privilege pending the filing of such proof.

History: En. Sec. 28, Ch. 204, L. 1951.

53-446. Duration of proof—when proof may be cancelled or returned.

The supervisor shall upon request consent to the immediate cancellation of any bond or certificate of insurance, the supervisor shall direct and the state treasurer shall return to the person entitled thereto any money or securities deposited pursuant to this act as proof of financial responsibility, or the supervisor shall waive the requirement of filing proof, in any of the following events: 1. at any time after three (3) years from the date such proof was required when, during the three-year period preceding the request, the supervisor has not received record of a conviction or a forfeiture of bail which would require or permit the suspension or revocation of the license, registration or nonresident's operating privilege of the person by or for whom such proof was furnished; or

2. in the event of the death of the person on whose behalf such proof was filed or the permanent incapacity of such person to operate a motor vehicle; or

3. in the event the person who has given proof surrenders his license and registration to the supervisor.

Provided, however, that the supervisor shall not consent to the cancellation of any bond or the return of any money or securities in the event any action for damages upon a liability covered by such proof is then pending or any judgment upon any such liability is then unsatisfied, or in the event the person who has filed such bond or deposited such money or securities has, within one (1) year immediately preceding such request been involved as an operator or owner in any motor vehicle accident resulting in injury or damage to the person or property of others. An affidavit of the applicant as to the nonexistence of such facts, or that he has been released from all of his liability, or has been finally adjudicated not to be liable, for such injury or damage, shall be sufficient evidence thereof in the absence of evidence to the contrary in the records of the supervisor.

Whenever any person whose proof has been cancelled or returned under subdivision 3 of this section applies for a license or registration within a period of three years from the date proof was originally required, any such application shall be refused unless the applicant shall reestablish such proof for the remainder of such three-year period.

History: En. Sec. 29, Ch. 204, L. 1951.

53-447. Transfer of registration to defeat purpose of act prohibited.

If an owner's registration has been suspended hereunder, such registration shall not be transferred nor the motor vehicle in the respect of which such registration was issued registered in any other name until the registrar is satisfied that such transfer of registration is proposed in good faith and not for the purpose or with the effect of defeating the purposes of this act. Nothing in this section shall in any wise affect the rights of any conditional vendor, chattel mortgagee or lessor of a motor vehicle registered in the name of another as owner who becomes subject to the provisions of this section.

History: En. Sec. 30, Ch. 204, L. 1951.

53-448. Surrender of license and registration. Any person whose license or registration shall have been suspended as herein provided, or whose policy of insurance or bond, when required under this act, shall have

been cancelled or terminated, or who shall neglect to furnish other proof upon request of the supervisor shall immediately return his license and registration to the supervisor. If any person shall fail to return to the supervisor the license or registration as provided herein, the supervisor shall forthwith direct any peace officer to secure possession thereof and to return the same to the supervisor. The supervisor shall thereupon forward the registration to the registrar.

History: En. Sec. 31, Ch. 204, L. 1951.

53-449. Violations of act—penalties. (a) Failure to report an accident as required in section 53-421 shall be punished by a fine not in excess of twenty-five dollars (\$25.00), and in the event of injury or damage to the person or property of another in such accident, the supervisor shall suspend the license of the person failing to make such report, or the nonresident's operating privilege of such person, until such report has been filed and for such further period not to exceed thirty (30) days as the supervisor may fix.

(b) Any person who gives information required in a report or otherwise as provided for in section 53-421, knowing or having reason to believe that such information is false, or who shall forge or, without authority, sign any evidence of proof of financial responsibility, or who files or offers for filing any such evidence of proof knowing or having reason to believe that it is forged or signed without authority, shall be fined not more than one thousand dollars (\$1,000.00) or imprisoned for not more than one (1) year, or both.

(c) Any person whose license or registration or nonresident's operating privilege has been suspended or revoked under this act and who, during such suspension or revocation drives any motor vehicle upon any highway or knowingly permits any motor vehicle owned by such person to be operated by another upon any highway, except as permitted under this act, shall be fined not more than five hundred dollars (\$500.00) or imprisoned not exceeding six (6) months, or both.

(d) Any person wilfully failing to return license or registration as required in section 53-448 shall be fined not more than five hundred dollars (\$500.00) or imprisoned not to exceed thirty (30) days, or both.

History: En. Sec. 32, Ch. 204, L. 1951.

53-450. Exceptions. This act shall not apply with respect to any motor vehicle owned by the United States, this state or any political subdivision of this state or any municipality therein; nor, except for sections 53-421 and 53-443, with respect to any motor vehicle which is subject to the provisions of section 8-113, requiring insurance or other security.

History: En. Sec. 33, Ch. 204, L. 1951.

53-451. Self-insurers. (a) Any person in whose name more than twenty-five (25) motor vehicles are registered may qualify as a self-insurer by obtaining a certificate of self-insurance issued by the supervisor as provided in subsection (b) of this section.

(b) The supervisor may, in his discretion, upon the application of such a person, issue a certificate of self-insurance when he is satisfied that such

person is possessed and will continue to be possessed of ability to pay judgments obtained against such person.

(c) Upon not less than five (5) days' notice and a hearing pursuant to such notice, the supervisor may upon reasonable grounds cancel a certificate of self-insurance. Failure to pay any judgment within thirty (30) days after such judgment shall have become final shall constitute a reasonable ground for the cancellation of a certificate of self-insurance.

History: En. Sec. 34, Ch. 204, L. 1951.

53-452. Assigned risk plans. After consultation with insurance companies authorized to issue automobile liability policies in this state, the commissioner of insurance shall approve a reasonable plan or plans for the equitable apportionment among such companies of applicants for such policies and for motor vehicle liability policies who are in good faith entitled to but are unable to procure such policies through ordinary methods. When any such plan has been approved, all such insurance companies shall subscribe thereto and participate therein. Any applicant for any such policy, any person insured under any such plan, and any insurance company affected, may appeal to the commissioner of insurance from any ruling or decision of the manager or committee designated to operate such plan. Any person aggrieved hereunder by any order or act of the commissioner of insurance may, within ten (10) days after notice thereof, file a petition in the district court of Lewis and Clark county, Montana, for a review thereof. The court shall summarily hear the petition and may make any appropriate order or decree.

History: En. Sec. 35, Ch. 204, L. 1951.

53-453. Repeal of existing laws. This act shall in no respect be considered as a repeal of the state motor vehicle laws, but shall be construed as supplemental thereto.

Sections 53-401 to 53-417, inclusive, of the Revised Codes of Montana, 1947, are hereby repealed except with respect to any accident, or judgment arising therefrom, or violation of the motor vehicle laws of this state, occurring prior to the effective date of this act.

History: En. Sec. 36, Ch. 204, L. 1951.

53-454. Past application of act. This act shall not apply with respect to any accident or judgment arising therefrom or violation of the motor vehicle laws of this state, occurring prior to the effective date of this act.

History: En. Sec. 37, Ch. 204, L. 1951.

53-455. Act not to prevent other process. Nothing in this act shall be construed as preventing the plaintiff in any action at law from relying for relief upon the other processes provided by law.

History: En. Sec. 38, Ch. 204, L. 1951.

53-456. Uniformity of interpretation. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the laws of those states which enact it.

History: En. Sec. 39, Ch. 204, L. 1951.

53-457. Title of act. This act may be cited as the Motor Vehicle Safety-Responsibility Act.

History: En. Sec. 41, Ch. 204, L. 1951.

53-458. Violations not otherwise provided for—penalties. Any person who shall violate any provision of this act for which no penalty is otherwise provided shall be fined not more than five hundred dollars (\$500.00) or imprisoned not more than ninety (90) days, or both.

History: En. Sec. 43, Ch. 204, L. 1951.

CHAPTER 5

STATE-OWNED MOTOR VEHICLES—CUSTODY—REGULATION OF USE—LETTERING

Section 53-501. Color of state-owned vehicles—vehicles in service of governor, the state highway commission, and highway patrol excepted—kind and size of letters.

53-502. Repealed.

53-503. Governor to be custodian of state-owned motor vehicles.

53-504. Rules and regulations by governor—authority.

53-505. Travel regulations by state departments.

53-506. State car for state business only.

53-507. Certain motor vehicles exempted.

53-508. Duties of state controller.

53-509. Repealed.

53-510. Violation a misdemeanor—dismissal.

53-501. Color of state-owned vehicles—vehicles in service of governor, the state highway commission, and highway patrol excepted—kind and size of letters. All automobiles hereafter purchased by the state of Montana, including suburbans, station wagons and jeeps, shall, except in the instance of the governor of Montana, the highway commission and the highway patrol, be painted chrome yellow in color, with black lettering, such lettering to be in the form herein prescribed, unless such coloring of cars is exempted by the governor in writing.

All highway patrol passenger cars, shall be distinctive, consistent coloring, such coloring to be determined by the highway patrol board, and such vehicles shall be lettered as prescribed by law.

All highway department passenger cars, station wagons, suburbans, jeeps, and trucks shall be of distinctive, consistent coloring, such coloring to be determined by the highway commission, and such vehicles to bear the lettering provided by law.

Every motor vehicle owned by the state of Montana shall be indelibly and conspicuously lettered in black on each side thereof in plain letters not less than two and one-half inches (2½") in height with the words "State of Montana," with the name of the proper department or institution inserted under the words "State of Montana." Such lettered words shall be kept clear, distinct, and visible at all times and shall not be blurred or defaced in any manner, provided, however, that the provisions of this act shall not be applicable to any such motor vehicle used in the service of the highway patrol of this state, except that upon the front doors of any motor

vehicle in their service there shall be placed the "Great Seal" of the state of Montana.

History: En. Sec. 1, Ch. 2, L. 1941;
amd. Sec. 1, Ch. 211, L. 1953.

53-502. Repealed—Chapter 211, Laws of 1953.

Repeal

by Sec. 8, Ch. 211, Laws 1953, effective

This section (Sec. 2, Ch. 2, L. 1941), relating to a penalty provision, was repealed July 1, 1953. For present law, see sec. 53-510.

53-503. Governor to be custodian of state-owned motor vehicles. The governor is hereby constituted the custodian of all state-owned motor vehicles. From and after the effective date of this act, the control of all motor vehicles, now owned or hereafter to be owned by the state of Montana, is vested in the governor, and the governor shall have the authority to assign the use of all state-owned motor vehicles to state officers, departments, bureaus, institutions and commissions, or employees thereof.

History: En. Sec. 1, Ch. 93, L. 1941;
amd. Sec. 2, Ch. 211, L. 1953.

53-504. Rules and regulations by governor—authority. The governor is hereby delegated the power and authority to formulate and enforce reasonable rules and regulations governing the use and operation of all motor vehicles used in the service of the state of Montana.

The governor is specifically authorized:

(a) To assign for either part, or full time, use to state officers, departments, bureaus, institutions and commissions one or more motor vehicles which may be required by said state officer, departments, bureaus, institutions and commissions, after the necessity for such use has been shown by written application, setting forth the substantiating facts.

(b) To approve the purchase of all new motor vehicles for such branches of the state government as required, providing, however, that all passenger automobiles, except ambulances, busses, jeeps, or trucks, and except the car purchased for the governor, shall be two and four-door standard sedans of the low-priced field, or where special use requires, standard station wagons or standard suburbans of the low-priced field; said motor vehicles shall have the following characteristics: approximate wheel base of 115 inches and approximate weight of 3100 lbs.; equipped with all standard equipment, plus the following: oil bath air cleaner, oil filter, conventional transmission (over-drive may be authorized when deemed necessary) shock absorbers—front and rear, safety glass throughout car, dual booster vacuum windshield wipers, fresh air heater and ventilating system with dual defrosters, five (5) wheels and five (5) four-ply tires.

(c) To revoke any assignment for use in any one department at any time, when the necessity for further use ceases to exist.

(d) To provide every department head or administrative officer, where automotive vehicles are used on state business, with uniform rules and regulations. These rules shall require that in each such vehicle, there shall be kept an operating history record book, showing the mileage and expenditures for each trip.

(e) To make reasonable rules and regulations relative to the use, storing and serving of all state-owned motor vehicles.

(f) To require of all departments a monthly report on forms to be approved by the governor.

(g) To authorize and permit state officers and employees to use their own motor vehicles on state business when deemed necessary, and to prescribe the regulations for such use.

History: En. Sec. 2, Ch. 93, L. 1941;
amd. Sec. 3, Ch. 211, L. 1953.

53-505. Travel regulations by state departments. The governor shall require of the administrator of every department that they formulate and enforce travel regulations providing:

(a) Filing an application for travel showing necessity for trip, points to be visited, approximate time of departure and return.

(b) Filing a report in the department upon completion of the trip, showing actual points reached, mileage traveled and car cost record data.

(c) Recording in the car operating history record book all items of expense incurred in the purchase of gas, oil, repairs, labor, storage, or service.

(d) That a decal be affixed to the instrument panel of every state-owned passenger vehicle with the following information contained thereon:

Any officer or employee of the state government who uses or authorizes the use of any state-owned motor-propelled passenger-carrying vehicle, or of any motor-propelled passenger-carrying vehicle leased by the state government, for other than official purposes shall be summarily removed from office by the head of the department or establishment concerned.

History: En. Sec. 3, Ch. 93, L. 1941;
amd. Sec. 4, Ch. 211, L. 1953.

53-506. State car for state business only. No state officer or employee shall use any state-owned motor vehicle for his own personal and private use, nor shall he be compensated for driving his own motor vehicle, except if such motor vehicle is used on state business.

History: En. Sec. 4, Ch. 93, L. 1941.

53-507. Certain motor vehicles exempted. The provisions of this act shall not apply to motor vehicles used by the governor.

History: En. Sec. 5, Ch. 93, L. 1941;
amd. Sec. 5, Ch. 211, L. 1953.

53-508. Duties of state controller. All requisitions for automobile purchases shall be submitted to the state controller twice yearly, at such times as he may specify and no other requisitions for automobile purchases shall be accepted by him, unless the governor shall deem such purchase to be an emergency necessity.

All automobile operating history records shall be entered in the office of the state controller, such records to include the purchase price of the vehicle and items of expense incurred in the operation of the vehicle to include gas, oil, repairs, labor, storage and service. A complete summary

of the operating cost and history record of all state-owned automobiles and trucks shall be prepared for each fiscal year.

History: En. Sec. 6, Ch. 93, L. 1941;
amd. Sec. 6, Ch. 211, L. 1953.

53-509. Repealed—Chapter 211, Laws of 1953.

Repeal changed by the act, was repealed by Sec. 8, Ch. 211, Laws 1953, effective July 1, 1953.
This section (Sec. 7, Ch. 93, L. 1941), which provided that the duties of the state purchasing agent were not to be

53-510. Violation a misdemeanor—dismissal. Any state officer or employee violating any of the provisions of this act shall upon conviction thereof be guilty of a misdemeanor, and such violator shall upon conviction be dismissed from state employment.

History: En. Sec. 9, Ch. 93, L. 1941;
amd. Sec. 7, Ch. 211, L. 1953.

CHAPTER 6

ADDITIONAL FEES OR TAXES ON MOTOR VEHICLES

Section 53-601 to 53-614. Superseded.

- 53-615. Additional fees on trucks, tractors, trailers and semitrailers.
- 53-616. Additional fees on trucks, trailers and semitrailers from other states.
- 53-617. Sales tax on new passenger vehicles.
- 53-618. Time for payment of fees—half fee after July first.
- 53-619. Time for payment of fees by nonresidents.
- 53-620. Blank forms furnished county treasurers.
- 53-621. Disposition of funds—fee of county treasurer.
- 53-622. Expiration date of license—not transferable.
- 53-623. Violation of act—penalty—excess weight—unloading or payment of deficiency.
- 53-624. Enforcement of act.
- 53-625. Reciprocity.
- 53-626. Exemptions from act.
- 53-627. Purpose of fees—effective date.
- 53-628. Trucks, trailers and semitrailers marked with weight or capacity—markings on farm, logging or livestock vehicles.
- 53-629. Additional tax by municipalities prohibited—exception.
- 53-630. Permit and transit plates for new vehicles being transported by drive-away or tow-away methods.
- 53-631. Expiration date of permit and plates.
- 53-632. Display of plates.
- 53-633. List of holders of permits and transit plates to be furnished state highway commission by registrar of motor vehicles.
- 53-634. One-trip fee in addition to permit and plate fees, payable quarterly.
- 53-635. Disposition of funds collected.
- 53-636. Fees provided for are in addition to fees now payable under Title 8, chapter 1.
- 53-637. Fees provided for are in lieu of fees payable under Title 53 or chapter 219, Laws 1951—proviso, election to pay fees under chapter 219, Laws 1951.
- 53-638. Exemption from act.

53-601 to 53-614. Superseded.

Compiler's Note

These sections (Secs. 1 to 13, Ch. 208, Laws 1949), relating to an additional tax

on motor vehicles, were temporary in nature and expired December 31, 1951. For present law see secs. 53-615 to 53-629.

53-615. Additional fees on trucks, tractors, trailers and semitrailers. In addition to other fees for the licensing of vehicles, there shall be paid

and collected annually for each motor truck and truck tractor, based upon the maximum gross loaded weight thereof as set by the licensee in his application, the following fees:

Schedule I:

Up to 6,000 lbs.	\$ 6.00
6,001 lbs. or more, and less than 8,000 lbs.	12.00
8,001 lbs. or more, and less than 10,000 lbs.	14.00
10,001 lbs. or more, and less than 12,000 lbs.	16.00
12,001 lbs. or more, and less than 14,000 lbs.	18.00
14,001 lbs. or more, and less than 16,000 lbs.	22.00
16,001 lbs. or more, and less than 18,000 lbs.	30.00
18,001 lbs. or more, and less than 20,000 lbs.	40.00
20,001 lbs. or more, and less than 22,000 lbs.	50.00
22,001 lbs. or more, and less than 24,000 lbs.	75.00
24,001 lbs. or more, and less than 26,000 lbs.	95.00
26,001 lbs. or more, and less than 28,000 lbs.	115.00
28,001 lbs. or more, and less than 30,000 lbs.	140.00
30,001 lbs. or more, and less than 32,000 lbs.	170.00
32,001 lbs. or more, and less than 34,000 lbs.	200.00
34,001 lbs. or more, and less than 36,000 lbs.	230.00
36,001 lbs. or more, and less than 38,000 lbs.	260.00
38,001 lbs. or more, and less than 40,000 lbs.	290.00
40,001 lbs. or more, and less than 42,000 lbs.	320.00

In addition to other fees for the licensing of vehicles, there shall be paid and collected annually for each trailer and semitrailer, based upon the maximum gross loaded weight described above, and as set by the licensee in his application except as otherwise provided in this act the following fee:

Schedule II:

Trailers other than house trailers.

Up to 2,500 lbs. for personal use	Exempt.
Up to 2,500 lbs. for commercial use	\$ 3.50
2,501 lbs. or more, and less than 6,000 lbs.	4.50
6,001 lbs. or more, and less than 8,000 lbs.	9.00
8,001 lbs. or more, and less than 10,000 lbs.	10.50
10,001 lbs. or more, and less than 12,000 lbs.	12.00
12,001 lbs. or more, and less than 14,000 lbs.	13.50
14,001 lbs. or more, and less than 16,000 lbs.	16.50
16,001 lbs. or more, and less than 18,000 lbs.	22.50
18,001 lbs. or more, and less than 20,000 lbs.	30.00
20,001 lbs. or more, and less than 22,000 lbs.	37.50
22,001 lbs. or more, and less than 24,000 lbs.	56.25
24,001 lbs. or more, and less than 26,000 lbs.	71.25
26,001 lbs. or more, and less than 28,000 lbs.	86.25
28,001 lbs. or more, and less than 30,000 lbs.	105.00
30,001 lbs. or more, and less than 32,000 lbs.	127.50
32,001 lbs. or more, and less than 34,000 lbs.	150.00
34,001 lbs. or more, and less than 36,000 lbs.	172.50

36,001 lbs. or more, and less than 38,000 lbs.	195.00
38,001 lbs. or more, and less than 40,000 lbs.	217.50
40,001 lbs. or more, and less than 42,000 lbs.	240.00

Provided further that on motor trucks, trailers, and semitrailers, which shall travel more than 24,000 miles on the highways of the state of Montana within the calendar year, there shall be paid and collected annually a total fee equal to one hundred twenty-five per cent (125%) of the fees provided for in this act, which shall be called the class A fee. Each vehicle upon which the class A fee has been paid shall have the letter "A" at least two (2) inches in height marked permanently upon it, immediately preceding the maximum gross weight markings provided for in section 53-628.

All applicants for registration of motor trucks, trailers, and semitrailers under this act who do not pay the class A fee shall furnish an affidavit reciting that the motor truck, trailer, or semitrailer for which registration is desired will not travel more than 24,000 miles on the highways of the state of Montana within the calendar year and that if such vehicle does travel more than 24,000 miles within such calendar year, the applicant will, as soon as the mileage for such vehicle on the highways of the state of Montana exceeds 24,000 miles, promptly pay the difference between the class A fee and the fee paid on registration.

In addition to other fees for the licensing of vehicles, there shall be paid and collected annually for each house trailer, based upon over-all length of body as set by the licensee in his application, except as otherwise provided in this act, a fee equal to fifty cents (50c) for each foot of over-all trailer body length, exclusive of bumpers and hitch.

Provided, that in lieu of the additional fee provided in this section there shall be collected a fee of five dollars (\$5.00) on any motor truck, truck tractor, trailer or semitrailer used only for the purpose of transporting any air compressor, rock crusher, conveyor, hoist, wrecker, donkey engine, cook house, tool house or bunk house attached to or made a part of such motor truck, trailer or semitrailer.

Provided further, on motor trucks, trailers and semitrailers, owned and operated by ranchers or farmers in the transportation of their own ranch, farm, orchard, or dairy products from point of production to market, or of supplies, commodities, or equipment to be used on the ranch, farm, orchard, or dairy, or in the infrequent or seasonal transportation by one farmer for another for any purpose other than commercial hire of products of the farm, orchard or dairy, or of supplies or commodities to be used on the farm, orchard or dairy, except motor trucks owned and operated by cooperative associations or cooperative marketing associations, shall be paid and collected annually a fee equal to twenty percent (20%) of the fees provided in Schedule I and Schedule II above: provided, however, the minimum fee under Schedule I shall be four dollars (\$4.00). The terms "trailers and semitrailers" as used herein shall not include farm wagons.

Provided further, that on motor trucks, trailers and semitrailers used exclusively in hauling logs, pole trailers, and ready-mix concrete there shall be paid and collected annually a fee equal to seventy-five per cent (75%) of the fees provided in Schedule I and Schedule II above; provided further, that on motor trucks, trailers and semitrailers hauling livestock

there shall be paid and collected annually a fee equal to sixty per cent (60%) of the fees provided in Schedule I and Schedule II above; provided further, that on "low boy trailers" there shall be paid and collected annually a fee equal to sixty per cent (60%) of the fees provided in Schedule I and Schedule II above; provided further, that on tractors permanently attached to "low boy trailers" there shall be paid and collected annually a fee equal to sixty per cent (60%) of the fees provided in Schedule I and Schedule II above.

Provided further, that there shall be paid and collected annually for each bus or auto stage with the exception of school busses the sum of seven dollars (\$7.00) per seat exclusive of the first seven seats and the operator, for the maximum adult seating capacity thereof; provided further, that motor vehicles which are regularly used to haul freight and passengers shall be taxed upon the basis of the gross weight schedule hereinabove established; provided further, that school busses shall not be exempt if they enter charter service.

History: En. Sec. 1, Ch. 219, L. 1951;
amd. Sec. 1, Ch. 139, L. 1953.

Collateral References

State taxation of motor carriers as affected by commerce clause. 17 ALR 2d 421.

53-616. Additional fees on trucks, trailers and semitrailers from other states. In addition to other fees for the licensing of vehicles, there shall be collected for each motor truck, trailer and semitrailer licensed for that year in another jurisdiction and operated upon an itinerant basis in this state upon each entrance into the state of Montana, based upon the application of the licensee, a fee to be computed as follows:

Five dollars (\$5.00) for each trip for the first four hundred (400) miles or less, ten dollars (\$10.00) for each trip over four hundred (400) miles, on any vehicle or combination of vehicles of over six thousand (6,000) pounds gross weight; provided, however, such fees shall not apply to any trailer the principal use of which is living quarters, temporary or permanent.

History: En. Sec. 2, Ch. 219, L. 1951.

53-617. Sales tax on new passenger vehicles. In consideration of the right to use the highways of the state of Montana, and from and after January 1, 1952, there shall be imposed upon all new passenger motor vehicles for which a license is sought, and which have not been otherwise assessed and not subject to assessment and taxation in Montana, a motor vehicle sales tax, as follows:

One and one-half percent ($1\frac{1}{2}\%$) of the F. O. B. factory list price of the automobile, during the first quarter of the year; one and one-eighth percent ($1\frac{1}{8}\%$) of said list price during the second quarter of the year, and three-fourths ($\frac{3}{4}$) of one percent (1%) during the third quarter of the year, and three-eighths ($\frac{3}{8}$) of one percent (1%) during the fourth quarter of the year, this assessment to be made when the owner applies for his original Montana license through his county treasurer. The proceeds from this tax should be remitted to the state treasurer every thirty (30) days for credit of the state highway fund.

History: En. Sec. 3, Ch. 219, L. 1951.

53-618. Time for payment of fees—half fee after July first. Residents of the state of Montana who own trucks, trailers or semitrailers, busses or new passenger automobiles and operate the same upon the highways of the state of Montana shall at the time they make application for their Montana license as provided for in section 53-114, pay the fees herein prescribed; provided that said residents who make application for a license after the 1st day of July of any year shall pay one-half ($\frac{1}{2}$) of the fees provided for herein.

History: En. Sec. 4, Ch. 219, L. 1951.

53-619. Time for payment of fees by nonresidents. Nonresident trucks, trailers and semitrailers shall immediately upon their arrival in the state of Montana contact the nearest state highway patrol or the county sheriff or the county treasurer's office and secure the license and pay the fees as in this act prescribed; provided that all fees collected shall immediately be remitted to the county treasurer.

History: En. Sec. 5, Ch. 219, L. 1951.

53-620. Blank forms furnished county treasurers. It shall be the duty of the Montana state highway commission to furnish all county treasurers with the following:

1. Blank application forms and affidavit forms outlining and providing for the information needed in each classification of registration required.

2. Registration, license or certificates in such form as is determined most suitable by the Montana highway commission.

3. Such other forms, stickers, certificates or blanks as in the opinion of the Montana highway commission are deemed necessary to carry out the provisions of this act.

History: En. Sec. 6, Ch. 219, L. 1951.

53-621. Disposition of funds—fee of county treasurer. Each county treasurer in the state of Montana at the time of application to pay the fees under this act shall retain five percent (5%) of the fees so collected for the cost of administering this act and the remaining ninety-five percent (95%) shall be remitted monthly to the state treasurer of the state of Montana for deposit in the state highway general fund on forms to be furnished the county treasurers by the state highway commission of the state of Montana.

History: En. Sec. 7, Ch. 219, L. 1951.

53-622. Expiration date of license—not transferable. The fees for every truck, trailer or semitrailer, bus, or automobile registered under this act shall expire on December 31st of each year. The certificate, registration or license issued hereunder shall be valid only for the period for which issued, and is not transferable to another truck, trailer or semitrailer, bus, or automobile but is transferable upon the transfer of title or interest of the legal owner of the truck, trailer or semitrailer, bus, or automobile; provided that if a motor vehicle is destroyed from any cause the fee hereunder may be transferred to a replacement vehicle upon such proof as may be required by the state highway commission except that if a smaller vehicle is purchased there shall be no refund.

History: En. Sec. 8, Ch. 219, L. 1951.

53-623. Violation of act—penalty—excess weight—unloading or payment of deficiency. Any owner or operator of a truck, trailer or semitrailer, bus, or automobile who violates any provision of this act shall upon conviction thereof be deemed guilty of a misdemeanor and punished by a fine of not more than three hundred dollars (\$300.00) or by a sentence of not more than sixty (60) days in the county jail or both. Whenever the gross laden weight of any truck, trailer or semitrailer operated upon any highway in the state exceeds the gross maximum weight marked upon such vehicle pursuant to section 53-628 hereof, the operator thereof shall be required to forthwith unload all cargo in excess of the gross maximum weight for which such vehicle is taxed; and such excess cargo shall not be reloaded until payment shall have been made to the nearest county treasurer of the amount of the deficiency in the fee provided for in section 53-615 hereof, based upon the gross weight of such vehicle immediately before the unloading of such excess cargo, provided it does not exceed the legal axle weight.

History: En. Sec. 9, Ch. 219, L. 1951.

53-624. Enforcement of act. It shall be the duty of the Montana state highway patrol to enforce the provisions of this act and each member thereof is hereby instructed to make examinations and inspection of trucks, trailers and semitrailers, busses, or automobiles operating upon the highways in this state, to ascertain whether or not the provisions of this law have been complied with.

History: En. Sec. 10, Ch. 219, L. 1951.

53-625. Reciprocity. Reciprocity shall be granted, notwithstanding anything to the contrary herein, in accordance with section 53-129.

History: En. Sec. 11, Ch. 219, L. 1951.

53-626. Exemptions from act. Motor vehicles operating exclusively for transportation of persons for hire within the limits of incorporated cities or towns and within fifteen (15) miles from such limits shall be exempt from the provisions of this act; provided that motor vehicles brought or driven into Montana by any nonresident migratory bona fide agricultural worker temporarily employed in agricultural work in this state where said motor vehicles are used exclusively for transportation of agricultural workers shall likewise be exempt from the provisions of this act.

History: En. Sec. 12, Ch. 219, L. 1951.

53-627. Purpose of fees—effective date. The fees provided in this act are in consideration of the right to use the highways of the state of Montana, and this act shall be in full force and effect from and after the first day of January, 1952.

History: En. Sec. 13, Ch. 219, L. 1951.

53-628. Trucks, trailers and semitrailers marked with weight or capacity—markings on farm, logging or livestock vehicles. Each truck, trailer, semitrailer or bus shall have permanently marked in clearly visible letters and numbers at least two inches in height on either side of said vehicle, the maximum gross weight or seating capacity for which said vehicle is

taxed under this act. Any such vehicle registered and taxed as a farm logging or livestock vehicle shall have in addition thereto, and equally visible, the words "Farm Vehicle," "Logging Vehicle" or "Livestock Vehicle."

History: En. Sec. 14, Ch. 219, L. 1951.

53-629. Additional tax by municipalities prohibited — exception. Municipalities shall not levy, assess, collect or charge any additional tax other than herein prescribed upon intrastate or interstate carriers of persons or property for hire whether such carriers operate between municipalities or through a municipality and other municipalities. No intrastate or interstate carrier shall be exempt hereby from paying a parking, curb or ad valorem property tax levied by any municipality.

History: En. Sec. 15, Ch. 219, L. 1951.

53-630. Permit and transit plates for new vehicles being transported by drive-away or tow-away methods. Every person, firm, partnership or corporation, regularly and lawfully engaged in the transportation of new vehicles over the highways of this state from manufacturing or assembly points to agents of manufacturers and dealers in this state or in other states, territories, foreign countries or provinces, by the drive-away or tow-away methods, where such vehicles being driven, towed or transported by the saddle-mount, tow-bar or full-mount methods, or any lawful combination thereof, will be transported over the highways of the state of Montana but once, may annually apply to the registrar of motor vehicles for a permit to use the highways of this state, and shall pay, upon filing such application, a fee of one hundred dollars. Upon processing of the application, the registrar of motor vehicles shall issue an annual permit to the applicant. The permit holder may also apply to the registrar of motor vehicles for a sufficient number of distinctive transit plates or devices showing the permit number for identification of the vehicles being transported by the permit holder, and such plates or devices may be used on any vehicle being driven, towed or transported by and under the control of the permit holder. The registrar of motor vehicles shall collect the additional sum of one dollar for each pair of transit plates or devices applied for and issued. The registrar of motor vehicles shall retain the permit and plate fees to defray costs of administering this act.

History: En. Sec. 1, Ch. 133, L. 1953.

53-631. Expiration date of permit and plates. The permit and transit plates or devices expire on December 31st of each year.

History: En. Sec. 2, Ch. 133, L. 1953.

53-632. Display of plates. Each vehicle or combination of vehicles transported over the highways of the state of Montana by the permit holder shall display in a prominent position thereon, the distinctive transit plates or devices, the towing vehicle displaying such on the front thereof and a towed vehicle on the rear thereof.

History: En. Sec. 3, Ch. 133, L. 1953.

53-633. List of holders of permits and transit plates to be furnished state highway commission by registrar of motor vehicles. The registrar of

motor vehicles shall furnish the state highway commission with a list of the permit holders and of the transit plates or devices issued to such permit holders.

History: En. Sec. 4, Ch. 133, L. 1953.

53-634. One-trip fee in addition to permit and plate fees, payable quarterly. In addition to the permit and plate fees, a permit holder using same shall pay to the registrar of motor vehicles, a one-trip fee of five dollars per driven vehicle, such being payable quarterly upon such forms as recommended or supplied by the registrar of motor vehicles, for that purpose, and such payment shall be made within fifteen days following the end of each quarter.

History: En. Sec. 5, Ch. 133, L. 1953.

53-635. Disposition of funds collected. The registrar of motor vehicles shall retain five per cent of the funds collected in payment of the trip fees to defray costs of administration, and the remaining ninety-five per cent shall be remitted monthly, on or before the fifteenth day of the month after collection, to the treasurer of the state of Montana for deposit in the state highway fund.

History: En. Sec. 6, Ch. 133, L. 1953.

53-636. Fees provided for are in addition to fees now payable under Title 8, chapter 1. The fees herein provided are in addition to any fees now payable by for-hire carriers under the provisions of chapter 1, Title 8, Revised Codes of Montana, 1947, as amended.

History: En. Sec. 7, Ch. 133, L. 1953.

53-637. Fees provided for are in lieu of fees payable under Title 53 or chapter 219, Laws 1951—proviso, election to pay fees under chapter 219, Laws 1951. The fees provided in this act are in lieu of all other fees including those which might be payable under the provisions of Title 53, Revised Codes of Montana, 1947, as amended, or chapter 219, Laws of 1951 as amended [53-615 to 53-629], and are declared to be in consideration of the right to use the highways of the state of Montana, provided however, that any such person, firm, partnership or corporation may elect to pay the fees payable under the provisions of chapter 219, Laws of 1951, as amended [53-615 to 53-629], in lieu of complying with the provisions of this act.

History: En. Sec. 8, Ch. 133, L. 1953.

53-638. Exemptions from act. This act shall not apply to vehicles regularly used in the hauling of vehicles by the truck-away method nor to the vehicles so transported, vehicles operated under dealers' licenses or plates, vehicles registerable under any other provisions of law, or to any person not issued a permit hereunder.

History: En. Sec. 9, Ch. 133, L. 1953.

TITLE 54

NARCOTIC DRUGS

- Chapter 1. Uniform drug act—regulation, possession and sale of narcotics, 54-101 to 54-128.
2. Narcotic education section of the state board of health (54-201 to 54-205 Repealed), 54-206 to 54-209.
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CHAPTER 1

UNIFORM DRUG ACT—REGULATION, POSSESSION AND SALE OF NARCOTICS

- Section 54-101. Definitions, words and phrases.
54-102. Acts prohibited.
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54-104. Qualification for licenses.
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54-124. Enforcement and cooperation.
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54-126. Effect of acquittal or conviction under federal narcotic laws.
54-127. Interpretation.
54-128. Name of act.

54-101. Definitions, words and phrases. The following words and phrases, as used in this act shall have the following meanings, unless the context otherwise requires:

(1) "Person" includes any corporation, association, co-partnership, or one or more individuals.

(2) "Physician" means a person authorized by law to practice medicine in this state and any other person authorized by law to treat sick and injured human beings in this state and to use narcotic drugs in connection with such treatment.

(3) "Dentist" means a person authorized by law to practice dentistry in this state.

(4) "Veterinarian" means a person authorized by law to practice veterinary medicine in this state.

(5) "Manufacturer" means a person who by compounding, mixing, cultivating, growing, or other process, produces or prepares narcotic drugs, but does not include an apothecary who compounds narcotic drugs to be sold or dispensed on prescriptions.

(6) "Wholesaler" means a person who supplies narcotic drugs that he himself has not produced or prepared, on official written orders, but not on prescription.

(7) "Apothecary" means a licensed pharmacist as defined by the laws of this state and, where the context so requires, the owner of a store or other place of business where narcotic drugs are compounded or dispensed by a licensed pharmacist; but nothing in this act shall be construed as conferring on a person who is not registered nor licensed as a pharmacist any authority, right, or privilege, that is not granted to him by the pharmacy laws of this state.

(8) "Hospital" means an institution for the care and treatment of the sick and injured, approved by the secretary of the state board of health as proper to be entrusted with the custody of narcotic drugs and the professional use of narcotic drugs under the direction of a physician, dentist, or veterinarian.

(9) "Laboratory" means a laboratory approved by the secretary of the state board of health as proper to be entrusted with the custody of narcotic drugs and the use of narcotic drugs for scientific and medical purposes and for purposes of instruction.

(10) "Sale" includes barter, exchange, or gift, or offer therefor, and each such transaction made by any person, whether as principal, proprietor, agent, servant or employee.

(11) "Coca leaves" includes cocaine and any compound, manufacture, salt, derivative, mixture, or preparation of coca leaves, except derivatives of coca leaves which do not contain cocaine, eegonine, or substances from which cocaine or eegonine may be synthesized or made.

(12) "Opium" includes morphine, codeine, and heroin, and any compound, manufacture, salt, derivative, mixture or preparation of opium, but does not include apomorphine or any of its salts.

(13) "Cannabis" includes all parts of the plant *cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin, but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, or any other compound, manufacture, salt, derivative, mixture or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

(14) "Narcotic drugs" means coca leaves, opium, cannabis, marijuana, Indian hemp, isonipecaine, amidone, isoamidone, keto-bemidone, and every substance neither chemically nor physically distinguishable from them; any other drugs to which the federal narcotic laws may now apply; and any drug found by the state board of health, after reasonable notice and opportunity for hearing, to have an addiction-forming or addic-

tion-sustaining liability similar to morphine or cocaine, from the effective date of determination of such finding by said state board of health.

(15) "Isonipecaïne" means any substance identified chemically as 1-methyl-4-phenyl-piperidine-4-carboxylic acid ethyl ester, or any salt thereof by whatever trade name designated.

(16) "Amidone" means any substance identified chemically as (4-4-diphenyl-6-dimethylamino-heptanone-3), or any salt thereof, by whatever trade name designated.

(17) "Isoamidone" means any substance identified chemically as (4-4-diphenyl-5-methyl-6-dimethylamino-hexanone-3), or any salt thereof, by whatever trade name designated.

(18) "Keto-bemidone" means any substance identified chemically as (4-(3-hydroxyphenyl)-1-methyl-4-piperidyl ethyl ketone hydrochloride) or any salt thereof, by whatever trade name designated.

(19) "Federal Narcotic Laws" means the laws of the United States relating to opium, coca leaves, and other narcotic drugs.

(20) "Official written order" means an order written on a form provided for that purpose by the United States Commissioner of Narcotics, under any laws of the United States making provision therefor, if such order forms are authorized and required by federal law, and if no such order form is provided, then on an official form provided for that purpose by the secretary of the state board of health.

(21) "Dispense" includes distribute, leave with, give away, dispose of, or deliver.

(22) "Registry number" means the number assigned to each person registered under the federal narcotic laws.

History: En. Sec. 1, Ch. 176, L. 1937; amd. Sec. 1, Ch. 146, L. 1941; amd. Sec. 1, Ch. 12, L. 1949; amd. Sec. 1, Ch. 174, L. 1953; earlier acts were secs. 3189 to 3193, and secs. 3199 to 3202.6, R. C. M. 1935.

Uniform State Laws in 1932 and adopted in all the states except California, Kansas, Massachusetts, Mississippi, New Hampshire and Pennsylvania and has also been adopted in Alaska, District of Columbia, Hawaii and Puerto Rico.

NOTE.—Uniform State Law. Sections 54-101 to 54-118 constitute the "Uniform Narcotic Drug Act" approved by the National Conference of Commissioners on

Collateral References

Poisons 2.

72 C.J.S. Poisons § 4.

54-102. Acts prohibited. It shall be unlawful for any person to manufacture, possess, knowingly permit to grow, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this act.

History: En. Sec. 2, Ch. 176, L. 1937. narcotic drugs are used, penalty, sec. 94-35-148.

Cross-Reference

Keeping or resorting to place where

54-103. Manufacturers and wholesalers. No person shall manufacture, compound, mix, cultivate, grow, or by any other process produce or prepare narcotic drugs, and no person as a wholesaler shall supply the same, without having first obtained a license so to do from the secretary of the state board of health.

History: En. Sec. 3, Ch. 176, L. 1937.

54-104. Qualification for licenses. No license shall be issued under the foregoing section unless and until the applicant therefor has furnished proof satisfactory to the secretary of the state board of health:

(a) That the applicant is of good moral character or, if the applicant be an association or corporation, that the managing officers are of good moral character.

(b) That the applicant is equipped as to land, buildings, and paraphernalia properly to carry on the business described in his application.

No license shall be granted to any person who has within five years been convicted of a willful violation of any law of the United States, or of any state, relating to opium, coca leaves, or other narcotic drugs, or to any person who is a narcotic drug addict. The secretary of the state board of health may suspend or revoke any license for cause.

History: En. Sec. 4, Ch. 176, L. 1937.

54-105. Sale on written orders. (1) A duly licensed manufacturer or wholesaler may sell and dispense narcotic drugs to any of the following persons, but only on official written orders:

(a) To a manufacturer, wholesaler or apothecary.

(b) To a physician, dentist or veterinarian.

(c) To a person in charge of a hospital, but only for use by or in that hospital.

(d) To a person in charge of a laboratory, but only for use in that laboratory for scientific and medical purposes.

(2) A duly licensed manufacturer or wholesaler may sell narcotic drugs to any of the following persons:

(a) On a special written order accompanied by a certificate of exemption, as required by the federal narcotic laws, to a person in the employ of the United States government or of any state, territorial, district, county, municipal, or insular government, purchasing, receiving, possessing, or dispensing narcotic drugs by reason of his official duties.

(b) To a master of a ship or a person in charge of any aircraft upon which no physician is regularly employed, or to a physician or surgeon duly licensed in some state, territory, or the District of Columbia to practice his profession, or to a retired commissioned medical officer of the United States army, navy, or public health service employed upon such ship or aircraft, for the actual medical needs of persons on board such ship or aircraft, when not in port. Provided, such narcotic drugs shall be sold to the master of such ship or person in charge of such aircraft or to a physician, surgeon, or retired commissioned medical officer of the United States army, navy, or public health service employed upon such ship or aircraft only in pursuance of a special order form approved by a commissioned medical officer or acting assistant surgeon of the United States public health service.

(c) To a person in a foreign country if the provisions of the federal narcotic laws are complied with.

(3) Use of official written orders. An official written order for any narcotic drug shall be signed in duplicate by the person giving said order or by his duly authorized agent. The original shall be presented to the person who sells or dispenses the narcotic drug or drugs named therein. In

event of the acceptance of such order by said person, each party to the transaction shall preserve his copy of such order for a period of two (2) years in such a way as to be readily accessible for inspection by any public officer or employee engaged in the enforcement of this act. It shall be deemed a compliance with this subsection if the parties to the transaction have complied with the federal narcotic laws, respecting the requirements governing the use of order forms.

(4) Possession lawful. Possession of or control of narcotic drugs obtained as authorized by this section shall be lawful if in the regular course of business, occupation, profession, employment, or duty of the possessor.

(5) A person in charge of a hospital or of a laboratory, or in the employ of this state or of any other state, or of any political subdivision thereof, or a master of a ship or a person in charge of any aircraft upon which no physician is regularly employed or a physician or surgeon duly licensed in some state, territory, or the District of Columbia, to practice his profession, or a retired commissioned medical officer of the United States army, navy, or public health service employed upon such ship or aircraft who obtains narcotic drugs under the provisions of this section or otherwise, shall not administer nor dispense, nor otherwise use such drugs, within this state, except within the scope of his employment or official duty, and then only for scientific or medicinal purposes and subject to the provisions of this act.

History: En. Sec. 5, Ch. 176, L. 1937;
amd. Sec. 2, Ch. 146, L. 1941.

Cross-References

Cities may regulate sale and use, sec.
11-963.

Morphine and opium, restrictions on sale
by druggists, secs. 66-1514, 66-1515.

Penalty for unlawful sale of narcotic
drugs, sec. 94-35-199.

Restrictions on sale by prescription, sec.
66-1514.

54-106. Sales by apothecaries. (1) An apothecary, in good faith, may dispense and sell narcotic drugs to any person upon a written prescription of a physician, dentist, or veterinarian, dated and signed by the person prescribing on the day when issued and bearing the full name and address of the patient for whom, or of the owner of the animal for which, the drug is dispensed, and the full name, address, and registry number under the federal narcotic laws of the person prescribing, if he is required by those laws to be so registered. If the prescription be for an animal, it shall state the species of animal for which the drug is prescribed. The person filling the prescription shall write the date of filling and his own signature on the face of the prescription. The prescription shall be retained on file by the proprietor of the pharmacy in which it is filled for a period of two years, so as to be readily accessible for inspection by any public officer or employee engaged in the enforcement of this act. The prescription shall not be refilled.

(2) The legal owner of any stock of narcotic drugs in a pharmacy, upon discontinuance of dealing in said drugs, may sell said stock to a manufacturer, wholesaler, or apothecary, but only on an official written order.

(3) An apothecary, only upon an official written order, may sell to a physician, dentist, or veterinarian, in quantities not exceeding one ounce

at any one time, aqueous or oleaginous solutions of which the content of narcotic drugs does not exceed a proportion greater than twenty percent of the complete solution to be used for medical purposes.

History: En. Sec. 6, Ch. 176, L. 1937.

54-107. Professional use of narcotic drugs. (1) Physicians and Dentists. A physician or a dentist, in good faith and in the course of his professional practice only, may prescribe, administer, and dispense narcotic drugs, or he may cause the same to be administered by a nurse or interne under his direction and supervision.

(2) Veterinarians. A veterinarian, in good faith and in the course of his professional practice only, and not for use by a human being, may prescribe, administer, and dispense narcotic drugs, and he may cause them to be administered by an assistant or orderly under his direction and supervision.

History: En. Sec. 7, Ch. 176, L. 1937.

54-108. Preparations exempted. Except as otherwise in this act specifically provided, this act shall not apply to the following cases:

Administering, dispensing, or selling at retail any medicinal preparation that contains in one fluid ounce, or if a solid or semisolid preparation, in one avoirdupois ounce, not more than one grain of codeine or of any of its salts, or not more than one-sixth grain of dihydrocodeinone or any of its salts.

The exemption authorized by this section shall be subject to the following conditions: (1) that the medicinal preparation administered, dispensed, or sold, shall contain, in addition to the narcotic drug in it, some drug or drugs conferring upon it medicinal qualities other than those possessed by the narcotic drug alone; and (2) that such preparation shall be administered, dispensed, and sold in good faith as a medicine, and not for the purpose of evading the provisions of this act.

Nothing in this section shall be construed to limit the quality of codeine or of any of its salts that may be prescribed, administered, dispensed, or sold, to any person or for the use of any person or animal, when it is prescribed, administered, dispensed, or sold, in compliance with the general provisions of this act.

History: En. Sec. 8, Ch. 176, L. 1937;
amd. Sec. 3, Ch. 146, L. 1941; amd. Sec. 2,
Ch. 174, L. 1953.

54-109. Record to be kept. (1) Physicians, Dentists, Veterinarians, and Other Authorized Persons. Every physician, dentist, veterinarian, or other person who is authorized to administer or professionally use narcotic drugs, shall keep a record of such drugs received by him, and a record of all such drugs administered, dispensed, or professionally used by him otherwise than by prescription. It shall, however, be deemed a sufficient compliance with this subsection if any such person using small quantities of solutions or other preparations of such drugs for local application, shall keep a record of the quantity, character, and potency of such solutions or other preparations purchased or made up by him, and of the dates when purchased or made up, without keeping a record of the amount of such solution or other preparation applied by him to individual patients.

Provided: That no record need be kept of narcotic drugs administered, dispensed, or professionally used in the treatment of any one patient, when the amount administered, dispensed, or professionally used for that purpose does not exceed in any forty-eight consecutive hours, (a) four grains of opium, or (b) one-half of a grain of morphine or of any of its salts, or (c) two grains of codeine or of any of its salts, or (d) one-fourth of a grain of heroin or of any of its salts, or (e) one grain of extract of cannabis or one grain of any more potent derivative or preparation of cannabis, or (f) a quantity of any other narcotic drug or any combination of narcotic drugs that does not exceed in pharmacologic potency any one of the drugs named above in the quantity stated.

(2) Manufacturers and Wholesalers. Manufacturers and wholesalers shall keep records of all narcotic drugs compounded, mixed, cultivated, grown, or by any other process produced or prepared, and of all narcotic drugs received and disposed of by them, in accordance with the provisions of subsection 5 of this section.

(3) Apothecaries. Apothecaries shall keep records of all narcotic drugs received and disposed of by them, in accordance with the provisions of subsection 5 of this section.

(4) Vendors of Exempted Preparations. Every person who purchases for resale, or who sells narcotic drug preparations exempted by section 54-108, shall keep a record showing the quantities and kinds thereof received and sold, or disposed of otherwise, in accordance with the provisions of subsection 5 of this section.

(5) Form and Preservation of Records. The form of records shall be prescribed by the secretary of the state board of health. The record of narcotic drugs received shall in every case show the date of receipt, the name and address of the person from whom received, and the kind and quantity of drugs received; the kind and quantity of narcotic drugs produced or removed from process of manufacture, and the date of such production or removal from process of manufacture; and the record shall in every case show the proportion of morphine, cocaine, or eegonine contained in or producible from crude opium or coca leaves received or produced; and the proportion of resin contained in or producible from the dried flowering or fruiting tops of the pistillate plant *Cannabis Sativa* L., from which the resin has not been extracted, received or produced. The record of all narcotic drugs sold, administered, dispensed, or otherwise disposed of, shall show the date of selling, administering, or dispensing, the name and address of the person to whom, or for whose use, or the owner and species of animal for which the drugs were sold, administered or dispensed, and the kind and quantity of drugs. Every such record shall be kept for a period of two years from the date of the transaction recorded. The keeping of a record required by or under the federal narcotic laws, containing substantially the same information as is specified above, shall constitute compliance with this section, except that every such record shall contain a detailed list of narcotic drugs lost, destroyed, or stolen, if any, the kind and quantity of such drugs, and the date of the discovery of such loss, destruction, or theft.

History: En. Sec. 9, Ch. 176, L. 1937.

54-110. Labels. (1) Whenever a manufacturer sells or dispenses a narcotic drug, and whenever a wholesaler sells or dispenses a narcotic drug in a package prepared by him, he shall securely affix to each package in which that drug is contained a label showing in legible English the name and address of the vendor and the quantity, kind and form of narcotic drug contained therein. No person, except an apothecary for the purpose of filling a prescription under this act, shall alter, deface, or remove any label so affixed.

(2) Whenever an apothecary sells or dispenses any narcotic drug on a prescription issued by a physician, dentist, or veterinarian, he shall affix to the container in which such drug is sold or dispensed, a label showing his own name, address, and registry number, or the name, address, and registry number of the apothecary for whom he is lawfully acting; the name and address of the patient or, if the patient is an animal, the name and address of the owner of the animal and the species of the animal; the name, address, and registry number of the physician, dentist, or veterinarian, by whom the prescription was written; and such directions as may be stated on the prescription. No person shall alter, deface, or remove any label so affixed.

History: En. Sec. 10, Ch. 176, L. 1937.

54-111. Authorized possession of narcotic drugs by individuals. A person to whom or for whose use any narcotic drug has been prescribed, sold, or dispensed, by a physician, dentist, apothecary, or other person authorized under the provisions of section 54-105, and the owner of any animal for which any such drug has been prescribed, sold, or dispensed, by a veterinarian, may lawfully possess it only in the container in which it was delivered to him by the person selling or dispensing the same.

History: En. Sec. 11, Ch. 176, L. 1937.

54-112. Issuance and execution of search warrant—seizure of narcotic drugs. If upon the sworn complaint of any person, it shall be made to appear to any judge of the district court that there is probable cause to believe that narcotic drugs are being manufactured, sold, exchanged, given away, bartered, or otherwise disposed of, or kept contrary to law, such judge shall, with or without the approval of the county attorney, issue a warrant directed to any peace officer in the county commanding him to search the premises designated and described in such complaint and warrant, and to seize all narcotic drugs there found, together with vessels and vehicles in which it is contained, and all implements, furniture, fixtures and other articles used or kept for the illegal manufacture, sale, barter, exchange, giving away, furnishing, or otherwise disposing of such narcotic drugs and to safely keep the same, and to make a return of said warrant within three days, showing all acts and things done thereunder, with a particular statement of all narcotic drugs, implements, furniture, fixtures, vehicles, and other articles seized, and the name of the person or persons in whose possession the same were found, if any, and if no person be found in the possession of the same, the return shall so state. No warrant shall be issued to search a private dwelling occupied as such, unless some part of it is used as a store or shop, hotel or boarding house, or for any other purpose

than a private residence, or unless such residence is a place of public resort. A copy of said warrant shall be served upon the person or persons found in possession of any such narcotic drugs, furniture, fixtures, vehicles, or articles so seized, and if no person be found in possession thereof, a copy of said warrant shall be posted on the door of the building or room wherein the same were found, or if there be no door, then in any conspicuous place upon the premises.

History: En. Sec. 12, Ch. 176, L. 1937.

Collateral References

Searches and Seizures \S 3.

79 C.J.S. Searches and Seizures \S 65.

54-113. Hearing of return—disposal of narcotic drugs and other articles seized. Upon the return of the warrant as provided in the last preceding section, the judge shall fix the time, not less than ten days nor more than twenty days thereafter, for the hearing of said return, when the court shall proceed to hear and determine whether or not the implements, furniture, fixtures, vehicles, or other articles so seized, or any part thereof, were used or in any manner kept or possessed by any person with the intention of violating any of the provisions of the laws of this state relating to narcotic drugs. At such hearing any person claiming any interest in any of the implements, furniture, fixtures, vehicles, or other articles seized, may appear and be heard upon filing a verified claim setting forth particularly the character and extent of his interest, but upon such hearing the sworn complaint or affidavit upon which the search warrant was issued and the possession of such narcotic drugs shall be prima facie evidence of the contraband character of the drugs and implements, furniture, fixtures, vehicles and other articles seized, and the burden shall rest upon the claimant to show, by competent evidence, his property right or interest therein, and that the same were not used in violation of, and were not in any manner kept or possessed with the intention of violating any of the provisions of the laws of this state relating to narcotic drugs.

If, upon such hearing, the evidence warrants, or if no person shall appear as claimant, the court shall thereupon enter a judgment of forfeiture and order such implements, furniture, fixtures, vehicles and articles destroyed forthwith by the officer having custody of the same at the time of adjudication; provided, however, the judge may, in his discretion, appoint a special officer for the purpose of executing the judgment of forfeiture by destroying said drugs and property; provided, further, however, that if in the opinion of the judge any of such forfeited vehicles or property, is of value and adapted to any lawful use, such judge shall, as a part of the order and judgment, direct that such property, other than narcotic drugs, shall be sold as upon execution by the officer having them in custody, and the proceeds of such sale, after the payment of all costs of such proceeding, shall be paid into the common school fund of the school district in which the same were seized. Action under this section and the forfeiture, destruction, or sale of any property thereunder, shall not be a bar to any prosecution under any other provision or provisions of the laws of this state relating to narcotic drugs and provided further, that all narcotic drugs so seized shall be held in the custody of the court issuing the order, for disposition as otherwise provided in this act.

History: En. Sec. 13, Ch. 176, L. 1937. 79 C.J.S. Searches and Seizures §§ 112, 115.
Collateral References
 Searches and Seizures ↪ 4, 5.

54-114. Duty of peace officers to arrest offenders and seize narcotic drugs. When any violation of any provisions of the laws of this state relating to narcotic drugs shall occur in the presence of any sheriff, constable, marshal, or other officer having power to serve criminal process, it shall be the duty of such officer without warrant, to arrest the offender, and to seize the drugs, furniture, fixtures, vessels, vehicles and appurtenances thereunto belonging, so unlawfully used, and to take such offender immediately before the court or judge having jurisdiction in the premises and there make complaint under oath, charging the offense so committed, and he shall also make return setting forth a particular description of the narcotic drugs and property seized and of the place and where the same was so seized, whereupon the court or judge shall issue a warrant commanding and directing the officer to hold in his possession the property so seized, until discharged by process of law, and such property shall be held and a hearing or adjudication on said return had in like manner as if the seizure had been made upon a warrant therefor.

History: En. Sec. 14, Ch. 176, L. 1937. **Collateral References**
 Arrest ↪ 63(3), 71.
 6 C.J.S. Arrest §§ 6, 18.

54-115. Replevin of narcotic drugs and other property forbidden. No narcotic drugs, vessels, fixtures, furniture or other property seized by authority of any warrant issued under the provisions of this act shall be taken from the possession of the officer seizing the same under any replevin or other process.

History: En. Sec. 15, Ch. 176, L. 1937. **Collateral References**
 Searches and Seizures ↪ 5.
 79 C.J.S. Searches and Seizures § 112.

54-116. Fines and costs a lien on property—disposal of. All fines and costs assessed against any person for any violation of any of the provisions of the laws of this state relating to narcotic drugs, shall be a lien upon the real estate of such person until paid; and in case any person shall let or lease any building or premises, and shall knowingly suffer the same to be used and occupied for the manufacture or sale of narcotic drugs, the premises so leased and occupied shall be subject to lien for, and may be sold to pay all fines and costs assessed against any such occupant for any violation of this act; and such liens may be enforced by civil action in any court having jurisdiction; provided, that the person against whom such fines and costs are assessed shall be committed to the jail of the county until such fines and costs are paid.

History: En. Sec. 16, Ch. 176, L. 1937. **Collateral References**
 Poisons ↪ 2.
 72 C.J.S. Poisons § 4.

54-117. Persons and corporations exempted. The provisions of this act restricting the possessing and having control of narcotic drugs shall not apply to common carriers or to warehousemen, while engaged in lawfully transporting or storing such drugs, or to any employee of the

same acting within the scope of his employment; or to public officers or their employees in the performance of their official duties requiring possession or control of narcotic drugs; or to temporary incidental possession by employees or agents of persons lawfully entitled to possession, or by persons whose possession is for the purpose of aiding public officers in performing their official duties.

History: En. Sec. 17, Ch. 176, L. 1937.

54-118. Common nuisances. Any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by narcotic drug addicts for the purpose of using narcotic drugs or which is used for the illegal keeping or selling of the same, shall be deemed a common nuisance. No person shall keep or maintain such a common nuisance.

History: En. Sec. 18, Ch. 176, L. 1937.

Collateral References

Nuisance \hookrightarrow 61.

66 C.J.S. Nuisances § 62.

54-119. Narcotic drugs to be delivered to state official, etc. All narcotic drugs, the lawful possession of which is not established or the title to which cannot be ascertained, which have come into the custody of a peace officer, shall be forfeited, and disposed of as follows:

(a) Except as in this section otherwise provided, the court or magistrate having jurisdiction shall order such narcotic drugs forfeited and destroyed. A record of the place where said drugs were seized, of the kinds and quantities of drugs so destroyed, and of the time, place, and manner of destruction, shall be kept, and a return under oath, reporting said destruction, shall be made to the court or magistrate and to the United States commissioner of narcotics, by the officer who destroys them.

(b) Upon written application by the secretary of the state board of health, the court or magistrate by whom the forfeiture of narcotic drugs has been decreed may order the delivery of any of them, except heroin and its salts and derivatives, to said secretary of the state board of health, for distribution or destruction, as hereinafter provided.

(c) Upon application by any hospital within this state, not operated for private gain, the secretary of the state board of health may in his discretion deliver any narcotic drugs that have come into his custody by authority of this section to the applicant for medicinal use. The secretary of the state board of health may from time to time deliver excess stocks of such narcotic drugs to the United States commissioner of narcotics, or may destroy the same.

(d) The secretary of the state board of health, shall keep a full and complete record of all drugs received and of all drugs disposed of, showing the exact kinds, quantities, and forms of such drugs; the persons from whom received and to whom delivered; by whose authority received, delivered, and destroyed; and the dates of the receipt, disposal, or destruction, which record shall be open to inspection by all federal or state officers charged with the enforcement of federal and state narcotic laws.

History: En. Sec. 19, Ch. 176, L. 1937.

Collateral References

Poisons \hookrightarrow 4.

72 C.J.S. Poisons § 8.

54-120. Notice of conviction to be sent to licensing board. On the conviction of any person of the violation of any provision of this act, a copy of the judgment and sentence, and of the opinion of the court or magistrate, if any opinion be filed, shall be sent by the clerk of the court, or by the magistrate, to the board or officer, if any, by whom the convicted defendant has been licensed or registered to practice his profession or to carry on his business. On the conviction of any such person, the court may, in its discretion, suspend or revoke the license or registration of the convicted defendant to practice his profession or to carry on his business. On the application of any person whose license or registration has been suspended or revoked, and upon proper showing and for good cause, said board or officers may reinstate such license or registration.

History: En. Sec. 20, Ch. 176, L. 1937.

Collateral References

Licenses ~~38~~ 38.

53 C.J.S. Licenses § 44.

54-121. Records confidential. Prescriptions, orders, and records required by this act, and stocks of narcotic drugs, shall be open for inspection only to federal, state, county, and municipal officers, whose duty it is to enforce the laws of this state or of the United States relating to narcotic drugs. No officer having knowledge by virtue of his office of any such prescription, order, or record shall divulge such knowledge, except in connection with a prosecution or proceeding in court or before a licensing or registration board or officer, to which prosecution or proceeding the person to whom such prescriptions, orders, or records relate is a party.

History: En. Sec. 21, Ch. 176, L. 1937.

54-122. Fraud or deceit. (1) No person shall obtain or attempt to obtain a narcotic drug, or procure or attempt to procure the administration of a narcotic drug, (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) by the forgery or alteration of a prescription or of any written order; or (c) by the concealment of a material fact; or (d) by the use of a false name or the giving of a false address.

(2) Information communicated to a physician in an effort unlawfully to procure a narcotic drug, or unlawfully to procure the administration of any such drug, shall not be deemed a privileged communication.

(3) No person shall willfully make a false statement in any prescription, order, report, or record, required by this act.

(4) No person shall, for the purpose of obtaining a narcotic drug, falsely assume the title of, or represent himself to be, a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person.

(5) No person shall make or utter any false or forged prescription or false or forged written order.

(6) No person shall affix any false or forged label to a package or receptacle containing narcotic drugs.

(7) The provisions of this section shall apply to all transactions relating to narcotic drugs under the provisions of section 54-108, in the same way as they apply to transactions under all other sections.

History: En. Sec. 22, Ch. 176, L. 1937.

54-123. Exceptions and exemptions not required to be negated. In any complaint, information, or indictment, and in any action or proceeding brought for the enforcement of any provisions of this act, it shall not be necessary to negative any exception, excuse, proviso, or exemption, contained in this act, and the burden of proof of any such exception, excuse, proviso, or exemption, shall be upon the defendant.

History: En. Sec. 23, Ch. 176, L. 1937. 42 C.J.S. Indictments and Informations § 140.

Collateral References

Indictment and Information ⇨ 111(1).

54-124. Enforcement and cooperation. It is hereby made the duty of the secretary of the state board of health, its officers, agents, inspectors, and representatives, and of all peace officers within the state, and of all county attorneys, to enforce all provisions of this act, except those specifically delegated, and to cooperate with all agencies charged with the enforcement of the laws of the United States, of this state, and of all other states, relating to narcotic drugs.

History: En. Sec. 24, Ch. 176, L. 1937.

54-125. Penalties. Any person violating any provision of this act shall upon conviction be punished, for the first offense by a fine not exceeding one thousand dollars (\$1,000.00) or by imprisonment in the county jail for not exceeding six (6) months or by both such fine and imprisonment, and for any subsequent offense, by a fine not exceeding five thousand dollars, (\$5,000.00) or by imprisonment in the state prison for not exceeding five (5) years, or by both such fine and imprisonment. Any person who sells, barter, exchanges, distributes, gives away, or in any manner disposes of any of the drugs in violation of the provisions of this act, to any person of the age of eighteen (18) years, or under, shall upon conviction be punished by imprisonment in the state prison for not less than five years nor more than life.

History: En. Sec. 25, Ch. 176, L. 1937.

Collateral References

Poisons ⇨ 9.

72 C.J.S. Poisons § 7.

54-126. Effect of acquittal or conviction under federal narcotic laws. No person shall be prosecuted for the violation of any provision of this act if such person has been acquitted or convicted under the federal narcotic laws of the same act or omission which it is alleged, constitutes a violation of this act.

History: En. Sec. 26, Ch. 176, L. 1937.

54-127. Interpretation. This act shall be so interpreted and construed as to effectuate its general purpose, to make uniform the laws of those states which enact it.

History: En. Sec. 28, Ch. 176, L. 1937.

54-128. Name of act. This act may be cited as the "Uniform Drug Act."

History: En. Sec. 30, Ch. 176, L. 1937.

CHAPTER 2

NARCOTIC EDUCATION SECTION OF THE STATE BOARD OF HEALTH

Section 54-201 to 54-205. Repealed.

54-206. Narcotic education section created.

54-207. Purpose of section.

54-208. Health education consultant—appointment—expenses.

54-209. Acceptance of contributions, donations and gifts.

54-201 to 54-205. Repealed—Chapter 104, Laws of 1949.**Repeal**

These sections (Secs. 1 to 5, Ch. 89, L. 1947), relating to the state narcotics

education commission, were repealed by Sec. 5, Ch. 104, Laws 1949.

54-206. Narcotic education section created. There is hereby created and established in the division of public health education in the state board of health a section to be known as the narcotic education section, which shall be under the direct supervision of the state board of health.

History: En. Sec. 1, Ch. 104, L. 1949.

Collateral References

Health 6.

39 C.J.S. Health § 9.

54-207. Purpose of section. It is hereby declared to be the purpose of such section of narcotic education to provide a consultant in narcotic education to the general public and to the Montana educational institutions from the elementary schools through the institutions of higher learning, regarding the scientific facts concerning narcotic drugs.

History: En. Sec. 2, Ch. 104, L. 1949.

54-208. Health education consultant—appointment—expenses. The state board of health is authorized and hereby empowered to appoint and employ a health educational consultant with special training in narcotic education to carry out the provisions of this act, who shall be under the merit system and whose educational qualifications shall meet merit system requirements of other health education consultants, and to incur such other expense as may be deemed necessary to carry out the provisions of this act.

History: En. Sec. 3, Ch. 104, L. 1949.

54-209. Acceptance of contributions, donations and gifts. In addition to state appropriations, the state board of health is hereby authorized to accept contributions, donations and gifts, and to use the fund derived therefrom for efficiently carrying out the purpose of this act.

History: En. Sec. 4, Ch. 104, L. 1949.

TITLE 55

NEGOTIABLE INSTRUMENTS

- Chapter 1. Negotiable instruments—general provisions, 55-101 to 55-107.
2. Negotiable instruments—form and interpretation, 55-201 to 55-223.
3. Consideration, 55-301 to 55-306.
4. Negotiation, 55-401 to 55-421.
5. Rights of holder, 55-501 to 55-509.
6. Liability of parties, 55-601 to 55-610.
7. Presentment for payment, 55-701 to 55-718.
8. Notice of dishonor, 55-801 to 55-830.
9. Discharge of negotiable instruments, 55-901 to 55-907.
10. Bills of exchange—form and interpretation, 55-1001 to 55-1006.
11. Acceptance, 55-1101 to 55-1111.
12. Presentment for acceptance, 55-1201 to 55-1209.
13. Protest, 55-1301 to 55-1309.
14. Acceptance for honor, 55-1401 to 55-1410.
15. Payment for honor, 55-1501 to 55-1507.
16. Bills in a set, 55-1601 to 55-1606.
17. Promissory notes and checks, 55-1701 to 55-1706.
18. General provisions, 55-1801.

CHAPTER 1

NEGOTIABLE INSTRUMENTS—GENERAL PROVISIONS

- Section 55-101. Short title.
55-102. Definitions and meaning of terms.
55-103. Person primarily liable on instrument.
55-104. Reasonable time, what constitutes.
55-105. Time—how computed—when last day falls on holiday.
55-106. Application of chapter.
55-107. Law merchant—when governs.

55-101. (8401) Short title. This act shall be known as the negotiable instruments law.

History: A short law relating to bills of exchange and promissory notes was enacted as Secs. 1-7, pp. 343, 344, Bannack Stat.; re-en. Ch. 9, pp. 385-386, Cod. Stat. 1871; re-en. Secs. 99-105, 5th Div. Rev. Stat. 1879; re-en. Secs. 156-162, 5th Div. Comp. Stat. 1887. The first complete negotiable instruments law of the state was that en. as Secs. 3990-4231, Civ. C. 1895. The act here given is the uniform negotiable instruments law en. as Ch. 121, L. 1903; ap. p. Secs. 5842-6037, Rev. C. 1907. References to the California codes are to Kerr's 1920 edition.

This section en. Sec. 5842, Rev. C. 1907; re-en. Sec. 8401, R. C. M. 1921.

NOTE.—Uniform State Law. Sections 55-101 through 55-1706 constitute the "Uniform Negotiable Instruments Law" approved by the National Conference of Commissioners on Uniform State Laws in 1896 and adopted by every state of the

United States. It has also been adopted in Alaska, District of Columbia, Hawaii, Philippine Islands and Puerto Rico. Section 55-101 varies the wording of Section 190 of the approved act as it now exists but follows that section as originally drafted. Sections 55-102 through 55-107 are enactments of Sections 191 through 196 of the approved act. Sections 55-201 through 55-1706 follow the wording of Sections 1 through 189 of the approved act with the following variations: 55-205 differs from 5; 55-209 differs from 9; 55-407 differs from 36; 55-706 differs from 75.

Scope of Act

Insofar as the provisions of the negotiable instruments law are clear and unambiguous, they are controlling in the determination of rights of the parties to negotiable paper. *Brophy Grocery Co. v. Wilson*, 45 M 489, 493, 124 P 510.

The provisions of the negotiable instruments law deal with negotiable instruments, and not with instruments non-negotiable in character. *United States Nat. Bank v. Shupak*, 54 M 542, 545, 172 P 324.

The Uniform Negotiable Instruments Act deals with negotiable instruments only so long as they are in the hands of holders in due course; if in other hands, they are subject to the same defenses as if nonnegotiable. *Merchants Nat. Bank v. Smith et al.*, 59 M 280, 289, 196 P 523.

References

Cited or applied as section 5842, Revised Codes, in *First Nat. Bank v. Barrett*, 52

M 359, 364, 157 P 951; *Commercial Nat. Bank v. Reichelt*, 62 M 302, 204 P 1037; *Matteson v. Trask*, 63 M 160, 206 P 428; *Stankey v. Citizens' Nat. Bank of Laurel*, 64 M 309, 209 P 1054; *Grosfield v. First Nat. Bank*, 73 M 219, 233, 236 P 250; *Anderson v. Border et al.*, 75 M 516, 244 P 494; *Clarke v. National Bk. of Montana*, 78 M 48, 252 P 373; *Lister v. Donlan*, 85 M 571, 576, 281 P 348; *First Nat. Bank v. Holding et al.*, 90 M 529, 4 P 2d 709.

Collateral References

Bills and Notes 146.
10 C.J.S. *Bills and Notes* §§ 10, 12, 13, 15.

55-102. (8402) Definitions and meaning of terms. In this act, unless the context otherwise requires:

"Acceptance" means an acceptance completed by delivery or notification.

"Action" includes counterclaim and set-off.

"Bank" includes any person or association of persons carrying on the business of banking, whether incorporated or not.

"Bearer" means the person in possession of a bill or note which is payable to bearer.

"Bill" means bill of exchange, and "note" means negotiable promissory note.

"Delivery" means transfer of possession, actual or constructive, from one person to another.

"Holder" means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.

"Indorsement" means an indorsement completed by delivery.

"Instrument" means negotiable instrument.

"Issue" means the first delivery of the instrument, complete in form, to the person who takes it as a holder.

"Person" includes a body of persons, whether incorporated or not.

"Value" means valuable consideration.

"Written" includes printed, and "writing" includes print.

History: En. Sec. 5843, Rev. C. 1907; re-en. Sec. 8402, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3266.

References

Merchants' Nat. Bank v. Smith et al., 59 M 280, 290, 293, 196 P 523; *Lefebure et al. v. Baker et al.*, 69 M 193, 204, 220 P 1111; *Olsen v. Zappone*, 83 M 573, 577,

578, 273 P 635; *Best et al. v. Boyer*, 98 M 40, 37 P 2d 331; *State ex rel. Freebourn v. Merchants' Credit Service, Inc.*, 104 M 76, 100, 66 P 2d 337; *Parcells v. Price*, 110 M 537, 540, 104 P 2d 12.

Collateral References

Bills and Notes 1.
10 C.J.S. *Bills and Notes* §§ 4, 5.

55-103. (8403) Person primarily liable on instrument. The person "primarily" liable on an instrument is the person who, by the terms of the instrument, is absolutely required to pay the same. All other parties are "secondarily" liable.

History: En. Sec. 5844, Rev. C. 1907; re-en. Sec. 8403, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3266a.

Operation and Effect

Under the negotiable instruments law, an accommodation maker of a promissory note is primarily liable, and is not dis-

charged by an extension of time given his comaker; the fact that plaintiff, a holder for value, knew that defendant was an accommodation maker did not change the rule. *First State Bank of Hilger v. Lang*, 55 M 146, 153, 174 P 597.

The liability of the maker of a promissory note is absolute, while that of an indorser is contingent upon the default of the maker. *Anderson v. Border et al.*, 75 M 516, 526, 244 P 494.

References

Merchants' Nat. Bank v. Smith et al.,

59 M 280, 289, 291, 196 P 523; *Mulany v. Murray*, 68 M 245, 252, 216 P 1105; *J. K. & C. S. C. Mullen Ben. Corp. v. School Dist.*, 99 M 388, 43 P 2d 902.

Collateral References

Bills and Notes 116.

10 C.J.S. *Bills and Notes* § 42.

Discharge of accommodation maker or surety by extension of time or release of collateral, under *Negotiable Instruments Law*. 48 ALR 715; 65 ALR 1425 and 108 ALR 1088.

55-104. (8404) Reasonable time, what constitutes. In determining what is a "reasonable time" or an "unreasonable time" regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case.

History: En. Sec. 5845, Rev. C. 1907; **history of Sec. 55-101.** Cal. Civ. C. Sec. re-en. Sec. 8404, R. C. M. 1921. See also 3266b.

55-105. (8405) Time—how computed—when last day falls on holiday. When the day, or the last day for doing any act herein required or permitted to be done, falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day.

History: En. Sec. 5846, Rev. C. 1907; re-en. Sec. 8405, R. C. M. 1921. See also **history of Sec. 55-101.** Cal. Civ. C. Sec. 3266c.

Collateral References

Time 10(10).

62 C.J. *Time* § 52.

55-106. (8406) Application of chapter. The provisions of this act do not apply to negotiable instruments made and delivered prior to the passage hereof.

History: En. Sec. 5847, Rev. C. 1907; **history of Sec. 55-101.** Cal. Civ. C. Sec. re-en. Sec. 8406, R. C. M. 1921. See also 3266d.

55-107. (8407) Law merchant—when governs. In any case not provided for in this act, the rules of the law merchant shall govern.

History: En. Sec. 5848, Rev. C. 1907; **history of Sec. 55-101.** Cal. Civ. C. Sec. re-en. Sec. 8407, R. C. M. 1921. See also 3266e.

CHAPTER 2

NEGOTIABLE INSTRUMENTS—FORM AND INTERPRETATION

- Section** 55-201. Form of negotiable instrument.
 55-202. Certainty as to sum, what constitutes.
 55-203. When promise is unconditional.
 55-204. Determinable future time, what constitutes.
 55-205. Instrument non-negotiable when orders or promises in addition to payment of money included—provisions not affecting negotiability.
 55-206. Omissions—seal—particular money.
 55-207. When payable on demand.
 55-208. When payable to order.
 55-209. When payable to bearer.
 55-210. Terms, when sufficient.
 55-211. Date, presumption as to.
 55-212. Antedated and postdated.
 55-213. When date may be inserted.
 55-214. Blanks—when may be filled.

- 55-215. Incomplete instrument not delivered.
- 55-216. Delivery—when effectual—when presumed.
- 55-217. Construction where instrument is ambiguous.
- 55-218. Liability of person signing in trade or assumed name.
- 55-219. Signature by agent—authority—how shown.
- 55-220. Liability of person signing as agent, etc.
- 55-221. Signature by procuration, effect of.
- 55-222. Effect of indorsement by infant or corporation.
- 55-223. Forged signature, effect of.

55-201. (8408) Form of negotiable instrument. An instrument to be negotiable must conform to the following requirements:

1. It must be in writing, and signed by the maker or drawer;
2. Must contain an unconditional promise or order to pay a sum certain in money;
3. Must be payable on demand, or at a fixed or determined future time;
4. Must be payable to order or to bearer; and,
5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

History: En. Sec. 5849, Rev. C. 1907; re-en. Sec. 8408, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3082.

Effect of Clause Providing Interest After Due Date

Inclusion in a promissory note of the clause "Interest or principal not paid when due, to draw interest thereafter at ten per cent. per annum until paid," held not to have destroyed its negotiability. *Lister v. Donlan*, 85 M 571, 577, 281 P 348.

When Payable

Held that a six months' promissory note containing an accelerating clause to the effect that "in the event of insolvency of either maker or indorsers, or the institution of suit or attachment against them or either of them, or the mortgaging of any property by the makers or indorsers," the note might be declared immediately due and payable, was non-negotiable in that it left the time when payable uncertain and indefinite. *Great Falls Nat. Bk. v. Young et al.*, 67 M 328, 335, 215 P 651.

When Proof of Negotiability of Instrument Unnecessary

Where in an action on a trade acceptance the instrument contained all the elements necessary under this section to constitute it a negotiable one and was introduced in evidence, it spoke for itself and proof of its negotiability was unnecessary. *Best et al. v. Boyer*, 98 M 40, 45, 37 P 2d 331.

References

Grosfield v. First Nat. Bank, 73 M 219, 233, 236 P 250; *State v. Phillips*, — M —, 264 P 2d 1009, 1011.

Collateral References

Bills and Notes ¶146.
10 C.J.S. *Bills and Notes* § 15.
7 Am. Jur. 801-804, *Bills and Notes*, §§ 22-28.

Validity and effect of note payable to maker without words of negotiability. 42 ALR 1067 and 50 ALR 426.

Negotiability as affected by option of maker to pay or of holder to require something in lieu of payment of money. 100 ALR 824.

55-202. (8409) Certainty as to sum, what constitutes. The sum payable is a sum certain within the meaning of this act, although it is to be paid:

1. With interest; or,
2. By stated instalments; or,
3. By stated instalments, with a provision that upon default in payment of any instalment or of interest, the whole shall become due; or,
4. With exchange, whether at a fixed rate or at the current rate; or,
5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity.

History: En. Sec. 5850, Rev. C. 1907; re-en. Sec. 8409, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3083.

Provision for Attorney Fees and Costs of Collection

A promissory note containing a provision for the payment of an attorney's fee and costs of collection, instead of the statutory phrase "with costs of collection or an attorney's fee," was not thereby rendered non-negotiable, the words "attorney's fee" and "costs of collection" in this connection meaning the same thing, so that the use of both of them in the conjunctive imposed no greater burden upon the maker than their use in the disjunctive would have done. *Wood v. Ferguson et al.*, 71 M 540, 549, 230 P 592.

Under this section, the sum mentioned in a promissory note as being payable is made certain although in addition to the principal sum it calls for payment of costs and attorney's fees in case the payee has to enforce collection. *National Park Bank of N. Y. v. American B. Co.*, 79 M 542, 547, 257 P 436.

55-203. (8410) When promise is unconditional. An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with:

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or,
2. A statement of the transaction which gives rise to the instrument.

But an order or promise to pay out of a particular fund is not unconditional.

History: En. Sec. 5851, Rev. C. 1907; re-en. Sec. 8410, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3084.

References

Cited or applied as Sec. 3, Ch. 121, Laws 1903, in *State v. Mitton*, 37 M 366, 375,

Provision Providing for Interest After Due Date

Inclusion in a promissory note of the clause: "Interest or principal not paid when due, to draw interest thereafter at ten per cent per annum until paid," held not to have destroyed its negotiability. *Lister v. Donlan*, 85 M 571, 576, 281 P 348.

References

Cited or applied as Sec. 2, Ch. 121, Laws 1903, in *Morrison v. Ornbaun*, 30 M 111, 114, 75 P 953; as section 5850, Revised Codes, in *First Nat. Bank v. Barrett*, 52 M 359, 365, 157 P 951.

Collateral References

Bills and Notes §157.

10 C.J.S. *Bills and Notes* § 105.

Bills and notes: negotiability as affected by provision in relation to interest or discount. 58 ALR 1281.

Negotiability under Uniform Negotiable Instruments Act as affected by provision for attorney's fee. 91 ALR 693.

96 P 926; as section 5851, Revised Codes, in *First Nat. Bank v. Barrett*, 52 M 359, 364, 157 P 951.

Collateral References

Bills and Notes §152.

10 C.J.S. *Bills and Notes* § 23.

55-204. (8411) Determinable future time, what constitutes. An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable:

1. At a fixed period after date or sight; or,
 2. On or before a fixed or determinable future time specified therein;
- or,
3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.

History: En. Sec. 5852, Rev. C. 1907; re-en. Sec. 8411, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3085.

Operation and Effect

Held that a six months' promissory note containing an accelerating clause to the effect that in the event of insolvency

of either maker or indorsers, or the institution of suit or attachment against them or either of them, or the mortgaging of any property by the makers or indorsers, the note might be declared immediately due and payable, was non-negotiable in that it left the time when payable uncertain and indefinite. *Great Falls Nat. Bk. v. Young et al.*, 67 M 328, 335, 215 P 651.

Collateral References

Bills and Notes—155.
10 C.J.S. Bills and Notes § 96.

Negotiability of instrument as affected by incompleteness of the attempt to fix due date. 19 ALR 508.

Negotiability as affected by provisions for extension of time. 77 ALR 1085.

Negotiability as affected by reservation of obligor's right to anticipate time of payments. 81 ALR 396.

55-205. (8412) Instrument non-negotiable when orders or promises in addition to payment of money included—provisions not affecting negotiability. An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or,
2. Authorizes a confession of judgment if the instrument be not paid at maturity; or,
3. Waives the benefit of any law intended for the advantage or protection of the obligor; or,
4. Gives the holder an election to require something to be done in lieu of payment of money.

5. An instrument otherwise negotiable in character is not affected by the fact that it was at the time of the execution or subsequently secured by mortgage on real or personal property.

But nothing in this section shall validate any provision or stipulation otherwise illegal.

History: En. Sec. 5853, Rev. C. 1907; re-en. Sec. 8412, R. C. M. 1921; amd. Sec. 1, Ch. 143, L. 1923. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3086.

Cross-Reference

Default judgment, agreements authorizing void, sec. 13-811.

Operation and Effect

A promissory note, negotiable on its face, executed prior to the amendment of this section was non-negotiable when secured by a mortgage on real property and

the assignee of the mortgage with the note indorsed in blank, taking it with full knowledge that it was a mortgage note, took it as a non-negotiable instrument. *Barnes et al., v. Rowles et al.*, 84 M 393, 396, 276 P 15.

References

Ingebrightsen et al. v. Hatcher et al., 87 M 482, 484, 288 P 1023.

Collateral References

Bills and Notes—162.
10 C.J.S. Bills and Notes § 93.

55-206. (8413) Omissions—seal—particular money. The validity and negotiable character of an instrument are not affected by the fact that:

1. It is not dated; or,
2. Does not specify the value given, or that any value has been given therefor; or,
3. Does not specify the place where it is drawn or the place where it is payable; or,
4. Bears a seal; or,
5. Designates a particular kind of current money in which payment is to be made.

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.

History: En. Sec. 5854, Rev. C. 1907; re-en. Sec. 8413, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3087.

Collateral References

Bills and Notes—144.
10 C.J.S. Bills and Notes § 13.

Negotiable Instruments Law as affecting defense of usury. 95 ALR 735.

55-207. (8414) When payable on demand. An instrument is payable on demand:

1. Where it is expressed to be payable on demand, or at sight, or on presentation; or,

2. In which no time for payment is expressed.

Where an instrument is issued, accepted, or indorsed and overdue, it is, as regards the person so issuing, accepting, or indorsing it, payable on demand.

History: En. Sec. 5855, Rev. C. 1907; re-en. Sec. 8414, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3088.

Collateral References

Bills and Notes—129(3).
10 C.J.S. Bills and Notes § 247.

Transferee of demand note as a purchaser before maturity. 60 ALR 649.

55-208. (8415) When payable to order. The instrument is payable to order where it is drawn payable to the order of a specified person, or to him or his order. It may be drawn payable to the order of:

1. A payee who is not maker, drawer, or drawee; or,

2. The drawer or maker; or,

3. The drawee; or,

4. Two or more payees jointly; or,

5. One or some of several payees; or,

6. The holder of an office for the time being.

Where the instrument is payable to order, the payee must be named or otherwise indicated therein with reasonable certainty.

History: En. Sec. 5856, Rev. C. 1907; re-en. Sec. 8415, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3089.

Collateral References

Bills and Notes—6, 32.
10 C. J. S. Bills and Notes § 112.

When instrument deemed payable to order within Uniform Negotiable Instruments Act. 58 ALR 1005.

55-209. (8416) When payable to bearer. The instrument is payable to bearer:

1. When it is expressed to be so payable; or,

2. When it is payable to a person named therein, or bearer; or,

3. When it is payable to the order of a fictitious or non-existing or living person not intended to have any interest in it, and such fact was known to the person making it so payable, or known to his employee or other agent who supplies the name of such payee.

4. When the name of the payee does not purport to be the name of any person; or,

5. When the only or last indorsement is an indorsement in blank.

History: En. Sec. 5857, Rev. C. 1907; re-en. Sec. 8416, R. C. M. 1921; amd. Sec. 1, Ch. 107, L. 1931. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3090.

References

Washington Loan & Trust Co. v. United States, 134 F 2d 59, 63.

Collateral References

Instrument payable to "estate" as within rule that an instrument payable to order of fictitious or nonexistent person is payable to bearer. 60 ALR 610.

Rights and obligations between depositor and bank which pays forged check, as affected by provisions of Negotiable Instruments Act. 146 ALR 840.

55-210. (8417) Terms, when sufficient. The instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.

History: En. Sec. 5858, Rev. C. 1907; re-en. Sec. 8417, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3091.

Collateral References

Bills and Notes—1, 28.

10 C.J.S. Bills and Notes §§ 70, 71.

Reference to extrinsic agreement as affecting negotiability of bill, note, or trade acceptance. 104 ALR 1378.

55-211. (8418) Date, presumption as to. Where an instrument or an acceptance of any indorsement thereon is dated, such date is deemed prima facie to be the true date of the making, drawing, acceptance, or indorsement, as the case may be.

History: En. Sec. 5859, Rev. C. 1907; re-en. Sec. 8418, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3092.

Collateral References

Bills and Notes—491, 492.

11 C.J.S. Bills and Notes §§ 651, 657.

55-212. (8419) Antedated and postdated. The instrument is not invalid for the reason only that it is antedated or postdated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.

History: En. Sec. 5860, Rev. C. 1907; re-en. Sec. 8419, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3093.

Collateral References

Bills and Notes—8, 34.

10 C.J.S. Bills and Notes § 72.

55-213. (8420) When date may be inserted. Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date.

History: En. Sec. 5861, Rev. C. 1907; re-en. Sec. 8420, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3094.

Collateral References

Bills and Notes—60.

10 C.J.S. Bills and Notes § 136.

55-214. (8421) Blanks—when may be filled. Where an instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable

instrument operates as a *prima facie* authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given, and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given, and within a reasonable time.

History: En. Sec. 5862, Rev. C. 1907; re-en. Sec. 8421, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3095.

Operation and Effect

In a prosecution for forgery, the rule that the delivery of a writing containing blanks evidently intended to be filled creates an implied authority in the person who receives it to complete the instrument by filling the blanks, has no application where the defendant had himself testified that the blanks in the note which he was charged with uttering, while knowing it to be spurious, had all been filled before it was signed. *State v. Mitton*, 37 M 366, 373, 96 P 926. See *First National Bank v. Barrett*, 52 M 359, 365, 157 P 951.

A promissory note payable with interest without, however, specifying the rate of interest, carries interest at the legal rate.

55-215. (8422) Incomplete instrument not delivered. Where an incomplete instrument has not been delivered, it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.

History: En. Sec. 5863, Rev. C. 1907; re-en. Sec. 8422, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3096.

55-216. (8423) Delivery—when effectual—when presumed. Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party, other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting, or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.

Burnett v. Burnett, 68 M 546, 548, 219 P 831.

Where four of the notes held by plaintiff were silent as to time interest should be paid, plaintiff could have filled in the blanks but there was no obligation to do so, and effect of the contract was the same as if the blanks had been filled in and annual payment of interest specifically stipulated. *Mercer v. Mercer*, 120 M 132, 180 P 2d 248, 250.

References

Merchants Nat. Bank v. Smith et al., 59 M 280, 294, 196 P 523.

Collateral References

Effect of payee of bill or note, executed in blank as to amount, filling it in for an amount in excess of that authorized. 75 ALR 1389.

Collateral References

Bills and Notes ¶63-65.
10 C.J.S. *Bills and Notes* §§ 79-81.

History: En. Sec. 5864, Rev. C. 1907; re-en. Sec. 8423, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3097.

Operation and Effect

Under this section, providing that where a negotiable instrument is no longer in the possession of a party whose signature appears thereon a valid and intentional delivery by him is presumed, held, in an action on a promissory note, that its production by plaintiff raised a presumption of a valid and intentional delivery of it to the payee by the maker, and that it was properly admitted as against the objection that plaintiff was not the owner or holder thereof. *Ely, Salyards & Co. v. Farmers' E. Co.*, 69 M 265, 270, 221 P 522.

Under this section, delivery of a promissory note, in order to be effectual, must be made by or under the authority of the

maker of the instrument, and therefore where no such delivery is shown the payee named therein cannot recover on it. *Baroch v. Greater Montana Oil Co.*, 70 M 93, 97, 225 P 800.

Under this section, where a negotiable instrument (trade acceptance) is in the hands of a holder in due course and produced by him at the trial of an action to recover thereon, a valid and intentional delivery of it to the transferee and acceptance of the instrument by the drawee are presumed; hence failure to prove them does not entitle defendant to a nonsuit. *Best et al. v. Boyer*, 98 M 40, 45, 37 P 2d 331.

Collateral References

Bills and Notes—63, 64, 492.

10 C.J.S. Bills and Notes §§ 79, 80; 11 C.J.S. Bills and Notes § 657.

55-217. (8424) Construction where instrument is ambiguous. Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount.

2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof.

3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued.

4. Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail.

5. Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election.

6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser.

7. Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon.

History: En. Sec. 5865, Rev. C. 1907; re-en. Sec. 8424, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3098.

References

Square Butte State Bank v. Ballard, 64, M 554, 559, 210 P 889.

Collateral References

Bills and Notes—116.

10 C.J.S. Bills and Notes § 42.

Validity and effect of note payable to maker without words of negotiability. 50 ALR 426.

55-218. (8425) Liability of person signing in trade or assumed name. No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who

signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.

History: En. Sec. 5866, Rev. C. 1907; re-en. Sec. 8425, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3099.

Operation and Effect

A person whose name does not appear on a promissory note is not liable thereon. Kohrs v. Smith, 45 M 467, 472, 124 P 275; Young v. Bray, 54 M 415, 417, 170 P 1044.

To hold a person, or his estate, liable on a promissory note, his name must appear thereon. First Nat. Bk. v. Cottonwood Land Co., 51 M 544, 548, 154 P 582. See

also First State Bank v. Mussigbrod et al., 83 M 68, 84, 271 P 695.

References

Cited or applied as section 5866, Revised Codes, in Young v. Bray, 54 M 415, 417, 170 P 1044; Larson v. Marcy et al., 61 M 1, 7, 201 P 685; Shaw v. McNamara & Marlow, Inc., 85 M 389, 397, 278 P 836.

Collateral References

Bills and Notes—59.

10 C.J.S. Bills and Notes § 34.

55-219. (8426) Signature by agent—authority—how shown. The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.

History: En. Sec. 5867, Rev. C. 1907; re-en. Sec. 8426, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3100.

Operation and Effect

Persons conducting business as a voluntary association, using a common or trade name, may be held jointly and severally liable upon a note executed in the trade name by their agent authorized to do so. Larson v. Marcy et al., 61 M 1, 7, 201 P 685.

Under this section, the signature of any party to a negotiable instrument may be made by a duly authorized agent. Commercial Nat. Bank v. Reichelt, 62 M 302, 305, 204 P 1037.

Principal's Ratification of Agent's Execution of Note Provable Under Allegation That Principal Executed It

An allegation in an action on a promissory note that it was executed by a certain person is sustained by proof of execution by an authorized agent of such person, and ratification of the acts of the agent can be proved under the general allegation that the principal executed it. Coffman v. Niece, 110 M 541, 545, 105 P 2d 661.

Collateral References

Principal and Agent—109.

3 C.J.S. Agency § 112.

55-220. (8427) Liability of person signing as agent, etc. Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.

History: En. Sec. 5868, Rev. C. 1907; re-en. Sec. 8427, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3101.

Operation and Effect

Held, under this section, that the indorsement, "J. H. Irwin, Presdt. Great Northern Surety Co.," on a note made payable to the company was its indorsement and not that of the individual signer, the

contention that the words following the name were merely descriptio personae and did not indicate the character in which he acted not being maintainable under the Negotiable Instruments Law. Commercial Nat. Bank v. Reichelt, 62 M 302, 307, 204 P 1037.

Collateral References

Bills and Notes—123(2).

10 C.J.S. Bills and Notes § 114.

55-221. (8428) Signature by procuration, effect of. A signature by "procuration" operates as a notice that the agent has but a limited author-

ity to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.

History: En. Sec. 5869, Rev. C. 1907;
re-en. Sec. 8428, R. C. M. 1921. See also
history of Sec. 55-101. Cal. Civ. C. Sec.
3102.

Collateral References
Bills and Notes 123(2).
10 C.J.S. Bills and Notes § 114.

55-222. (8429) Effect of indorsement by infant or corporation. The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon.

History: En. Sec. 5870, Rev. C. 1907;
re-en. Sec. 8429, R. C. M. 1921. See also
history of Sec. 55-101. Cal. Civ. C. Sec.
3103.

19 C.J.S. Corporations § 1227; 43 C.J.S.
Infants § 79.

Collateral References

Corporations 466; Infants 52.

Construction and effect of provision of
Negotiable Instruments Law as to in-
dorsement or assignment of instrument
by infant or corporation. 73 ALR 172.

55-223. (8430) Forged signature, effect of. When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority.

History: En. Sec. 5871, Rev. C. 1907;
re-en. Sec. 8430, R. C. M. 1921. See also
history of Sec. 55-101. Cal. Civ. C. Sec.
3104.

ALR 1089; 71 ALR 337 and 121 ALR
1056.

Right of previous holder of check paid
by bank to take advantage of depositor's
failure to examine vouchers in order to
discover forgeries. 17 ALR 956.

Who must bear loss as between drawer
or indorser, who delivers check to an im-
poster and one who purchases, cashes, or
pays it upon the impostor's indorsement.
22 ALR 1228; 52 ALR 1326 and 112 ALR
1435.

Rights and obligations between depos-
itor and bank which pays forged check,
as affected by provisions of Negotiable
Instruments Act. 146 ALR 840.

Cross-References

Fictitious instrument, penalty for utter-
ing or passing, sec. 94-2007.
Forgery, penalty, sec. 94-2006.

Collateral References

Bills and Notes 54.
10 C.J.S. Bills and Notes § 73.

Right of drawee of forged check or
draft to recover amount paid thereon. 12

CHAPTER 3

CONSIDERATION

- Section 55-301. Presumption of consideration.
55-302. What constitutes value.
55-303. What constitutes holder for value.
55-304. When lien on instrument constitutes holder for value.
55-305. Effect of want of consideration.
55-306. Liability of accommodation party.

55-301. (8431) Presumption of consideration. Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value.

History: En. Sec. 5872, Rev. C. 1907; history of Sec. 55-101. Cal. Civ. C. Sec.
re-en. Sec. 8431, R. C. M. 1921. See also 3105.

Cross-References

Effect of recital, sec. 93-1301-6.
Presumption, sec. 93-1301-7.

Operation and Effect

In an action on a promissory note against the maker, plaintiff is not required to prove consideration, a note being deemed to have been issued for a valuable consideration, and absence of it being a matter of defense. *Alley v. Butte & Western Min. Co.*, 77 M 477, 487, 251 P 517.

The burden of showing a want of consideration to support a written instrument lies with the party seeking to inval-

idate it on that ground, the presumption being that there was a consideration. *Farmers' & Miners' State Bank v. Probst*, 81 M 248, 258, 263 P 693.

References

McConnell v. Blackley, 66 M 510, 514, 214 P 64; *Allen v. Montana Refining Co.*, 71 M 105, 120, 227 P 582; *Olsen v. Zapone*, 83 M 573, 579, 273 P 635.

Collateral References

Bills and Notes §§ 493, 497.
11 C.J.S. *Bills and Notes* §§ 654, 655.

55-302. (8432) What constitutes value. Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time.

History: En. Sec. 5873, Rev. C. 1907; re-en. Sec. 8432, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3106.

Evidence of Prior Indebtedness to Prove Consideration

When defendant signed written guaranty to pay for goods sold by plaintiff to a codefendant and thereafter, while unpaid indebtedness remained on this contract a "renewal contract" was executed by the same parties, in action against guarantor on second contract where defense was lack of consideration, the first contract was admissible to prove consideration for the second, since it showed the guarantor's prior indebtedness, a valid consideration under this section. *W. T. Raleigh Co. v. Miller et al.*, 105 M 456, 462, 73 P 2d 552.

Operation in General

Held, in an action on a promissory note for \$650, a defense to which was want of consideration, that where plaintiff, in possession of public land under a claim of right to desert entry and upon which he had made improvements consisting of about three miles of fencing, located defendants thereon, delivering possession and surrendering the improvements to them, defendants giving the note in payment, there was sufficient consideration for the instrument. *McConnell v. Blackley*, 66 M 510, 514, 214 P 64.

Where the vendor of land accepted a note in payment of interest past due on a deferred payment of the purchase price, he waived the right given him under the contract of sale to declare the contract terminated by its breach, and extended the time in which the amount might be paid, and such extension was a sufficient consideration for the note. *Edwards et al. v. Muri*, 73 M 339, 346, 237 P 209.

Pre-Existing Debt

An antecedent or pre-existing debt constitutes value, and therefore one who takes property in satisfaction of such a debt is a purchaser for value and entitled to full protection as such. *Hackney v. Birely*, 67 M 155, 162, 215 P 642; *Schauer v. Morgan et al.*, 67 M 455, 465, 216 P 347; *Mulany v. Murray*, 68 M 245, 252, 216 P 1105.

A pre-existing debt constitutes value and, therefore, the surrender of an old promissory note upon execution of one to take its place is a sufficient consideration for the latter, and the fact that the obligation surrendered is that of another person is immaterial. *First State Bank v. Mussigbrod et al.*, 83 M 68, 88, 271 P 695.

Promissory Note Constitutes Valuable Consideration

A promissory note given in consideration of an oil and gas lease held a valuable consideration, and the fact that the lessor more than a year after its delivery returned it to the lessee was immaterial; it having been the property of the lessor he could do with it as he saw fit. *Nadeau v. Texas Company*, 104 M 558, 569, 69 P 2d 586, 593.

Where Transferee May Be Bona Fide Purchaser But Not Innocent Purchaser

Held, in claim and delivery action, that while the cancellation or satisfaction of an antecedent debt constitutes a sufficient consideration for a transfer under this section, and may make the transferee a bona fide purchaser, the mere transfer of property to secure an antecedent debt does not make the transferee an innocent purchaser. *Rasmussen v. Lee & Co.*, 104 M 278, 285, 66 P 2d 119.

References

Yale Oil Corp. v. Sedlacek et al., 99 M 411, 43 P 2d 887.

Collateral References

Bills and Notes 92, 96, 353.
10 C.J.S. Bills and Notes §§ 148, 316;
11 C.J.S. Bills and Notes § 742.

55-303. (8433) What constitutes holder for value. Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.

History: En. Sec. 5874, Rev. C. 1907; re-en. Sec. 8433, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3107.

References

Olsen v. Zappone, 83 M 573, 579, 273 P 635.

55-304. (8434) When lien on instrument constitutes holder for value. Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.

History: En. Sec. 5875, Rev. C. 1907; re-en. Sec. 8434, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3108.

References

Union Bank etc. Co. v. Lynn, 73 M 473, 476, 237 P 490.

55-305. (8435) Effect of want of consideration. Absence or failure of consideration is a matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount, or otherwise.

History: En. Sec. 5876, Rev. C. 1907; re-en. Sec. 8435, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3109.

Application of Presumption of Existence

In view of the ease with which a note and mortgage may be transferred without the necessity of making a public record thereof, the presumption that a thing once shown to have existed will be presumed to have continued as long as is usual with things of that nature (sec. 93-1301-7), standing alone, held, too weak as proof of ownership to establish a prima facie case of want or absence of consideration, after fifteen years. Sommer v. Wigen, 103 M 327, 333, 62 P 2d 333.

Operation and Effect

In an action by the payee of a promissory note against the maker, defendant's general averment that the note "was executed without any consideration whatever and there was a total absence and failure of consideration" was sufficient without setting out the evidentiary facts upon which defendant relied. United States Nat. Bank v. Chappell, 71 M 553, 563, 230 P 1084.

In an action on a promissory note against the maker, plaintiff is not required to

prove consideration, a note being deemed to have been issued for a valuable consideration, and absence of it being a matter of defense. Alley v. Butte & Western Min. Co., 77 M 477, 251 P 517.

A note given in aid of a contract which is invalid under the statute of frauds is without consideration and payment thereof cannot be enforced; but where only a portion of a note is given in payment of such a void contract, the remaining portion being based upon a valid consideration, payment may be enforced as to such latter portion. Eccles v. Kendrick, 80 M 120, 129, 259 P 609.

Under this section absence of consideration is a matter of defense as against any person not a holder in due course. This is an affirmative defense, and must be pleaded. Sommer v. Wigen, 103 M 327, 331, 62 P 2d 333.

References

Best et al. v. Boyer, 98 M 40, 37 P 2d 331.

Collateral References

Bills and Notes 90, 97, 370, 452(3).
10 C.J.S. Bills and Notes §§ 143, 518, 519, 520, 521, 523; 11 C.J.S. Bills and Notes § 755.

55-306. (8436) Liability of accommodation party. An accommodation party is one who signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending

his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

History: En. Sec. 5877, Rev. C. 1907; re-en. Sec. 8436, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3110.

Operation and Effect

Defendant, an accommodation maker, was primarily liable on the note, though the payee bank, at the time it took the instrument, knew that he was lending his name to his comaker, and was not discharged from liability by the act of the bank in releasing mortgage security furnished by the latter, without his (defendant's) knowledge or consent. Merchants' Nat. Bank v. Smith et al., 59 M 280, 291, 196 P 523.

Where defendant signed a renewal note taking the place of a note signed by her husband and another, at the request of the husband for the purpose of lending her name to him as comaker, she was an accommodation maker within the meaning of this section, and not a guarantor, and liable as such to a holder for value though the latter knew her to be only an accommodation maker and that no consideration moved to her for signing it, the consideration moving to one or both of her comakers having been sufficient to uphold the note. Mulany v. Murray, 68 M 245, 252, 216 P 1105.

The liability of the maker of a promissory note is absolute, while that of an indorser is contingent upon the default of the maker. Anderson v. Border et al., 75 M 516, 526, 244 P 494.

Id. While it is the general rule that where a number of persons successively sign a note, they are prima facie liable in the order in which their names appear even though they are in fact accommodation indorsers, their intention that there should be a joint, rather than a successive, liability may be inferred from the circumstances incident to the indorsements, and

parol evidence is admissible to show that there was an agreement between them to that effect.

Evidence tending to show that the maker of a negotiable instrument was merely an accommodation maker was properly excluded in an action by a holder in due course, since under this section, an accommodation maker is liable to a holder for value (even though the latter knew at the time of taking the instrument that the former was but an accommodation maker). Lister v. Donlan, 85 M 571, 579, 281 P 348.

References

Cited or applied as section 5877, Revised Codes, in Columbus State Bank v. Erb, 50 M 442, 449, 147 P 617; First State Bank of Hilger v. Lang, 55 M 146, 153, 174 P 597.

Collateral References

Bills and Notes—122, 237, 238, 371. 11 C.J.S. Bills and Notes §§ 739, 744, 749.

8 Am. Jur. 207-212, Bills and Notes §§ 454-463.

Discharge of accommodation maker or surety by extension of time or release of collateral, under Negotiable Instruments Law. 48 ALR 715; 65 ALR 1425 and 108 ALR 1088.

Amount paid for paper by holder as limiting recovery against accommodation party. 69 ALR 1313.

Construction, application, and effect of provision of Negotiable Instruments Law to effect that accommodation party is liable to holder for value notwithstanding that latter knew of accommodation character. 95 ALR 964.

Discharge of accommodation maker by release of mortgage or other security given for note. 2 ALR 2d 260.

CHAPTER 4

NEGOTIATION

- Section 55-401. What constitutes negotiation.
 55-402. Indorsement—how made.
 55-403. Indorsement must be of entire instrument.
 55-404. Kinds of indorsement.
 55-405. Special indorsement—indorsement in blank.
 55-406. Blank indorsement—how changed to special indorsement.
 55-407. When indorsement restrictive.
 55-408. Effect of restrictive indorsement—rights of indorsee.
 55-409. Qualified indorsement.
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 55-411. Indorsement of instrument payable to bearer.

- 55-412. Indorser where payable to two or more persons.
- 55-413. Effect of instrument drawn or indorsed to a person as cashier.
- 55-414. Indorsement where name is misspelled, etc.
- 55-415. Indorsement in representative capacity.
- 55-416. Time of indorsement—presumption.
- 55-417. Place of indorsement—presumption.
- 55-418. Continuation of negotiable character.
- 55-419. Striking out indorsement.
- 55-420. Transfer without indorsement, effect of.
- 55-421. When prior party may negotiate instrument.

55-401. (8437) What constitutes negotiation. An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder, completed by delivery.

History: En. Sec. 5878, Rev. C. 1907; re-en. Sec. 8437, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3111.

Cross-References

Assignment, defenses and set-off, sec. 93-2802.

Transfer of nonnegotiable instrument, sec. 13-602.

Cancellation of Old Note and Mortgage for Execution of New Ones

There is an absence or want of consideration where the party surrendering an old note and mortgage for execution of new ones doesn't own the old ones in the first instance. If plaintiff was not the owner of the original note and mortgage, she was in no position to perform her promise to cancel and surrender the original note and mortgage. *Sommer v. Wigen*, 103 M 327, 332, 62 P 2d 333.

55-402. (8438) Indorsement—how made. The indorsement must be written on the instrument itself, or upon paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.

History: En. Sec. 5879, Rev. C. 1907; re-en. Sec. 8438, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3112.

55-403. (8439) Indorsement must be of entire instrument. The indorsement must be an indorsement of the entire instrument. An indorsement, which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue.

History: En. Sec. 5880, Rev. C. 1907; re-en. Sec. 8439, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3113.

Operation and Effect

A note made payable to a named person, with the words added, "or bearer," passes from hand to hand by mere delivery, and on becoming due may be enforced by the person then holding it. *J. I. Case Threshing Machine Co. v. Simpson*, 54 M 316, 318, 170 P 12.

Held that the payee of a negotiable promissory note, in possession of it, is a prima facie holder in due course, within the meaning of the Uniform Negotiable Instruments Act, negotiation by indorsement and delivery not being necessary to constitute one a holder in due course.

References

Cited or applied as section 5878, Revised Codes, in *Fifty Associates Co. v. Quigley*, 56 M 348, 352, 185 P 155.

Collateral References

Bills and Notes—176.
10 C.J.S. Bills and Notes § 204.

Collateral References

Bills and Notes—183, 188.
10 C.J.S. Bills and Notes §§ 207, 208, 212.

Collateral References

Construction and application of provision of Negotiable Instruments Law in respect of indorsements which purport to

transfer only part of amount payable. 63 ALR 499.

Construction, application, and effect of provision of Negotiable Instruments Law

that an indorsement which purports to transfer the instrument to two or more indorsees severally does not operate as a negotiation. 149 ALR 1055.

55-404. (8440) Kinds of indorsement. An indorsement may be either special or in blank; and it may also be either restrictive or qualified, or conditional.

History: En. Sec. 5881, Rev. C. 1907; re-en. Sec. 8440, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3114.

Collateral References

Bills and Notes⇒188-190.

10 C.J.S. Bills and Notes §§ 209, 212-214.

Indorsement of bill or note in form of guaranty of payment. 21 ALR 1375; 33

ALR 97 and 46 ALR 1516.

Indorsement of bill or note by writing not on instrument itself. 56 ALR 921.

Sale or negotiation for value of commercial paper after it has been indorsed by the holder with a restrictive indorsement, as waiver of the restriction so as to entitle the purchaser to recover thereon as a holder in due course. 149 ALR 318.

55-405. (8441) Special indorsement—indorsement in blank. A special indorsement specifies the person to whom, or to whose order, the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.

History: En. Sec. 5882, Rev. C. 1907; re-en. Sec. 8441, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3115.

55-406. (8442) Blank indorsement—how changed to special indorsement. The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

History: En. Sec. 5883, Rev. C. 1907; re-en. Sec. 8442, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3116.

55-407. (8443) When indorsement restrictive. An indorsement is restrictive, which either:

1. Prohibits the future negotiation of the instrument; or,
2. Constitutes the indorsee the agent of the indorser; or,
3. Vests the title of the indorsee in trust for or to the use of some other person.

But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

History: En. Sec. 5884, Rev. C. 1907; re-en. Sec. 8443, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3117.

Collateral References

Bills and Notes⇒190.

10 C.J.S. Bills and Notes § 214.

Indorsement, "To order of any bank or

banker," as a restrictive indorsement. 10 ALR 709.

Sale or negotiation for value of commercial paper after it has been indorsed by the holder with a restrictive indorsement, as waiver of the restriction so as to entitle the purchaser to recover thereon as a holder in due course. 149 ALR 318.

55-408. (8444) Effect of restrictive indorsement—rights of indorsee. A restrictive indorsement confers upon the indorsee the right:

1. To receive payment of the instrument;
2. To bring any action thereon that the indorser could bring;

3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

History: En. Sec. 5885, Rev. C. 1907; re-en. Sec. 8444, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3118.

Collateral References

Bills and Notes—199, 250, 290.
10 C.J.S. Bills and Notes §§ 39, 214, 220.

Indorsement "for deposit only" as affecting right of holder of paper against drawer

or maker who would have a good defense as against payee. 75 ALR 1415.

Sale or negotiation for value of commercial paper after it has been indorsed by the holder with a restrictive indorsement, as waiver of the restriction so as to entitle the purchaser to recover thereon as a holder in due course. 149 ALR 318.

55-409. (8445) Qualified indorsement. A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse," or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.

History: En. Sec. 5886, Rev. C. 1907; re-en. Sec. 8445, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3119.

Collateral References

Bills and Notes—170, 171, 198, 293.
10 C.J.S. Bills and Notes §§ 18, 214, 220.

Indorsement without recourse as affecting character of indorsee or subsequent holder as holder in due course. 77 ALR 487.

Undertaking of one who indorses note without recourse. 91 ALR 399.

55-410. (8446) Conditional indorsement. Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.

History: En. Sec. 5887, Rev. C. 1907; re-en. Sec. 8446, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3120.

55-411. (8447) Indorsement of instrument payable to bearer. Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make (take) title through his indorsement.

History: En. Sec. 5888, Rev. C. 1907; re-en. Sec. 8447, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3121.

Collateral References

Bills and Notes—210, 289.
10 C.J.S. Bills and Notes §§ 213, 226.

55-412. (8448) Indorser where payable to two or more persons. Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.

History: En. Sec. 5889, Rev. C. 1907; re-en. Sec. 8448, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3122.

References

Swords v. Occident Elevator Co., 72 M 189, 197, 232 P 189.

Collateral References

Bills and Notes⇒182, 196.
10 C.J.S. Bills and Notes §§ 194, 206,
220.

Indorsement by one of several joint
payees or indorsees not partners. 38 ALR
799.

Necessity of express agreement between
indorsers to be jointly and not successively
liable in order to give a right of contribu-
tion as between themselves. 90 ALR 305.

55-413. (8449) Effect of instrument drawn or indorsed to a person as cashier. Where an instrument is drawn or indorsed to a person as "cashier," or other fiscal officer of a bank or corporation, it is deemed prima facie to be payable to the bank or corporation of which he is such officer; and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer.

History: En. Sec. 5890, Rev. C. 1907;
re-en. Sec. 8449, R. C. M. 1921. See also
history of Sec. 55-101. Cal. Civ. C. Sec.
3123.

Collateral References

Bills and Notes⇒123(3), 182.
10 C.J.S. Bills and Notes §§ 124, 191,
206.

55-414. (8450) Indorsement where name is misspelled, etc. Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he thinks fit, his proper signature.

History: En. Sec. 5891, Rev. C. 1907;
re-en. Sec. 8450, R. C. M. 1921. See also
history of Sec. 55-101. Cal. Civ. C. Sec.
3124.

Construction and application of provi-
sion of Negotiable Instruments Law re-
garding indorsement of instrument by
payee or indorsee whose name is wrong-
fully designated or misspelled. 153 ALR
598.

Collateral References

Bills and Notes⇒183.
10 C.J.S. Bills and Notes § 208.

55-415. (8451) Indorsement in representative capacity. Where a person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability.

History: En. Sec. 5892, Rev. C. 1907;
re-en. Sec. 8451, R. C. M. 1921. See also
history of Sec. 55-101. Cal. Civ. C. Sec.
3125.

Indorsement in representative or fiduciary capacity after name of
payee, indorser, or indorsee on commercial
paper as charging transferee with notice of
trust in favor of third parties or of de-
fenses of maker. 61 ALR 1389.

Collateral References

Addition of word indicating representa-

55-416. (8452) Time of indorsement—presumption. Except where an indorsement bears date after the maturity of the instrument, every negoti-
ation is deemed prima facie to have been effected before the instrument was
overdue.

History: En. Sec. 5893, Rev. C. 1907;
re-en. Sec. 8452, R. C. M. 1921. See also
history of Sec. 55-101. Cal. Civ. C. Sec.
3126.

Collateral References

Bills and Notes⇒496(1).
11 C.J.S. Bills and Notes § 659.

Cross-Reference

Indorsement, presumption as to time, sec.
93-1301-7.

55-417. (8453) Place of indorsement—presumption. Except where the contrary appears, every indorsement is presumed prima facie to have been made at the place where the instrument is dated.

History: En. Sec. 5894, Rev. C. 1907; re-en. Sec. 8453, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3127.

Collateral References

Bills and Notes⇒496(3).
11 C.J.S. Bills and Notes § 661.

55-418. (8454) Continuation of negotiable character. An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.

History: En. Sec. 5895, Rev. C. 1907; re-en. Sec. 8454, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3128.

Sale or negotiation for value of commercial paper after it has been indorsed by the holder with a restrictive indorsement, as waiver of the restriction so as to entitle the purchaser to recover thereon as a holder in due course. 149 ALR 318.

Collateral References

Bills and Notes⇒144, 170, 174.
10 C.J.S. Bills and Notes §§ 13, 18, 21.

55-419. (8455) Striking out indorsement. The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.

History: En. Sec. 5896, Rev. C. 1907; re-en. Sec. 8455, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3129.

Collateral References

Bills and Notes⇒193, 256, 301.
10 C.J.S. Bills and Notes §§ 215, 470.

55-420. (8456) Transfer without indorsement, effect of. Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

History: En. Sec. 5897, Rev. C. 1907; re-en. Sec. 8456, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3130.

error. *Leffek v. Luedeman*, 95 M 457, 466, 27 P 2d 511.

Collateral References

Bills and Notes⇒220, 313, 348.
10 C.J.S. Bills and Notes §§ 223, 225, 227, 229, 232, 311.

Operation and Effect

Upon transfer of a mortgage note payable to order without indorsement, title vested in the transferee; hence where the fact that the plaintiff assignee in his action to foreclose the mortgage bought the note from the mortgagee was uncontradicted and he produced it at the trial, a finding that he had failed to produce competent evidence of its ownership was

Necessity of indorsement by all payees before maturity to make a transferee a bona fide holder. 25 ALR 163.

Construction, applicability, and effect of provisions of Negotiable Instruments Law as to delivery of order paper without indorsement. 87 ALR 1178.

55-421. (8457) When prior party may negotiate instrument. Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

History: En. Sec. 5898, Rev. C. 1907; re-en. Sec. 8457, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3131.

Collateral References

Bills and Notes⇒264, 308.
10 C.J.S. Bills and Notes §§ 39, 222, 516, 517.

CHAPTER 5

RIGHTS OF HOLDER

- Section 55-501. Right of holder to sue—payment.
 55-502. What constitutes a holder in due course.
 55-503. When person not deemed holder in due course.
 55-504. Notice before full amount paid.
 55-505. When title defective.
 55-506. What constitutes notice of defect.
 55-507. Rights of holder in due course.
 55-508. When subject to original defenses.
 55-509. Who deemed holder in due course.

55-501. (8458) Right of holder to sue—payment. The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument.

History: En. Sec. 5899, Rev. C. 1907; re-en. Sec. 8458, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3132.

Cross-References

Actions, parties to overdue instrument, sec. 93-2830.

Pleading in action on, sec. 93-3808.

Operation and Effect

A holder of a note may maintain an action for its collection; it is not required that the plaintiff in such an action allege in his complaint that he is owner at the time. *J. I. Case Threshing Machine Co. v. Simpson*, 54 M 316, 318, 170 P 12.

The mere possession of a promissory note by a foreign administrator, made payable to the order and transferred to his in-

testate but never indorsed, does not constitute him a holder thereof within the meaning of the Negotiable Instruments Law, and he is therefore not entitled to maintain an action thereon in his individual capacity but may maintain it only in his representative capacity after taking out ancillary letters. *Lefebure et al. v. Baker et al.*, 69 M 193, 204, 220 P 1111; *State ex rel. Freebourn v. Merchants' Credit Service, Inc.*, 104 M 76, 100, 66 P 2d 337; *Parcells v. Price*, 110 M 537, 540, 104 P 2d 12.

Collateral References

Bills and Notes—427(1), 443.

10 C.J.S. Bills and Notes §§ 452, 534.

Amount paid by holder as limiting recovery against accommodation party. 69 ALR 1313.

55-502. (8459) What constitutes a holder in due course. A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face;
2. That he became the holder of it before it was overdue, and without notice that it has been previously dishonored, if such was the fact;
3. That he took it in good faith and for value;
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

History: En. Sec. 5900, Rev. C. 1907; re-en. Sec. 8459, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3133.

Burden of Proof

Under section 55-509, where, after plaintiff indorse had made out a prima facie case, defendant (drawer) produced evidence tending fairly to prove that the payee had obtained the check through fraud, the burden shifted to plaintiff to prove every fact necessary to show that he was a holder in due course, among them: that he took it in good faith and for value, failing in which he was not

entitled to recover. *Matteson v. Trask*, 63 M 160, 164, 206 P 428.

To defeat the claim of ownership of coupon Liberty bonds, negotiable in character, asserted by plaintiff in his action for their conversion, it was incumbent upon defendant bank to show that it was a holder in due course, under this section and sections 55-508 and 55-509. *Grosfield v. First Nat. Bank*, 73 M 219, 235, 236 P 250.

Definition of Holder in Due Course

A holder of a promissory note who bought it before maturity in good faith paying full value therefor without actual

knowledge or notice that it was secured by a mortgage, or of the assignment of the note containing a provision that it was being transferred without recourse, was a holder in due course within the meaning of this section. *Wood v. Ferguson et al.*, 71 M 540, 550, 230 P 592.

Where plaintiffs in an action on a negotiable instrument by their uncontradicted evidence showed that they became the holders of it before it was overdue, and without notice that it had been dishonored, that they took it in good faith and for value, and that at the time it was negotiated to them they had no notice of any infirmity in the title of the person who negotiated it to them, their showing was sufficient to establish their status as holders in due course, and evidence to establish failure of consideration was inadmissible. *Best et al. v. Boyer*, 98 M 40, 46, 37 P 2d 331.

Jury Question

While the question whether a holder of a negotiable instrument is a holder in due course is usually one of fact for the jury to decide, where the facts are shown and undisputed, and the transaction discloses nothing which would justify an inference of bad faith, it becomes one of law and it is the duty of the trial court to direct a verdict for plaintiff. *Lister v. Donlan*, 85 M 571, 577, 281 P 348.

Payee Prima Facie Holder in Due Course

Held, that the payee of a negotiable promissory note, in possession of it, is a prima facie holder in due course, within the meaning of the Uniform Negotiable Instruments Act, negotiation by indorsement and delivery not being necessary to constitute one a holder in due course. *Merchants' Nat. Bank v. Smith et al.*, 59 M 280, 292, 196 P 523.

What Defeats Holder in Due Course

Where the payee in a demand note for five hundred dollars assigned it to plaintiff about twenty months after its date, with indorsements thereon showing partial payments amounting to four hundred and fifty dollars of the principal sum due, and where it appeared that plaintiff, through one of its employees, had notice that there was a dispute between the maker and the payee as to whether any balance remained unpaid, plaintiff was not a holder in due course, within the meaning of this section, but took the paper with notice of its dishonor. *Brophy Grocery Co. v. Wilson*, 45 M 489, 493, 124 P 510.

Id. Part payment of the principal of a demand note is evidence of its dishonor.

A bank which accepted a note four years overdue did not become a holder in due course, but took only the title thereto

which the assignor, its debtor, had, with the risk of all defects therein, as well as of the defenses to it or demands existing at the time against him with reference to it. *Northwestern Improvement Co. v. Rhoades*, 52 M 428, 434, 158 P 832.

Knowledge of a warranty that an automobile would meet certain requirements as to service did not defeat a bank's claim as a holder in due course of promissory notes taken in payment of the machine before maturity, and without being aware of a breach of such warranty. *Baker State Bank v. Grant*, 54 M 7, 9, 166 P 27.

Id. If an automobile is sold and notes are given for the purchase price, which notes are transferred to a bank, the fact that the bank knew, when it took the notes, that the car was sold under a warranty, and that the consideration for the notes might possibly fail, cannot defeat its claim to be a holder in due course.

In an action on a promissory note which had never been previously negotiated and was overdue when plaintiff acquired it by assignment, and who was therefore not a holder in due course, parol evidence was admissible to show that defendants with plaintiff's knowledge had indorsed the note with the understanding that each was doing so as representative of an association and not in his personal capacity. *Anderson v. Border et al.*, 75 M 516, 529, 244 P 494.

To defeat the claim of plaintiff in an action on a promissory note that he was a holder in due course, on the ground that when he acquired it he had notice of a defect of title in the transferor consisting of a breach of faith in the latter as against the maker, it must, under section 55-506, be made to appear that he had actual knowledge of the infirmity or knowledge of such facts that his taking it under the circumstances amounted to bad faith. *Olsen v. Zappone*, 83 M 573, 577, 273 P 635.

In the absence of evidence showing that plaintiff was not a holder in due course of the note sued upon, the mere fact that he purchased it at a ten per cent. discount was not sufficient to raise an inference or suspicion that he bought a tainted instrument. *Lister v. Donlan*, 85 M 571, 577, 281 P 348.

One who takes a promissory note by assignment after its maturity is not a holder in due course, and all defenses existing as against the original payee are available in his action to recover thereon. *Alward v. Broadway Gold Min. Co.*, 94 M 45, 52, 20 P 2d 647.

In action by bank, which, at request of a payee who was known only by sight, had cashed a \$5,000 pencil written check, bearing indications of material alteration, the maker of which was a stranger, without first presenting check to drawee bank in

ordinary course of business, evidence was insufficient to sustain judgment for plaintiff bank against maker as against defenses of alteration and bad faith of holder. *Miles City Bank v. Askin*, 119 M 581, 179 P 2d 750, 754, 171 ALR 790.

References

Cited or applied as section 5900, Revised Codes, in *First National Bank of New Castle v. Grow*, 57 M 376, 188 P 907; *Sylvester v. Anaconda C. Min. Co.*, 73 M 465, 476, 236 P 1067; *Newer v. First Nat. Bank of Harlem*, 74 M 549, 555, 241 P. 613.

Collateral References

Bills and Notes↪327.

10 C.J.S. Bills and Notes § 301.

Payee as holder in due course under Negotiable Instruments Law. 15 ALR 437; 21 ALR 1365; 26 ALR 769; 32 ALR 289; 68 ALR 962 and 97 ALR 1215.

Taking a negotiable paper as collateral security for or in payment of pre-existing indebtedness as sustaining one's character as holder in due course under Uniform Negotiable Instruments Act. 80 ALR 670.

Sale or negotiation for value of commercial paper after it has been indorsed by the holder with a restrictive indorsement, as waiver of the restriction so as to entitle the purchaser to recover thereon as a holder in due course. 149 ALR 318.

55-503. (8460) When person not deemed holder in due course. Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

History: En. Sec. 5901, Rev. C. 1907; re-en. Sec. 8460, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3134.

Collateral References

Bills and Notes↪348.

10 C.J.S. Bills and Notes § 311.

55-504. (8461) Notice before full amount paid. Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.

History: En. Sec. 5902, Rev. C. 1907; re-en. Sec. 8461, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3135.

Renewal of note after notice of defense as destroying bona fide character of holder. 35 ALR 1294.

Collateral References

Bills and Notes↪334.

10 C.J.S. Bills and Notes § 322.

55-505. (8462) When title defective. The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

History: En. Sec. 5903, Rev. C. 1907; re-en. Sec. 8462, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3136.

References

Cited or applied as section 5903, Revised Codes, in *Northwestern Improvement Co. v. Rhoades*, 52 M 428, 435, 158 P 832; *Olsen v. Zappone*, 83 M 573, 578, 273 P 635.

Cross-Reference

Larceny of instrument, secs. 94-2710 to 94-2712.

Collateral References

Bills and Notes↪365(1).

10 C.J.S. Bills and Notes § 482.

55-506. (8463) What constitutes notice of defect. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual

knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

History: En. Sec. 5904, Rev. C. 1907; re-en. Sec. 8463, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3137.

Operation and Effect

To defeat the claim of plaintiff in an action on a promissory note that he was a holder in due course, on the ground that when he acquired it he had notice of a defect of title in the transferor consisting of a breach of faith in the latter as against the maker, it must, under this section, be made to appear that he had actual knowledge of the infirmity or knowledge of such facts that his taking it under the circumstances amounted to bad faith. *Olsen v. Zappone*, 83 M 573, 578, 273 P 635.

55-507. (8464) Rights of holder in due course. A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

History: En. Sec. 5905, Rev. C. 1907; re-en. Sec. 8464, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3138.

Operation and Effect

Want or failure of consideration for a negotiable promissory note constitutes no defense as against a holder in due course, under this section. *Lister v. Donlan*, 85 M 571, 577, 281 P 348.

References

Cited or applied as section 5905, Revised Codes, in *Northwestern Improvement Co. v. Rhoades*, 52 M 428, 434, 158 P 832;

55-508. (8465) When subject to original defenses. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defense as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.

History: En. Sec. 5906, Rev. C. 1907; re-en. Sec. 8465, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3139.

Operation and Effect

The Uniform Negotiable Instruments Act deals with negotiable instruments only so long as they are in the hands of holders in due course, if in other hands, they are subject to the same defenses as if non-negotiable. *Merchants' Nat. Bank v. Smith et al.*, 59 M 280, 292, 196 P 523.

References

Cited or applied as section 5904, Revised Codes, in *First National Bank of Lewistown v. Wilson et al.*, 57 M 384, 188 P 371; *Miles City Bank v. Askin*, 119 M 581, 179 P 2d 750, 754, 171 ALR 790.

Collateral References

Bills and Notes §335.
10 C.J.S. *Bills and Notes* § 321.

Who must bear loss as between drawer or indorser who delivers check to an imposter and one who purchases, cashes or pays it upon imposter's indorsement. 22 ALR 1228; 52 ALR 1326 and 112 ALR 1435.

Notation or memorandum on bill or note as notice. 56 ALR 1373.

Wood v. Ferguson et al., 71 M 540, 550, 230 P 592; *Olsen v. Zappone*, 83 M 573, 577, 273 P 635; *Best et al. v. Boyer*, 98 M 40, 37 P 2d 331.

Collateral References

Rights of holder in due course of negotiable paper given by buyer under conditional sale contract as affected by the fact that he is also an assignee of rights under the contract in connection with which the paper was given. 152 ALR 1222.

Insanity of maker, drawer, or indorser as defense against holder in due course. 24 ALR 2d 1380.

References

Cited or applied as section 5906, Revised Codes, in *Buhler v. Loftus*, 53 M 546, 565, 165 P 601; *Grosfield v. First Nat. Bank*, 73 M 219, 235, 236 P 250.

Collateral References

Bills and Notes §451.
10 C.J.S. *Bills and Notes* § 479.

Negotiable Instruments Law as affecting defense of usury. 5 ALR 1447 and 95 ALR 735.

Effect of Negotiable Instruments Act on statute invalidating instrument given for gambling consideration. 11 ALR 211; 37 ALR 698 and 46 ALR 959.

Deception as to character of paper signed as defense as against bona fide holder of negotiable paper. 160 ALR 1295.

55-509. (8466) Who deemed holder in due course. Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims, acquired the title as holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

History: En. Sec. 5907, Rev. C. 1907; re-en. Sec. 8466, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3140.

Operation and Effect

Under this section, where, after plaintiff indorsee had made out a prima facie case, defendant (drawer) produced evidence tending fairly to prove that the payee had obtained the check through fraud, the burden shifted to plaintiff to prove every fact necessary to show that he was a holder in due course, among them: that he took it in good faith and for value, failing in which he was not entitled to recover. *Matteson v. Trask*, 63 M 160, 164, 165, 206 P 428.

References

Cited or applied as section 5907, Revised

Codes, in *Northwestern Improvement Co. v. Rhoades*, 52 M 428, 434, 158 P 832; *First National Bank of New Castle v. Grow*, 57 M 376, 188 P 907; *Merchants' Nat. Bank v. Smith et al.*, 59 M 280, 292, 196 P 523; *Grosfield v. First Nat. Bank*, 73 M 219, 235, 236 P 250; *Olsen v. Zappone*, 83 M 573, 577, 273 P 635; *Lister v. Donlan*, 85 M 571, 578, 281 P 348; *Best et al. v. Boyer*, 98 M 40, 37 P 2d 331.

Collateral References

Bills and Notes ⇨ 497.
11 C.J.S. *Bills and Notes* § 654.

Sale or negotiation for value of commercial paper after it has been indorsed by the holder with a restrictive indorsement, as waiver of the restriction so as to entitle the purchaser to recover thereon as a holder in due course. 149 ALR 318.

CHAPTER 6

LIABILITY OF PARTIES

- Section 55-601. Liability of maker.
55-602. Liability of drawer.
55-603. Liability of acceptor.
55-604. When person deemed indorser.
55-605. Liability of irregular indorser.
55-606. Warranty—where negotiation by delivery, etc.
55-607. Liability of general indorser.
55-608. Liability of indorser where paper negotiable by delivery.
55-609. Order in which indorsers are liable.
55-610. Liability of agent or broker.

55-601. (8467) Liability of maker. The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse.

History: En. Sec. 5908, Rev. C. 1907; re-en. Sec. 8467, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3141.

Operation and Effect

By making a promissory note to a corporation the maker admits the payee's

corporate existence and its capacity to indorse. *Commercial Nat. Bank v. Reichelt*, 62 M 302, 305, 204 P 1037.

Collateral References

Bills and Notes ⇨ 48.
10 C.J.S. *Bills and Notes* § 37.

55-602. (8468) Liability of drawer. The drawer by drawing this instrument admits the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negating or limiting his own liability to the holder.

History: En. Sec. 5909, Rev. C. 1907; re-en. Sec. 8468, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3142.

References

Jensen v. Laurel Meat Co., 71 M 582, 589, 230 P 1081.

Collateral References

Bills and Notes ⇨ 23.
10 C.J.S. Bills and Notes § 35.

Rights and obligations between depositor and bank which pays forged check, as affected by provisions of Negotiable Instruments Act. 146 ALR 840.

55-603. (8469) Liability of acceptor. The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance, and admits:

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and,
2. The existence of the payee and his then capacity to indorse.

History: En. Sec. 5910, Rev. C. 1907; re-en. Sec. 8469, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3143.

Collateral References

Bills and Notes ⇨ 74.
10 C.J.S. Bills and Notes § 183.

55-604. (8470) When person deemed indorser. A person placing his signature upon an instrument, otherwise than as maker, drawer, or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

History: En. Sec. 5911, Rev. C. 1907; re-en. Sec. 8470, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3144.

deemed to be an indorser, was inapplicable in an action on such a note. Newer v. First Nat. Bank of Harlem, 74 M 549, 555, 241 P 613.

Operation and Effect

In the absence of a special agreement to that effect, one who signs his name on the back of a non-negotiable note is not an indorser in the sense that term is used in the Negotiable Instruments Law; hence an instruction in the language of this section, that a person who places his signature upon an instrument otherwise than as maker, drawer or acceptor is

References

Square Butte State Bank v. Ballard, 61 M 554, 559, 210 P 889; Wood v. Ferguson et al., 71 M 540, 551, 230 P 592; Anderson v. Border et al., 75 M 516, 525, 244 P 494.

Collateral References

Bills and Notes ⇨ 176, 188.
10 C.J.S. Bills and Notes §§ 204, 212.

55-605. (8471) Liability of irregular indorser. Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser, in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.
2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.

History: En. Sec. 5912, Rev. C. 1907; re-en. Sec. 8471, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3145.

Operation and Effect

This section, with reference to the liability of irregular or accommodation indorsers, has no application where a party places his indorsement on a promissory note after its delivery to the payee unless he does so pursuant to an agreement or understanding had prior to delivery that the indorsement should relate back and be considered as having been made before

delivery; in the absence of such an agreement the indorsement constitutes a contract of guaranty rather than one of surety. *Anderson v. Border et al.*, 75 M 516, 524, 244 P 494.

References

Cited or applied as section 5912, Revised Codes, in *Columbus State Bank v. Erb*, 50 M 442, 449, 147 P 617.

Collateral References

Bills and Notes—188, 288.

10 C.J.S. Bills and Notes § 212.

55-606. (8472) Warranty—where negotiation by delivery, etc. Every person negotiating an instrument by delivery or by a qualified indorsement warrants:

1. That the instrument is genuine and in all respects what it purports to be;
2. That he has a good title to it;
3. That all prior parties had capacity to contract;
4. That he has no knowledge of any fact which would impair the validity of the instrument or renders it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee. The provisions of subdivision 3 of this section do not apply to persons negotiating public or corporation securities, other than bills and notes.

History: En. Sec. 5913, Rev. C. 1907; re-en. Sec. 8472, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3146.

Operation and Effect

An unqualified indorsement of a promissory note warrants to all subsequent holders in due course that the instrument is genuine, that the indorser has good title to it, that all prior parties had capacity to contract, that the note at the time of his indorsement was valid and subsisting, that it will be paid according to its tenor, and that in case of its dishonor he will pay the amount of it to the holder or to any subsequent indorser who may be compelled to pay it. *Wood v. Ferguson et al.*, 71 M 540, 551, 230 P 592.

Plaintiff's right of action does not depend upon any express promise or warranty, but rather upon the implied warranty that all preceding indorsements are genuine and that it had good title to the check (this section and the next following). The indorsement of the payee having been forged, the warranties were broken, defendant had no title whatever to the check and, consequently, no right to collect any money thereon, and plaintiff is entitled to recover the amount paid and its right to recover was not affected by delay in giving notice of the forgery after discovery. *First Nat. Bank v. Federal Reserve Bank*, 88 M 589, 598, 294 P 1105.

55-607. (8473) Liability of general indorser. Every indorser who indorses without qualification warrants to all subsequent holders in due course:

1. The matters and things mentioned in subdivisions 1, 2, and 3 of the next preceding section; and,
2. That the instrument is at the time of his indorsement valid and subsisting.

And, in addition, he engages that on due presentment it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.

History: En. Sec. 5914, Rev. C. 1907; re-en. Sec. 8473, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3147.

Operation and Effect

A promissory note, negotiable on its face, executed prior to the amendment of section 55-205, was non-negotiable when secured by a mortgage on real property, and the assignee of the mortgage with the note indorsed in blank, taking it with full knowledge that it was a mortgage note, took it as a non-negotiable instrument. *Barnes et al. v. Rowles et al.*, 84 M 393, 396, 276 P 15.

Id. The provisions of this section, prescribing the extent of the liability of a general indorser, relate only to negotiable instruments; hence the blank indorsement of the above-mentioned negotiable

note did not carry with it a legal liability on the part of the indorser to pay the amount of the note, in the absence of a spécial agreement to pay, and the holding of the court in an action to foreclose that plaintiffs were not entitled to a deficiency judgment as against him was correct.

References

Baroch v. Greater Montana Oil Co., 70 M 93, 225 P 800; *Wood v. Ferguson et al.*, 71 M 540, 551, 230 P 592; *Newer v. First Nat. Bank of Harlem*, 74 M 549, 555, 557, 241 P 613; *First Nat. Bank v. Federal Reserve Bank*, 88 M 589, 598, 294 P 1105.

Collateral References.

Bills and Notes ⇨ 223, 296.
10 C.J.S. *Bills and Notes* §§ 38, 237, 240, 241, 243.

55-608. (8474) Liability of indorser where paper negotiable by delivery. Where a person places his indorsement on an instrument negotiable by delivery, he incurs all the liabilities of an indorser.

History: En. Sec. 5915, Rev. C. 1907; re-en. Sec. 8474, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3148.

55-609. (8475) Order in which indorsers are liable. As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorseees who indorse are deemed to indorse jointly and severally.

History: En. Sec. 5916, Rev. C. 1907; re-en. Sec. 8475, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3149.

References

Anderson v. Border et al., 75 M 516, 526 528, 244 P 494.

Collateral References

Bills and Notes ⇨ 249, 298, 504.

10 C.J.S. *Bills and Notes* §§ 39, 217, 219;
11 C.J.S. *Bills and Notes* § 675.

Necessity of express agreement between indorsers to be jointly and not successively liable, in order to give a right of contribution as between themselves. 11 ALR 1332 and 90 ALR 305.

55-610. (8476) Liability of agent or broker. Where a broker or agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by section 55-606, unless he discloses the name of his principal and the fact that he is acting only as agent.

History: En. Sec. 5917, Rev. C. 1907; re-en. Sec. 8476, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3150.

CHAPTER 7

PRESENTMENT FOR PAYMENT

- Section 55-701. Effect of want of demand on principal debtor.
 55-702. Presentment of instrument not payable on demand—of demand instrument.
 55-703. What constitutes a sufficient presentment.
 55-704. Place of presentment.
 55-705. Instrument must be exhibited.
 55-706. Effect of instruments made payable at bank and payable at future time.
 55-707. Presentment where principal debtor is dead.
 55-708. Presentment to persons liable as partners.
 55-709. Presentment to joint debtors.
 55-710. When presentment not required to charge the drawer.
 55-711. When presentment not required to charge the indorser.
 55-712. When delay in making presentment is excused.
 55-713. When presentment may be dispensed with.
 55-714. When instrument dishonored by nonpayment.
 55-715. Liability of person secondarily liable when instrument dishonored.
 55-716. Time of maturity.
 55-717. Time—how computed.
 55-718. What constitutes payment in due course.

55-701. (8477) Effect of want of demand on principal debtor. Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.

History: En. Sec. 5918, Rev. C. 1907; re-en. Sec. 8477, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3151.

Cross-Reference

Agent's duty to present for payment, sec. 2-111.

"Maturity" Defined

"Maturity" of a note, within the meaning of this section, is the time when a note or bill becomes due. *United States Nat. Bank v. Shupak*, 54 M 542, 546, 172 P 324.

Operation and Effect

This section defines the purpose of presentment, and is not modified by subsequent sections. *United States Nat. Bank v. Shupak*, 54 M 542, 546, 172 P 324.

Id. In an action to enforce a note against the maker, it is not necessary to prove presentment for payment; it is only persons secondarily liable that the law has reference to in specifying the time and manner in which presentment must

be made, and, unless the statute of limitations bars a demand against the maker, he cannot say it was not made in time.

Id. Presentment for payment is not necessary to charge the makers of a demand note payable at a particular place.

Id. The provision of this section, that where a note is by its terms payable at a special place, and the maker is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment by him, has no application to a demand note.

Demand upon the maker of a promissory note for payment or presentment to him, is not necessary before action against him thereon (this section). *Quickenden v. Hulbert et al.*, 83 M 501, 510, 272 P 994.

References

Morgan v. Huffman, 76 M 396, 402, 247 P 326; *J. K. & C. S. Mullen Ben. Corp. v. School Dist.*, 99 M 388, 43 P 2d 902.

Collateral References

Bills and Notes—394, 396.
 10 C.J.S. *Bills and Notes* § 344.

55-702. (8478) Presentment of instrument not payable on demand—of demand instrument. Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on

demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

History: En. Sec. 5919, Rev. C. 1907; re-en. Sec. 8478, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3152.

Codes, in United States Nat. Bank v. Shupak, 54 M 542, 546, 172 P 324; Cellars v. Dwinnell, 87 M 73, 80, 285 P 181.

Collateral References

References

Cited or applied as section 5919, Revised

Bills and Notes 394, 404.

10 C.J.S. Bills and Notes §§ 344, 352.

55-703. (8479) What constitutes a sufficient presentment. Presentment for payment, to be sufficient, must be made:

1. By the holder, or by some person authorized to receive payment on his behalf;

2. At a reasonable hour on a business day;

3. At a proper place as herein defined;

4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made.

History: En. Sec. 5920, Rev. C. 1907; re-en. Sec. 8479, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3153.

Codes, in United States Nat. Bank v. Shupak, 54 M 542, 546, 172 P 324.

Collateral References

References

Cited or applied as section 5920, Revised

Bills and Notes 401, 402, 403, 404(1).

10 C.J.S. Bills and Notes §§ 358, 359, 364, 366.

55-704. (8480) Place of presentment. Presentment for payment is made at the proper place:

1. Where a place of payment is specified in the instrument, and it is there presented;

2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument, and it is there presented;

3. Where no place of payment is specified and no address is given, and the instrument is presented at the usual place of business or residence of the person to make payment;

4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.

History: En. Sec. 5921, Rev. C. 1907; re-en. Sec. 8480, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3154.

Collateral References

Bills and Notes 403.

10 C.J.S. Bills and Notes § 359.

55-705. (8481) Instrument must be exhibited. The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.

History: En. Sec. 5922, Rev. C. 1907; re-en. Sec. 8481, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3155.

10 C.J.S. Bills and Notes §§ 361, 465.

Bills and notes: Necessity of possession and exhibition of paper at time of demand in order to make a valid presentment. 11 ALR 969 and 50 ALR 1200.

Collateral References

Bills and Notes 405, 440.

55-706. (8482) Effect of instruments made payable at bank and payable at future time. Where the instrument is made payable at a bank, it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon. But where the instrument is made payable at a fixed or determinable future time, the order to the bank is limited to the day of maturity only.

History: En. Sec. 5923, Rev. C. 1907; amd. Sec. 1, Ch. 82, L. 1909; re-en. Sec. 8482, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3156.

NOTE.—Chapter 82, Laws of 1909, expressly amends section 5923, Revised Codes of 1907, to read as above given. However, the evident intent of the legislature was to amend section 5935, Revised Codes of 1907 (now repealed), instead of section 5923. The following is the language of section 5923, Revised Codes of 1907, before amendment: "Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient."

Operation and Effect

Held, that the effect of the repeal of section 5923, Revised Codes of 1907, by Chapter 82, Laws of 1909, which section provided that presentment of instrument payable at a bank must be made during banking hours, and substituting therefor this section, which makes no reference to the time when presentment must be made, is to make presentment for payment at any time proper, whether during banking hours or not. *Clarke v. National Bk. of Montana*, 78 M 48, 55, 252 P 373.

Collateral References

Bills and Notes ⇨ 426.

10 C.J.S. Bills and Notes § 448.

55-707. (8483) Presentment where principal debtor is dead. Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if, with the exercise of reasonable diligence, he can be found.

History: En. Sec. 5924, Rev. C. 1907; re-en. Sec. 8483, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3157.

Collateral References.

Bills and Notes ⇨ 402.

10 C.J.S. Bills and Notes § 366.

55-708. (8484) Presentment to persons liable as partners. Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

History: En. Sec. 5925, Rev. C. 1907; re-en. Sec. 8484, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3158.

55-709. (8485) Presentment to joint debtors. Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.

History: En. Sec. 5926, Rev. C. 1907; re-en. Sec. 8485, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3159.

55-710. (8486) When presentment not required to charge the drawer. Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.

History: En. Sec. 5927, Rev. C. 1907; re-en. Sec. 8486, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3160.

Collateral References

Bills and Notes ⇨ 394.

10 C.J.S. Bills and Notes § 346.

55-711. (8487) When presentment not required to charge the indorser. Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented.

History: En. Sec. 5928, Rev. C. 1907; re-en. Sec. 8487, R. C. M. 1921. See also **history of Sec. 55-101. Cal. Civ. C. Sec. 3161.**

55-712. (8488) When delay in making presentment is excused. Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

History: En. Sec. 5929, Rev. C. 1907; re-en. Sec. 8488, R. C. M. 1921. See also **history of Sec. 55-101. Cal. Civ. C. Sec. 3162.**

Collateral References

Bills and Notes \S 406.
10 C.J.S. Bills and Notes \S 403.

References

J. K. & C. S. Mullen Ben. Corp. v. School Dist., 99 M 388, 43 P 2d 902.

55-713. (8489) When presentment may be dispensed with. Presentment for payment is dispensed with:

1. Where, after the exercise of reasonable diligence, presentment as required by this act cannot be made;
2. Where the drawee is a fictitious person;
3. By waiver of presentment, express or implied.

History: En. Sec. 5930, Rev. C. 1907; re-en. Sec. 8489, R. C. M. 1921. See also **history of Sec. 55-101. Cal. Civ. C. Sec. 3163.**

Collateral References

Bills and Notes \S 397, 422(1).
10 C.J.S. Bills and Notes \S 350, 437.

References

Wood v. Ferguson et al., 71 M 540, 551, 230 P 592.

55-714. (8490) When instrument dishonored by nonpayment. The instrument is dishonored by nonpayment when:

1. It is duly presented for payment and payment is refused or cannot be obtained; or,
2. Presentment is excused and the instrument is overdue and unpaid.

History: En. Sec. 5931, Rev. C. 1907; re-en. Sec. 8490, R. C. M. 1921. See also **history of Sec. 55-101. Cal. Civ. C. Sec. 3164.**

Collateral References

Bills and Notes \S 385.
10 C.J.S. Bills and Notes \S 343.

55-715. (8491) Liability of person secondarily liable when instrument dishonored. Subject to the provisions of this act, when the instrument is dishonored by nonpayment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder.

History: En. Sec. 5932, Rev. C. 1907; re-en. Sec. 8491, R. C. M. 1921. See also **history of Sec. 55-101. Cal. Civ. C. Sec. 3165.**

10 C.J.S. Bills and Notes \S 217.

Collateral References

Bills and Notes \S 241.

Presentment and notice of dishonor as condition of holding one who appears on paper as indorser but was in fact primarily liable. 62 ALR 116.

55-716. (8492) Time of maturity. Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.

History: En. Sec. 5933, Rev. C. 1907; re-en. Sec. 8492, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3166.

Collateral References

Bills and Notes \S 129, 130; Time \S 10 (10).
10 C.J.S. Bills and Notes \S 249, 254; 62 C.J. Time \S 52.

Construction, application, and effect of provision of Uniform Negotiable Instruments Law, or other statute, relating to maturity or time for presentment of negotiable paper which falls due on Saturday, Sunday, or holiday. 102 ALR 437.

What is essential to exercise of option to accelerate maturity of bill or note. 5 ALR 2d 968.

55-717. (8493) Time—how computed. Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment.

History: En. Sec. 5934, Rev. C. 1907; re-en. Sec. 8493, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3167.

Collateral References

Time \S 9(10).
62 C.J. Time \S 38.

55-718. (8495) What constitutes payment in due course. Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith, and without notice that his title is defective.

History: En. Sec. 5936, Rev. C. 1907; re-en. Sec. 8495, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3169.

Collateral References

Bills and Notes \S 425.
10 C.J.S. Bills and Notes \S 440.

CHAPTER 8

NOTICE OF DISHONOR

- Section 55-801. To whom notice of dishonor must be given.
55-802. By whom given.
55-803. Notice given by agent.
55-804. Effect of notice given on behalf of holder.
55-805. Effect where notice is given by party entitled thereto.
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- 55-820. Where notice must be sent.
- 55-821. Waiver of notice.
- 55-822. Who affected by waiver.
- 55-823. Waiver of protest.
- 55-824. When notice is dispensed with.
- 55-825. Delay in giving notice—how excused.
- 55-826. When notice need not be given to drawer.
- 55-827. When notice need not be given to indorser.
- 55-828. Notice of nonpayment where acceptance refused.
- 55-829. Effect of omission to give notice of nonacceptance.
- 55-830. When protest need not be made—when must be made.

55-801. (8496) To whom notice of dishonor must be given. Except as herein otherwise provided, when a negotiable instrument has been dishonored by nonacceptance or nonpayment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

History: En. Sec. 5937, Rev. C. 1907; re-en. Sec. 8496, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3170.

Cross-Reference

Notice of dishonor, what it imports, sec. 93-401-22.

Operation and Effect

Where plaintiff in an action against the indorser of a promissory note contented himself with introducing the note in evidence, failing to show that defendant's liability had been fixed by presentment to and demand of payment thereof from the maker and notice of nonpayment to defendant, or facts excusing presentment, demand and notice, or a waiver thereof by defendant, judgment for defendant was proper. *Morgan v. Huffman*, 76 M 396, 402, 247 P 326.

The general rule is that unless the drawer of a check has sustained loss or damage by reason of delay in giving notice of dishonor or nonpayment, such delay is of no consequence; hence where, even if timely notice had been given, it could not have reached him and therefore not aided him in preventing loss, the delay was immaterial. *Cellars v. Dwinnell*, 87 M 73, 81, 285 P 181.

Collateral References

Bills and Notes—414.
10 C.J.S. Bills and Notes § 390.

Necessity of notice of nonpayment of note or bill upon which corporation is primary obligor, in order to hold officer, director, or stockholder as indorser. 123 ALR 1367.

55-802. (8497) By whom given. The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it, to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given.

History: En. Sec. 5938, Rev. C. 1907; re-en. Sec. 8497, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3171.

55-803. (8498) Notice given by agent. Notice of dishonor may be given by an agent, either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

History: En. Sec. 5939, Rev. C. 1907; re-en. Sec. 8498, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3172.

55-804. (8499) Effect of notice given on behalf of holder. Where such notice is given by or on behalf of the holder, it inures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.

History: En. Sec. 5940, Rev. C. 1907;
re-en. Sec. 8499, R. C. M. 1921. See also
history of Sec. 55-101. Cal. Civ. C. Sec.
3173.

Collateral References
Bills and Notes—411.
10 C.J.S. Bills and Notes § 391.

55-805. (8500) Effect where notice is given by party entitled thereto. Where notice is given by or on behalf of a party entitled to give notice, it inures for the benefit of the holder and all parties subsequent to the party to whom notice is given.

History: En. Sec. 5941, Rev. C. 1907; history of Sec. 55-101. Cal. Civ. C. Sec.
re-en. Sec. 8500, R. C. M. 1921. See also 3174.

55-806. (8501) When agent may give notice. Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal, upon the receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder.

History: En. Sec. 5942, Rev. C. 1907;
re-en. Sec. 8501, R. C. M. 1921. See also
history of Sec. 55-101. Cal. Civ. C. Sec.
3175.

Collateral References
Bills and Notes—413, 416.
10 C.J.S. Bills and Notes §§ 389, 393.

55-807. (8502) When notice sufficient. A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice, unless the party to whom the notice is given is in fact misled thereby.

History: En. Sec. 5943, Rev. C. 1907; history of Sec. 55-101. Cal. Civ. C. Sec.
re-en. Sec. 8502, R. C. M. 1921. See also 3176.

55-808. (8503) Form of notice—delivery. The notice may be in writing or merely oral, and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by nonpayment. It may in all cases be given by delivering it personally or through the mails.

History: En. Sec. 5944, Rev. C. 1907;
re-en. Sec. 8503, R. C. M. 1921. See also
history of Sec. 55-101. Cal. Civ. C. Sec.
3177.

Collateral References
Bills and Notes—419-421.
10 C.J.S. Bills and Notes §§ 398-400.

55-809. (8504) To whom notice may be given. Notice of dishonor may be given either to the party himself, or to his agent in that behalf.

History: En. Sec. 5945, Rev. C. 1907;
re-en. Sec. 8504, R. C. M. 1921. See also
history of Sec. 55-101. Cal. Civ. C. Sec.
3178.

Collateral References
Bills and Notes—414.
10 C.J.S. Bills and Notes § 390; 11
C.J.S. Bills and Notes § 754.

55-810. (8505) Notice where party is dead. When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if, with reasonable diligence, he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.

History: En. Sec. 5946, Rev. C. 1907; history of Sec. 55-101. Cal. Civ. C. Sec.
re-en. Sec. 8505, R. C. M. 1921. See also 3179.

55-811. (8506) Notice to partners. Where the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution.

History: En. Sec. 5947, Rev. C. 1907; re-en. Sec. 8506, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3180.

Collateral Reference

Necessity of protest and notice as between coindorsers of negotiable paper. 9 ALR 1188 and 32 ALR 190.

55-812. (8507) Notice to persons jointly liable. Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others.

History: En. Sec. 5948, Rev. C. 1907; re-en. Sec. 8507, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3181.

55-813. (8508) Notice to bankrupt. Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself, or to his trustee or assignee.

History: En. Sec. 5949, Rev. C. 1907; re-en. Sec. 8508, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3182.

55-814. (8509) Time within which notice must be given. Notice may be given as soon as the instrument is dishonored; and unless delay is excused as hereinafter provided, must be given within the times fixed by this act.

History: En. Sec. 5950, Rev. C. 1907; re-en. Sec. 8509, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3183.

Collateral References

Bills and Notes \S 416.
10 C.J.S. Bills and Notes \S 392.

Insolvency or bankruptcy of party primarily liable on commercial paper, as excusing demand and notice of dishonor. 25 ALR 962 and 87 ALR 1394.

Cross-Reference

Time in which bank required to give notice, sec. 5-1047.

55-815. (8510) Where parties reside in same place. Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following.
2. If given at his residence, it must be given before the usual hours of rest on the day following.
3. If sent by mail, it must be deposited in the postoffice in time to reach him in usual course on the day following.

History: En. Sec. 5951, Rev. C. 1907; re-en. Sec. 8510, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3184.

References

Cellars v. Dwinnell, 87 M 73, 81, 285 P 181.

55-816. (8511) Where parties reside in different places. Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

1. If sent by mail, it must be deposited in the postoffice in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.
2. If given otherwise than through the postoffice, then within the time that notice would have been received in due course of mail, if it had been deposited in the postoffice within the time specified in the last subdivision.

History: En. Sec. 5952, Rev. C. 1907; re-en. Sec. 8511, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3185.

References
Cellars v. Dwinnell, 87 M 73, 81, 285 P 181.

55-817. (8512) When sender deemed to have given due notice. Where notice of dishonor is duly addressed and deposited in the postoffice, the sender is deemed to have given due notice, notwithstanding any mis-carriage in the mails.

History: En. Sec. 5953, Rev. C. 1907; re-en. Sec. 8512, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3186.

Collateral References
Bills and Notes ⇨ 421; Evidence ⇨ 71.
10 C.J.S. Bills and Notes § 399; 31 C.J.S. Evidence §§ 136, 139.

55-818. (8513) Deposit in postoffice, what constitutes. Notice is deemed to have been deposited in the postoffice when deposited in any branch postoffice or in any letter-box under the control of the postoffice department.

History: En. Sec. 5954, Rev. C. 1907; re-en. Sec. 8513, R. C. M. 1921. See also

history of Sec. 55-101. Cal. Civ. C. Sec. 3187.

55-819. (8514) Notice to subsequent party, time of. Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.

History: En. Sec. 5955, Rev. C. 1907; re-en. Sec. 8514, R. C. M. 1921. See also

history of Sec. 55-101. Cal. Civ. C. Sec. 3188.

55-820. (8515) Where notice must be sent. Where a party has added an address to his signature, notice of dishonor must be sent to that address but if he has not given such address, then the notice must be sent as follows:

1. Either to the postoffice nearest to his place of residence, or to the postoffice where he is accustomed to receive his letters; or
2. If he live in one place, and have his place of business in another, notice may be sent to either place; or
3. If he is sojourning in another place, notice may be sent to the place where he is sojourning.

But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section.

History: En. Sec. 5956, Rev. C. 1907; re-en. Sec. 8515, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3189.

Collateral References
Bills and Notes ⇨ 415.
10 C.J.S. Bills and Notes § 396.

55-821. (8516) Waiver of notice. Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied.

History: En. Sec. 5957, Rev. C. 1907; re-en. Sec. 8516, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3190.

Collateral References
Bills and Notes ⇨ 422.
10 C.J.S. Bills and Notes §§ 421, 423.

References

Wood v. Ferguson et al., 71 M 540, 551, 230 P 592.

Waiver of demand and notice as affecting indorsers other than the one above whose name it immediately appears. 21 ALR 1396 and 110 ALR 1228.

Indorsement of renewal note, or offer to renew, as waiver by indorser of presentment and notice of non-payment. 110 ALR 1149.

55-822. (8517) Who affected by waiver. Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only.

History: En. Sec. 5958, Rev. C. 1907; re-en. Sec. 8517, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3191.

References

Wood v. Ferguson et al., 71 M 540, 551, 230 P 592.

Collateral References

Bills and Notes—422.
10 C.J.S. Bills and Notes § 435.

Construction and application of provision of Uniform Negotiable Instruments Act that waiver embodied in instrument itself is binding upon all parties. 140 ALR 1253.

55-823. (8518) Waiver of protest. A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a former protest, but also of presentment and notice of dishonor.

History: En. Sec. 5959, Rev. C. 1907; re-en. Sec. 8518, R. C. M. 1921. See also

history of Sec. 55-101. Cal. Civ. C. Sec. 3192.

55-824. (8519) When notice is dispensed with. Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged.

History: En. Sec. 5960, Rev. C. 1907; re-en. Sec. 8519, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3193.

Operation and Effect

Under this section and the following section, held that where the drawer of a check was out of the state at the time of its dishonor and despite efforts of the

holder to ascertain his whereabouts could not be reached until the bank upon which drawn had closed its doors, a finding exculpating the holder for failure to give notice sooner was warranted. Cellars v. Dwinnell, 87 M 73, 82, 285 P 181.

Collateral References

Bills and Notes—397.
10 C.J.S. Bills and Notes § 403.

55-825. (8520) Delay in giving notice—how excused. Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

History: En. Sec. 5961, Rev. C. 1907; re-en. Sec. 8520, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3194.

Operation and Effect

Under the preceding section and this section, held that where the drawer of a check was out of the state at the time of its dishonor and despite efforts of the

holder to ascertain his whereabouts could not be reached until the bank upon which drawn had closed its doors, a finding exculpating the holder for failure to give notice sooner was warranted. Cellars v. Dwinnell, 87 M 73, 82, 285 P 181.

Collateral References

Bills and Notes—417.
10 C.J.S. Bills and Notes § 403.

55-826. (8521) When notice need not be given to drawer. Notice of dishonor is not required to be given to the drawer in either of the following cases:

1. Where the drawer and drawee are the same person;
2. When the drawee is a fictitious person or a person not having capacity to contract;

3. When the drawer is the person to whom the instrument is presented for payment;

4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument;

5. When the drawer has countermanded payment.

History: En. Sec. 5962, Rev. C. 1907;
re-en. Sec. 8521, R. C. M. 1921. See also
history of Sec. 55-101. Cal. Civ. C. Sec.
3195.

Collateral References
Bills and Notes ⇨ 414.
10 C.J.S. Bills and Notes § 390.

55-827. (8522) When notice need not be given to indorser. Notice of dishonor is not required to be given to an indorser in any of the following cases:

1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument;

2. Where the indorser is the person to whom the instrument is presented for payment;

3. Where the instrument was made or accepted for his accommodation.

History: En. Sec. 5963, Rev. C. 1907;
re-en. Sec. 8522, R. C. M. 1921. See also
history of Sec. 55-101. Cal. Civ. C. Sec.
3196.

tween coindorsers of negotiable paper. 9
ALR 1188 and 32 ALR 190.

Law regarding notice as condition of
holding indorser as applied to bill or note
with acceleration clause, or payable in
instalments. 104 ALR 1331.

Collateral References

Necessity of protest and notice as be-

55-828. (8523) Notice of nonpayment where acceptance refused. Where due notice of dishonor by nonacceptance has been given, notice of a subsequent dishonor by nonpayment is not necessary, unless in the meantime the instrument has been accepted.

History: En. Sec. 5964, Rev. C. 1907;
re-en. Sec. 8523, R. C. M. 1921. See also
history of Sec. 55-101. Cal. Civ. C. Sec.
3197.

Collateral References
Bills and Notes ⇨ 392.
10 C.J.S. Bills and Notes § 387.

55-829. (8524) Effect of omission to give notice of nonacceptance. An omission to give notice of dishonor by nonacceptance does not prejudice the right of a holder in due course subsequent to the omission.

History: En. Sec. 5965, Rev. C. 1907;
re-en. Sec. 8524, R. C. M. 1921. See also
history of Sec. 55-101. Cal. Civ. C. Sec.
3198.

Collateral References
Bills and Notes ⇨ 392.
10 C.J.S. Bills and Notes § 387.

55-830. (8525) When protest need not be made—when must be made. Where any negotiable instrument has been dishonored, it may be protested for nonacceptance or nonpayment, as the case may be; but protest is not required except in the case of foreign bills of exchange.

History: En. Sec. 5966, Rev. C. 1907;
re-en. Sec. 8525, R. C. M. 1921. See also
history of Sec. 55-101. Cal. Civ. C. Sec.
3199.

Collateral References
Bills and Notes ⇨ 408.
10 C.J.S. Bills and Notes § 369.

References

Wood v. Ferguson et al., 71 M 540, 551,
230 P 592.

CHAPTER 9

DISCHARGE OF NEGOTIABLE INSTRUMENTS

- Section 55-901. Instrument—how discharged.
 55-902. When person secondarily liable on, discharged.
 55-903. Right of party who discharges instrument.
 55-904. Renunciation by holder.
 55-905. Unintentional cancellation—burden of proof.
 55-906. Alteration of instrument, effect of.
 55-907. What constitutes a material alteration.

55-901. (8526) Instrument—how discharged. A negotiable instrument is discharged:

1. By payment in due course by or on behalf of the principal debtor;
2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;
3. By the intentional cancellation thereof by the holder;
4. By any other act which will discharge a simple contract for the payment of money;
5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right.

History: En. Sec. 5967, Rev. C. 1907; re-en. Sec. 8526, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3200.

Operation and Effect

Payment by one of the debt of another with full knowledge of the facts, or without the latter's request or promise to repay, is voluntary; by it the obligation is discharged and the volunteer cannot compel reimbursement. *Watterson v. Hill*, 84 M 549, 553, 276 P 948.

Id. Under the last above rule, held, that where the holder of a promissory note indorsed it and delivered it to a bank as collateral to secure his note to it, and a stranger to the transaction paid the latter note, the bank neither indorsing nor assigning it to him but simply surrendering it to him together with the note given as collateral, there was no sale of either note but the transaction resulted in a voluntary payment of the note so paid, and the

maker was entitled to a return of the collateral.

References

Merchants' Nat. Bank v. Smith et al., 59 M 280, 291, 196 P 523; *Equity Co-operative Assn. v. Milling Co.*, 63 M 26, 36, 206 P 349; *First Nat. Bank v. Holding et al.*, 90 M 529, 537, 4 P 2d 709.

Collateral References

Bills and Notes 425, 438.
 10 C.J.S. *Bills and Notes* §§ 438, 468, 475.

Discharge of accommodation maker or surety by extension of time or release of collateral, under Negotiable Instruments Law. 48 ALR 715; 65 ALR 1425 and 108 ALR 1088.

Renewal note as discharging original obligation of indebtedness. 52 ALR 1416.

Presumption as to payment or discharge of obligation from obligor's possession of paper evidencing it. 156 ALR 777.

55-902. (8527) When person secondarily liable on, discharged. A person secondarily liable on the instrument is discharged:

1. By any act which discharges the instrument;
2. By the intentional cancellation of his signature by the holder;
3. By the discharge of a prior party;
4. By a valid tender of payment made by a prior party;
5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;
6. By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved.

History: En. Sec. 5968, Rev. C. 1907; re-en. Sec. 8527, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3201.

Collateral References

Indorsing payment upon note before maturity as releasing surety or indorser. 37 ALR 477.

Failure or delay by holder of note to enforce collateral security as releasing indorser, surety, or guarantor. 74 ALR 129.

Discharge of accommodation maker by release of mortgage or other security given for note. 2 ALR 2d 260.

55-903. (8528) Right of party who discharges instrument. Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except:

1. Where it is payable to the order of a third person, and has been paid by the drawer; and,

2. Where it was made or accepted for accommodation, and has been paid by the party accommodated.

History: En. Sec. 5969, Rev. C. 1907; re-en. Sec. 8528, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3202.

Collateral References

Bills and Notes \Rightarrow 257 et seq., 426, 440.
10 C.J.S. Bills and Notes §§ 450, 465, 466.

55-904. (8529) Renunciation by holder. The holder may expressly renounce his rights against any party to the instrument before, at, or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor, made at or after the maturity of the instrument, discharges the instrument. But a renunciation does not affect the right of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

History: En. Sec. 5970, Rev. C. 1907; re-en. Sec. 8529, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3203.

sent. *Hollingsworth v. Ruckman*, 72 M 147, 157, 232 P 180.

Collateral References

Bills and Notes \Rightarrow 52, 383, 438.
10 C.J.S. Bills and Notes §§ 468, 469, 472, 510; 11 C.J.S. Bills and Notes § 752.

Operation and Effect

This section providing that the holder of a promissory note may in writing renounce his rights under it, held inapplicable to an action by the payee against the maker where the contract under which it was given was rescinded by mutual con-

Scope and effect of provision of Negotiable Instruments Law as to renunciation of rights. 69 ALR 846; 86 ALR 334 and 121 ALR 1353.

55-905. (8530) Unintentional cancellation—burden of proof. A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been canceled, the burden of proof lies on the party who alleges that the cancellation is made unintentionally, or under a mistake, or without authority.

History: En. Sec. 5971, Rev. C. 1907; re-en. Sec. 8530, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3204.

Collateral References

Bills and Notes \Rightarrow 438, 499.
10 C.J.S. Bills and Notes §§ 468, 475; 11 C.J.S. Bills and Notes § 662.

55-906. (8531) Alteration of instrument, effect of. Where a negotiable instrument is materially altered without the assent of all parties liable

thereon, it is avoided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

History: En. Sec. 5972, Rev. C. 1907; re-en. Sec. 8531, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3205.

Cross-Reference

Altered bill or note, action because of bank's payment, limitation, sec. 93-2618.

Operation and Effect

Where a check on its face showed signs of alteration, the figures having been written with different pencil than balance of writing and the surface of paper underlying such figures bearing unmistakable signs of erasure so that alteration appeared

suspicious, it would not be presumed that alteration was made prior to delivery and with assent of maker. *Miles City Bank v. Askin*, 119 M 581, 179 P 2d 750, 754, 171 ALR 790.

Collateral References

Alteration of Instruments⇒20; Bills and Notes⇒378.

3 C.J.S. Alteration of Instruments § 6; 10 C.J.S. Bills and Notes § 486.

Rights and obligations between depositor and bank which pays forged check, as affected by provisions of Negotiable Instruments Act. 146 ALR 840.

55-907. (8532) What constitutes a material alteration. Any alteration which changes:

1. The date;
2. The sum payable, either for principal or interest;
3. The time or place of payment;
4. The number or the relations of the parties;
5. The medium or currency in which payment is to be made;

Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.

History: En. Sec. 5973, Rev. C. 1907; re-en. Sec. 8532, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3206.

References

Miles City Bank v. Askin, 119 M 581, 179 P 2d 750, 755, 171 ALR 790.

Collateral References

Alteration of Instruments⇒1-9; Bills and Notes⇒378.

3 C.J.S. Alteration of Instruments §§ 4, 5, 19, 23-27, 29-39, 41, 43, 62, 63; 10 C.J.S. Bills and Notes § 486.

CHAPTER 10

BILLS OF EXCHANGE—FORM AND INTERPRETATION

- Section 55-1001. Bill of exchange defined.
 55-1002. Bill not an assignment of funds in hands of drawee.
 55-1003. Bill addressed to more than one drawee.
 55-1004. Inland and foreign bills of exchange.
 55-1005. When bill may be treated as promissory note.
 55-1006. Referee in case of need.

55-1001. (8533) Bill of exchange defined. A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer.

History: En. Sec. 5974, Rev. C. 1907; re-en. Sec. 8533, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3207.

Collateral References

Bills and Notes↪13, 18, 19.
10 C.J.S. Bills and Notes § 4.

55-1002. (8534) Bill not an assignment of funds in hands of drawee. A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.

History: En. Sec. 5975, Rev. C. 1907; re-en. Sec. 8534, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3208.

Brothers Bankers, Inc., 100 M 183, 195, 46 P 2d 697.

Collateral References

Assignments↪49; Bills and Notes↪66.
6 C.J.S. Assignments § 60; 10 C.J.S. Bills and Notes § 171.

References

Stankey v. Citizens' Nat. Bank of Laurel, 64 M 309, 315, 209 P 1054; Powell Building & Loan Association v. Larabie

55-1003. (8535) Bill addressed to more than one drawee. A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession.

History: En. Sec. 5976, Rev. C. 1907; re-en. Sec. 8535, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3209.

Collateral References

Bills and Notes↪3, 6.
10 C.J.S. Bills and Notes §§ 32, 112.

55-1004. (8536) Inland and foreign bills of exchange. An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.

History: En. Sec. 5977, Rev. C. 1907; re-en. Sec. 8536, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3210.

Collateral References

Bills and Notes↪13.
10 C.J.S. Bills and Notes § 4.

55-1005. (8537) When bill may be treated as promissory note. Wherein a bill drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note.

History: En. Sec. 5978, Rev. C. 1907; re-en. Sec. 8537, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3211.

Collateral References

Bills and Notes↪32.
10 C.J.S. Bills and Notes §§ 112, 127.

55-1006. (8538) Referee in case of need. The drawee of a bill and any indorser may insert therein the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not, as he may see fit.

History: En. Sec. 5979, Rev. C. 1907; re-en. Sec. 8538, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3212.

Collateral References

Bills and Notes↪3, 6.
10 C.J.S. Bills and Notes §§ 32, 112.

CHAPTER 11

ACCEPTANCE

- Section 55-1101. Acceptance—how made, etc.
 55-1102. Holder entitled to acceptance on face of bill.
 55-1103. Acceptance by separate instrument.
 55-1104. Promise to accept—when equivalent to acceptance.
 55-1105. Time allowed drawee to accept.
 55-1106. Liability of drawee retaining or destroying bill.
 55-1107. Acceptance of incomplete, overdue or previously dishonored bill.
 55-1108. Kinds of acceptance.
 55-1109. What constitutes a general acceptance.
 55-1110. Qualified acceptance.
 55-1111. Rights of parties as to qualified acceptance.

55-1101. (8539) Acceptance—how made, etc. The acceptance of a bill is signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money.

History: En. Sec. 5980, Rev. C. 1907; re-en. Sec. 8539, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3213.

References

Clarke v. National Bk. of Montana, 78 M 48, 252 P 373.

Collateral References

Bills and Notes—66.
 10 C.J.S. Bills and Notes § 171.

Drawee's mere writing of his name on bill as an acceptance thereof. 48 ALR 760.

55-1102. (8540) Holder entitled to acceptance on face of bill. The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and, if such request is refused, may treat the bill as dishonored.

History: En. Sec. 5981, Rev. C. 1907; re-en. Sec. 8540, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3214.

Collateral References

Bills and Notes—24-27, 68.
 10 C.J.S. Bills and Notes §§ 35, 36, 174.

55-1103. (8541) Acceptance by separate instrument. Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown, and who, on the faith thereof, receives the bill for value.

History: En. Sec. 5982, Rev. C. 1907; re-en. Sec. 8541, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3216.

Collateral References

Bills and Notes—68, 74.
 10 C.J.S. Bills and Notes §§ 174, 183.

Indorsement of bill or note by writing not on instrument itself. 56 ALR 921.

55-1104. (8542) Promise to accept—when equivalent to acceptance. An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value.

History: En. Sec. 5983, Rev. C. 1907; re-en. Sec. 8542, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3216.

Collateral References

Bills and Notes—87.
 10 C.J.S. Bills and Notes § 175.

55-1105. (8543) Time allowed drawee to accept. The drawee is allowed twenty-four hours after presentment in which to decide whether

or not he will accept the bill; but the acceptance, if given, dates as of the day of presentation.

History: En. Sec. 5984, Rev. C. 1907; re-en. Sec. 8543, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3217.

Operation and Effect

The provisions of this and the following section (Negotiable Instruments Law), that the drawee of a bill of exchange is allowed twenty-four hours after presentment in which to decide whether he will or will not accept it, and will be deemed

to have accepted it if he fails to return it within that time, are applicable to a check which, under section 55-1702, is declared to be a bill of exchange drawn on a bank. *Clarke v. National Bk. of Montana*, 78 M 48, 53, 252 P 373; *Blackwelder v. Fergus Motor Co.*, 80 M 374, 393, 260 P 734.

Collateral References

Bills and Notes—25, 66.
10 C.J.S. Bills and Notes §§ 36, 171.

55-1106. (8544) Liability of drawee retaining or destroying bill.

Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or nonaccepted to the holder, he will be deemed to have accepted the same.

History: En. Sec. 5985, Rev. C. 1907; re-en. Sec. 8544, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3218.

Operation and Effect

The provisions of the preceding section and this one (Negotiable Instruments Law), that the drawee of a bill of exchange is allowed twenty-four hours after presentment in which to decide whether he will or will not accept it, and will be deemed to have accepted it if he fails to return it within that time, are applicable to a check which, under section 55-1702, is declared to be a bill of exchange drawn on a bank. *Clarke v. National Bk. of Montana*, 78 M 48, 53, 252 P 373; *Blackwelder v. Fergus Motor Co.*, 80 M 374, 393, 260 P 734.

In the absence of proof showing the length of time for which the check of this action was held by the bank upon which drawn before returning it dishonored, the contention of defendant drawer that the bank having held it for more than twenty-four hours, his obligation thereon was discharged under this section, may not be sustained; the burden of proving payment in this manner having been upon him. *Cellars v. Dwinnell*, 87 M 73, 81, 285 P 181.

Collateral References

Bills and Notes—70.
10 C.J.S. Bills and Notes § 176.

Construction and effect of provision of Negotiable Instruments Law regarding destruction of or refusal to return bill as an acceptance. 63 ALR 1138.

55-1107. (8545) Acceptance of incomplete, overdue or previously dishonored bill. A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by nonpayment. But when a bill payable after sight is dishonored by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.

History: En. Sec. 5986, Rev. C. 1907; re-en. Sec. 8545, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3219.

55-1108. (8546) Kinds of acceptance. An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

History: En. Sec. 5987, Rev. C. 1907; re-en. Sec. 8546, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3220.

Collateral References

Bills and Notes—83.
10 C.J.S. Bills and Notes § 179.

55-1109. (8547) What constitutes a general acceptance. An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only, and not elsewhere.

History: En. Sec. 5988, Rev. C. 1907; history of Sec. 55-101. Cal. Civ. C. Sec. re-en. Sec. 8547, R. C. M. 1921. See also 3221.

55-1110. (8548) Qualified acceptance. An acceptance is qualified, which is:

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated;

2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;

3. Local, that is to say, an acceptance to pay only at a particular place;

4. Qualified as to time;

5. The acceptance of some one or more of the drawees, but not of all.

History: En. Sec. 5989, Rev. C. 1907; history of Sec. 55-101. Cal. Civ. C. Sec. re-en. Sec. 8548, R. C. M. 1921. See also 3222.

55-1111. (8549) Rights of parties as to qualified acceptance. The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or an indorser receives notice of a qualified acceptance, he must, within a reasonable time, express his dissent to the holder, or he will be deemed to have assented thereto.

History: En. Sec. 5990, Rev. C. 1907; history of Sec. 55-101. Cal. Civ. C. Sec. re-en. Sec. 8549, R. C. M. 1921. See also 3223.

CHAPTER 12

PRESENTMENT FOR ACCEPTANCE

- Section 55-1201. When presentment for acceptance must be made.
 55-1202. When failure to present releases drawer and indorser.
 55-1203. Presentment—how made.
 55-1204. On what days presentment may be made.
 55-1205. Presentment where time is insufficient.
 55-1206. Where presentment is excused.
 55-1207. When dishonored by nonacceptance.
 55-1208. Duty of holder where bill not accepted.
 55-1209. Rights of holder where bill not accepted.

55-1201. (8550) When presentment for acceptance must be made. Presentment for acceptance must be made:

1. Where the bill is payable after sight, or in any other case, where presentment for acceptance is necessary in order to fix the maturity of the instrument; or,

2. Where the bill expressly stipulates that it shall be presented for acceptance; or,

3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

History: En. Sec. 5991, Rev. C. 1907;
re-en. Sec. 8550, R. C. M. 1921. See also
history of Sec. 55-101. Cal. Civ. C. Sec.
3224.

Collateral References

Bills and Notes—389.
10 C.J.S. Bills and Notes § 166.

Cross-Reference

Collecting agent's duty, sec. 2-111.

55-1202. (8551) When failure to present releases drawer and indorser. Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fails to do so, the drawer and all indorsers are discharged.

History: En. Sec. 5992, Rev. C. 1907;
re-en. Sec. 8551, R. C. M. 1921. See also
history of Sec. 55-101. Cal. Civ. C. Sec.
3225.

Collateral References

Bills and Notes—390.
10 C.J.S. Bills and Notes §§ 167, 169.

Discharge of drawer by delay in presenting check as affected by insufficiency of funds during time within which check should have been presented, or subsequent insufficiency occasioned by their withdrawal. 160 ALR 1069.

55-1203. (8552) Presentment—how made. Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour on a business day, and before the bill is over due, to the drawer or some person authorized to accept or refuse acceptance on his behalf; and,

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only;

2. Where the drawee is dead, presentment may be made to his personal representative;

3. Where the drawee has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, presentment may be made to him, or to his trustee or assignee.

History: En. Sec. 5993, Rev. C. 1907; re-en. Sec. 8552, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3226.

55-1204. (8553) On what days presentment may be made. A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections 55-703 and 55-716. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock noon on that day.

History: En. Sec. 5994, Rev. C. 1907;
re-en. Sec. 8553, R. C. M. 1921. See also
history of Sec. 55-101. Cal. Civ. C. Sec.
3227.

Collateral References

Bills and Notes—391; Time—10(10).
10 C.J.S. Bills and Notes § 169; 62 C.J.
Time § 52.

55-1205. (8554) Presentment where time is insufficient. Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawers and indorsers.

History: En. Sec. 5995, Rev. C. 1907; re-en. Sec. 8554, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3228.

55-1206. (8555) Where presentment is excused. Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance in any of the following cases:

1. Where the drawee is dead, or has absconded, or is a fictitious person, or a person not having capacity to contract by bill.

2. Where, after the exercise of reasonable diligence, presentment cannot be made.

3. Where, although presentment has been irregular, acceptance has been refused on some other ground.

History: En. Sec. 5996, Rev. C. 1907; history of Sec. 55-101. Cal. Civ. C. Sec. re-en. Sec. 8555, R. C. M. 1921. See also 3229.

55-1207. (8556) When dishonored by nonacceptance. A bill is dishonored by nonacceptance:

1. When it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained; or,

2. When presentment for acceptance is excused and the bill is not accepted.

History: En. Sec. 5997, Rev. C. 1907; re-en. Sec. 8556, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3230.

Collateral References
Bills and Notes 385.
10 C.J.S. Bills and Notes § 343.

55-1208. (8557) Duty of holder where bill not accepted. Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance, or he loses the right of recourse against the drawer and indorsers.

History: En. Sec. 5998, Rev. C. 1907; history of Sec. 55-101. Cal. Civ. C. Sec. re-en. Sec. 8557, R. C. M. 1921. See also 3231.

55-1209. (8558) Rights of holder where bill not accepted. When a bill is dishonored by nonacceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder, and no presentment for payment is necessary.

History: En. Sec. 5999, Rev. C. 1907; re-en. Sec. 8558, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3232.

Collateral References
Bills and Notes 24-27, 252, 297.
10 C.J.S. Bills and Notes §§ 35, 36, 184, 217.

CHAPTER 13

PROTEST

- Section 55-1301. In what cases protest necessary.
55-1302. Protest—how made.
55-1303. Protest—by whom made.
55-1304. Protest—when to be made.
55-1305. Protest—where made.
55-1306. Protest both for nonacceptance and nonpayment.
55-1307. Protest before maturity where acceptor insolvent.
55-1308. When protest dispensed with.
55-1309. Protest where bill is lost, etc.

55-1301. (8559) In what cases protest necessary. Where a foreign bill appearing on its face to be such is dishonored by nonacceptance, it must

be duly protested for nonacceptance, and where such a bill which has not previously been dishonored by nonacceptance is dishonored by nonpayment, it must be duly protested for nonpayment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.

History: En. Sec. 6000, Rev. C. 1907;
re-en. Sec. 8559, R. C. M. 1921. See also
history of Sec. 55-101. Cal. Civ. C. Sec.
3233.

Collateral References

Bills and Notes ⇨ 408.

10 C.J.S. Bills and Notes §§ 368, 369,
371.

55-1302. (8560) Protest—how made. The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify:

1. The time and place of presentment;
2. The fact that presentment was made, and the manner thereof;
3. The cause or reason for protesting the bill;
4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

History: En. Sec. 6001, Rev. C. 1907;
re-en. Sec. 8560, R. C. M. 1921. See also

history of Sec. 55-101. Cal. Civ. C. Sec.
3234.

55-1303. (8561) Protest—by whom made. Protest may be made by:

1. A notary public; or,
2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.

History: En. Sec. 6002, Rev. C. 1907;
re-en. Sec. 8561, R. C. M. 1921. See also
history of Sec. 55-101. Cal. Civ. C. Sec.
3235.

Cross-Reference

Protest by notaries, sec. 56-104.

55-1304. (8562) Protest—when to be made. When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

History: En. Sec. 6003, Rev. C. 1907;
re-en. Sec. 8562, R. C. M. 1921. See also

history of Sec. 55-101. Cal. Civ. C. Sec.
3236.

55-1305. (8563) Protest—where made. A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person, other than the drawee, has been dishonored by nonacceptance, it must be protested for nonpayment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

History: En. Sec. 6004, Rev. C. 1907;
re-en. Sec. 8563, R. C. M. 1921. See also

history of Sec. 55-101. Cal. Civ. C. Sec.
3237.

55-1306. (8564) Protest both for nonacceptance and nonpayment. A bill which has been protested for nonacceptance may be subsequently protested for nonpayment.

History: En. Sec. 6005, Rev. C. 1907;
re-en. Sec. 8564, R. C. M. 1921. See also
history of Sec. 55-101. Cal. Civ. C. Sec.
3238.

Collateral References

Bills and Notes ⇨ 408, 409.

10 C.J.S. Bills and Notes §§ 368, 370-
373.

55-1307. (8565) Protest before maturity where acceptor insolvent. Where the acceptor has been adjudged a bankrupt or an insolvent, or has

made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

History: En. Sec. 6006, Rev. C. 1907; history of Sec. 55-101. Cal. Civ. C. Sec. re-en. Sec. 8565, R. C. M. 1921. See also 3239.

55-1308. (8566) When protest dispensed with. Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

History: En. Sec. 6007, Rev. C. 1907; history of Sec. 55-101. Cal. Civ. C. Sec. re-en. Sec. 8566, R. C. M. 1921. See also 3240.

55-1309. (8567) Protest where bill is lost, etc. When a bill is lost or destroyed, or is wrongfully detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

History: En. Sec. 6008, Rev. C. 1907; history of Sec. 55-101. Cal. Civ. C. Sec. re-en. Sec. 8567, R. C. M. 1921. See also 3241.

CHAPTER 14

ACCEPTANCE FOR HONOR

- Section 55-1401. When bill may be accepted for honor.
 55-1402. Acceptance for honor—how made.
 55-1403. When deemed to be an acceptance for honor of the drawer.
 55-1404. Liability of acceptor for honor.
 55-1405. Agreement of acceptor for honor.
 55-1406. Maturity of bill payable after sight accepted for honor.
 55-1407. Protest of bill accepted for honor, etc.
 55-1408. Presentment for payment to acceptor for honor—how made.
 55-1409. When delay in making presentment is excused.
 55-1410. Dishonor of bill by acceptor for honor.

55-1401. (8568) When bill may be accepted for honor. Where a bill of exchange has been protested for dishonor by nonacceptance or protested for better security, and is not overdue, any person not being a party already liable thereon may, with the consent of the holder, intervene and accept the bill *supra* protest for the honor of any party liable thereon, or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party.

History: En. Sec. 6009, Rev. C. 1907; re-en. Sec. 8568, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3242.

Collateral References

Bills and Notes \S 71.
 10 C.J.S. Bills and Notes \S 185.

55-1402. (8569) Acceptance for honor—how made. An acceptance for honor *supra* protest must be in writing, and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

History: En. Sec. 6010, Rev. C. 1907; history of Sec. 55-101. Cal. Civ. C. Sec. re-en. Sec. 8569, R. C. M. 1921. See also 3243.

55-1403. (8570) When deemed to be an acceptance for honor of the drawer. Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

History: En. Sec. 6011, Rev. C. 1907; history of Sec. 55-101. Cal. Civ. C. Sec. re-en. Sec. 8570, R. C. M. 1921. See also 3244.

55-1404. (8571) Liability of acceptor for honor. The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

History: En. Sec. 6012, Rev. C. 1907; re-en. Sec. 8571, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3245.	Collateral References Bills and Notes⇨80. 10 C.J.S. Bills and Notes § 185.
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55-1405. (8572) Agreement of acceptor for honor. The acceptor for honor, by such acceptance, engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided, also, that it shall have been duly presented for payment and protested for nonpayment, and notice of dishonor given to him.

History: En. Sec. 6013, Rev. C. 1907; re-en. Sec. 8572, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3246.	Collateral References Rights of transferee after maturity of accommodation paper. 48 ALR 1280.
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55-1406. (8573) Maturity of bill payable after sight accepted for honor. Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for nonacceptance, and not from the date of the acceptance for honor.

History: En. Sec. 6014, Rev. C. 1907; re-en. Sec. 8573, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3247.	Collateral References Bills and Notes⇨129. 10 C.J.S. Bills and Notes § 245 et seq.
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55-1407. (8574) Protest of bill accepted for honor, etc. Where a dishonored bill has been accepted for honor supra protest, or contains a reference in case of need, it must be protested for nonpayment before it is presented for payment to the acceptor for honor or referee in case of need.

History: En. Sec. 6015, Rev. C. 1907; re-en. Sec. 8574, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3248.	Collateral References Bills and Notes⇨408. 10 C.J.S. Bills and Notes §§ 368, 369.
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55-1408. (8575) Presentment for payment to acceptor for honor—how made. Presentment for payment to the acceptor for honor must be made as follows:

1. If it is to be presented in the place where the protest for nonpayment was made, it must be presented not later than the day following its maturity.
2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section 55-816.

History: En. Sec. 6016, Rev. C. 1907; re-en. Sec. 8575, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3249.	Collateral References Bills and Notes⇨404. 10 C.J.S. Bills and Notes § 352.
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55-1409. (8576) When delay in making presentment is excused. The provisions of section 55-712 apply where there is delay in making presentment to the acceptor for honor or referee in case of need.

History: En. Sec. 6017, Rev. C. 1907; re-en. Sec. 8576, R. C. M. 1921. See also history of Sec 55-101. Cal. Civ. C. Sec. 3250.	Collateral References Bills and Notes 406. 10 C.J.S. Bills and Notes § 403.
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55-1410. (8577) Dishonor of bill by acceptor for honor. When the bill is dishonored by the acceptor for honor, it must be protested for nonpayment by him.

History: En. Sec. 6018, Rev. C. 1907; re-en. Sec. 8577, R. C. M. 1921. See also	history of Sec. 55-101. Cal. Civ. C. Sec. 3251.
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CHAPTER 15

PAYMENT FOR HONOR

Section 55-1501. Who may make payment for honor.
 55-1502. Payment for honor—how made.
 55-1503. Declaration before payment for honor.
 55-1504. Preference of parties offering to pay for honor.
 55-1505. Effect on subsequent parties where bill is paid for honor.
 55-1506. Where holder refuses to receive payment supra protest.
 55-1507. Rights of payer for honor.

55-1501. (8578) Who may make payment for honor. Where a bill has been protested for nonpayment, any person may intervene and pay it supra protest for the honor of any person liable thereon, or for the honor of the person for whose account it was drawn.

History: En. Sec. 6019, Rev. C. 1907; re-en. Sec. 8578, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3252.	Collateral References Bills and Notes 426. 10 C.J.S. Bills and Notes § 448.
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55-1502. (8579) Payment for honor—how made. The payment for honor supra protest in order to operate as such, and not as a mere voluntary payment, must be attested by a notarial act of honor, which may be appended to the protest or form an extension to it.

History: En. Sec. 6020, Rev. C. 1907; re-en. Sec. 8579, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3253.	Collateral References Bills and Notes 429. 10 C.J.S. Bills and Notes § 442.
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55-1503. (8580) Declaration before payment for honor. The notarial act of honor must be founded on a declaration made by the payer for honor, or by his agent in that behalf, declaring his intention to pay the bill for honor, and for whose honor he pays.

History: En. Sec. 6021, Rev. C. 1907; re-en. Sec. 8580, R. C. M. 1921. See also	history of Sec. 55-101. Cal. Civ. C. Sec. 3254.
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55-1504. (8581) Preference of parties offering to pay for honor. Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.

History: En. Sec. 6022, Rev. C. 1907; re-en. Sec. 8581, R. C. M. 1921. See also	history of Sec. 55-101. Cal. Civ. C. Sec. 3255.
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55-1505. (8582) Effect on subsequent parties where bill is paid for honor. Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for and succeeds to both the rights and duties of the holder, as regards the party for whose honor he pays and all parties liable to the latter.

History: En. Sec. 6023, Rev. C. 1907; re-en. Sec. 8582, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3256.

Collateral References

Bills and Notes 439, 440; Subrogation 4.
10 C.J.S. Bills and Notes §§ 449, 450, 471, 472; 11 C.J.S. Bills and Notes § 751; 83 C.J.S. Subrogation § 22.

55-1506. (8583) Where holder refuses to receive payment supra protest. Where the holder of a bill refuses to receive payment supra protest, he loses his right of recourse against any party who would have been discharged by such payment.

History: En. Sec. 6024, Rev. C. 1907; re-en. Sec. 8583, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3257.

Collateral References

Bills and Notes 437.
10 C.J.S. Bills and Notes §§ 468, 472.

55-1507. (8584) Rights of payer for honor. The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.

History: En. Sec. 6025, Rev. C. 1907; re-en. Sec. 8584, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3258.

Collateral References

Rights and remedies of accommodation party to paper as against accommodated party after payment. 36 ALR 553 and 77 ALR 668.

CHAPTER 16

BILLS IN A SET

- Section 55-1601. Bills in sets constitute one bill.
55-1602. Rights of holders where different parts are negotiated.
55-1603. Liability of holder who indorses two or more parts of a set to different persons.
55-1604. Acceptance of bills drawn in sets.
55-1605. Payment by acceptor of bills drawn in sets.
55-1606. Effect of discharging one of a set.

55-1601. (8585) Bills in sets constitute one bill. Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitutes one bill.

History: En. Sec. 6026, Rev. C. 1907; re-en. Sec. 8585, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3259.

Collateral References

Bills and Notes 14
11 C.J.S. Bills and Notes § 731.

55-1602. (8586) Rights of holders where different parts are negotiated. Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is, as between such holders, the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

History: En. Sec. 6027, Rev. C. 1907; re-en. Sec. 8586, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3260.

11 C.J.S. Bills and Notes § 736.

Maturity of one or more of series of notes as affecting status of purchaser as holder in due course. 64 ALR 457.

Collateral References

Bills and Notes ⇨ 437.

55-1603. (8587) Liability of holder who indorses two or more parts of a set to different persons. Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if such parts were separate bills.

History: En. Sec. 6028, Rev. C. 1907; re-en. Sec. 8587, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3261.

Collateral References

Bills and Notes ⇨ 233.

10 C.J.S. Bills and Notes § 38.

55-1604. (8588) Acceptance of bills drawn in sets. The acceptance may be written on any part, and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill.

History: En. Sec. 6029, Rev. C. 1907; re-en. Sec. 8588, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3262.

Collateral References

Bills and Notes ⇨ 68.

10 C.J.S. Bills and Notes § 174.

55-1605. (8589) Payment by acceptor of bills drawn in sets. When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

History: En. Sec. 6030, Rev. C. 1907; re-en. Sec. 8589, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3263.

Collateral References

Bills and Notes ⇨ 383.

10 C.J.S. Bills and Notes § 510.

55-1606. (8590) Effect of discharging one of a set. Except as herein otherwise provided, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged.

History: En. Sec. 6031, Rev. C. 1907; re-en. Sec. 8590, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3264.

Collateral References

Bills and Notes ⇨ 437.

11 C.J.S. Bills and Notes § 736.

CHAPTER 17

PROMISSORY NOTES AND CHECKS

Section 55-1701. Promissory note defined.

55-1702. Check defined.

55-1703. Within what time a check must be presented.

55-1704. Certification of check, effect of.

55-1705. Effect where holder of check procures it to be certified.

55-1706. When check operates as an assignment.

55-1701. (8591) Promissory note defined. A negotiable promissory note, within the meaning of this act, is an unconditional promise in writing

made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him.

History: En. Sec. 6032, Rev. C. 1907; re-en. Sec. 8591, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3265.

Interest Coupons in Effect Promissory Notes

Interest coupons are in effect promissory notes, and as to such commercial paper laches of the holder in failing promptly to make presentment for payment does not discharge the maker (in the instant case the district issuing the coupon bonds) from liability thereon; the maker (district) is primarily liable and presentment is unnecessary to preserve such liability. J. K. & C. S. Mullen Ben. Corp. v. School Dist., 99 M 388, 397, 43 P 2d 902.

When Negotiable

The negotiable character of a promissory note which met the requirements of this section was not affected by recitals therein contained to the effect that the makers had purchased a stallion from the payee; that the indebtedness should bear interest at a fixed rate, payable semiannually; that upon default of an interest instalment, the principal sum with interest should become due; that the makers should pay an attorney fee in case collection had to be enforced, coupled with an order authorizing delivery of the animal to any one of the makers. First Nat. Bank v. Barrett, 52 M 359, 364, 157 P 951.

Id. To constitute an instrument a negotiable one, it must, under this section, be

in writing, signed by the maker, contain an unconditional promise to pay a certain sum in money, and be payable, on demand or at a fixed or determinable future time, to order or bearer.

A promissory note containing a provision for the payment of an attorney's fee and costs of collection, instead of the statutory phrase "with costs of collection or an attorney's fee," was not thereby rendered non-negotiable, the words "attorney's fee" and "costs of collection" in this connection meaning the same thing, so that the use of both of them in the conjunctive imposed no greater burden upon the maker than their use in the disjunctive would have done. Wood v. Ferguson et al., 71 M 540, 230 P 592.

When Non-Negotiable

Held, that a six months' promissory note containing an accelerating clause to the effect that "in the event of insolvency of either makers or indorsers, or the institution of suit or attachment against them or either of them, or the mortgaging of any property by the makers or indorsers," the note might be declared immediately due and payable, was non-negotiable in that it left the time when payable uncertain and indefinite. Great Falls Nat. Bk. v. Young et al., 67 M 328, 334, 336, 215 P 651.

Collateral References

Bills and Notes \Rightarrow 28.

10 C.J.S. Bills and Notes § 7.

55-1702. (8592) Check defined. A check is a bill of exchange drawn on a bank, payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.

History: En. Sec. 6033, Rev. C. 1907; re-en. Sec. 8592, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3265a.

Cross-References

Bank's liability on forwarded items, sec. 5-1016.

Drawing order on insufficient funds, sec. 94-2702.

Cashier's Check

A cashier's check is a draft, or bill of exchange, drawn by a bank upon itself or some other bank in which funds of the former are deposited; it represents credit which the purchaser of such a check buys;

the money paid the issuing bank becomes the bank's money, the transaction being one of purchase and sale, and no trust relationship is thereby established. Montana-Wyoming Assn. v. Commercial Bk., 80 M 174, 177, 259 P 1060.

Operation and Effect

The provisions of sections 55-1105 and 55-1106 (Negotiable Instruments Law), that the drawee of a bill of exchange is allowed twenty-four hours after presentment in which to decide whether he will or will not accept it, and will be deemed to have accepted it if he fails to return it within that time, are applicable to a check which, under this section, is declared

to be a bill of exchange drawn on a bank. *Clarke v. National Bk. of Montana*, 78 M 48, 53, 252 P 373.

References

Cited or applied as section 6033, Revised Codes, in *Montana Livestock Co. v. Stewart*, 58 M 221, 227, 190 P 985; *Black-*

welder v. Fergus Motor Co., 80 M 374, 393, 260 P 734; *Cellars v. Dwinnell*, 87 M 73, 80, 285 P 181.

Collateral References

Bills and Notes 15.
10 C.J.S. *Bills and Notes* § 5.

55-1703. (8593) Within what time a check must be presented. A check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

History: En. Sec. 6034, Rev. C. 1907; re-en. Sec. 8593, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3265b.

Cross-Reference

Limitation on time of presentment, sec. 5-1008.

Operation and Effect

Where the board of county commissioners had wrongfully refused to issue an order for the payment of a warrant not re-presented for payment until after the sixty-day period provided for in section 16-2609, had expired, and thereafter the bank in which its funds were deposited became insolvent, the county was not discharged from liability thereon under this section by the holder's neglect to make timely demand for payment, since the detriment suffered by it was traceable to its improper refusal and not to the holder's failure to act. *State ex rel. Case v. Bolles et al.*, 74 M 54, 66, 238 P 586.

However, such a check must be presented for payment within a reasonable time after its issuance, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay (this section), but this result follows only on a showing of loss or injury by reason of the delay. *Blackwelder v. Fergus Motor Co.*, 80 M 374, 390, 260 P 734.

In an action against the drawer of a check to recover thereon, defendant pleading payment by reason of the delay of plaintiff in presenting it before the bank on which drawn closed its doors, the rule

is that transfers of it to successive indorsees do not extend the time within which it must be presented, so far as defendant drawer is concerned, which, under this section, is within a reasonable time after its issue. *Cellars v. Dwinnell*, 87 M 73, 79 et seq., 285 P 181.

Id. Under this section, the drawer of a check is discharged from liability thereon for delay in presenting it for payment, only "to the extent of the loss caused by the delay"; hence where the indorsee of a check, drawn on a bank in another town, immediately upon its receipt three days after its issuance, mailed it to his bank, which in turn on the same day mailed it to the bank upon which drawn, which, while paying checks presented over the counter, refused to pay check presented by mail, of which fact the indorsee was ignorant, the loss sustained by the drawer was due to the wrongful act of the drawee bank and not to delay in presenting the check for payment.

Collateral References

Bills and Notes 404.
10 C.J.S. *Bills and Notes* § 355.

Discharge of indorser by delay in presenting check. 11 ALR 1028.

Duty of holder as regards presentation of check to drawee bank as affected by run on bank or other indications of impending closing of doors. 88 ALR 479.

Time within which check must be presented to prevent discharge of drawer in event of bank's insolvency. 91 ALR 1181.

55-1704. (8594) Certification of check, effect of. Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance.

History: En. Sec. 6035, Rev. C. 1907; re-en. Sec. 8594, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3265c.

References

Cited or applied as section 6035, Revised Codes, in *Montana Livestock Co. v. Stewart*, 58 M 221, 227, 190 P 985.

Collateral References

Banks and Banking 145; *Bills and Notes* 68.

9 C.J.S. *Banks and Banking* § 375; 10 C.J.S. *Bills and Notes* § 174.

Right of drawer to stop payment of certified check. 35 ALR 942.

55-1705. (8595) Effect where holder of check procures it to be certified. Where the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon.

History: En. Sec. 6036, Rev. C. 1907; re-en. Sec. 8595, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3265d.

Collateral References
Bills and Notes↪437.
10 C.J.S. Bills and Notes §§ 468, 472.

55-1706. (8596) When check operates as an assignment. A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.

History: En. Sec. 6037, Rev. C. 1907; re-en. Sec. 8596, R. C. M. 1921. See also history of Sec. 55-101. Cal. Civ. C. Sec. 3265e.

Montana Livestock Co. v. Stewart, 58 M 221, 228, 190 P 985; Stankey v. Citizens' Nat. Bank of Laurel, 64 M 309, 315, 209 P 1054.

References

Cited or applied as section 6037, Revised Codes, in Brophy Grocery Co. v. Wilson, 45 M 489, 493, 124 P 510; First Nat. Bank v. Barrett, 52 M 359, 364, 157 P 951;

Collateral References

Assignments↪49; Bills and Notes↪23, 66.
6 C.J.S. Assignments § 60; 10 C.J.S. Bills and Notes §§ 35, 171.

CHAPTER 18

GENERAL PROVISIONS

Section 55-1801. General provisions.

55-1801. (8597) General provisions. Except where it is otherwise declared, the provisions of sections of this code, in respect to the rights and obligations of parties to contracts, are subordinate to the intention of the parties, when ascertained in the manner prescribed by the chapter on interpretation of contracts; and the benefit thereof may be waived by any party entitled thereto, unless such waiver be against public policy.

History: En. Sec. 4240, Civ. C. 1895; re-en. Sec. 6037a, Rev. C. 1907; re-en. Sec. 8597, R. C. M. 1921. Cal. Civ. C. Sec. 3268. Field Civ. C. Sec. 1829.

Operation and Effect

A provision in a note that it is negotiable at a particular bank is not a waiver of the effect of a stipulation for payment of attorney's fees in case of suit, which, under other statutory provisions, renders the note non-negotiable. Stadler v. First National Bank, 22 M 190, 204, 56 P 111.

Purpose of Statutory Provisions—Waiver of Benefits

Statutory provisions relating to contracts are enacted to fix rules of conduct the parties shall be governed by in such matters as the contracting parties have

not fully provided for in their agreement; where parties agree to obligations, the statutes need not be consulted as to what they provide in respect to such obligations; the statutes are subordinate to the intentions of the parties, and any party may waive any benefit unless such waiver is against public policy. Gibbons v. Huntsinger, 105 M 562, 573, 74 P 2d 443.

References

Cited or applied as section 4240, Civil Code, in Bullard v. Smith, 28 M 387, 399, 72 P 761; Doggett v. Johnson, 82 M 338, 343, 267 P 292.

Collateral References

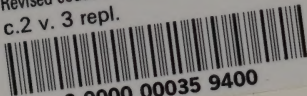
Contracts↪147; Estoppel↪52.
17 C.J.S. Contracts § 295; 31 C.J.S. Estoppel § 61.

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